

Tentative Rulings for June 15, 2010
Departments 97A, 97B, 97C & 97D

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

09CECG03946 *Daniel v. Deutsche Bank, et al.* (Dept. 97A)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

07CECG02071 *Kalmbach v. Sportsmobile* is continued to June 24, 2010 at 3:30 p.m. in Dept. 97D.

06 CECG 03460 *Wonder Valley Property Owners Ass'n v. Aal, et al.* is continued to July 8, 2010 at 3:30 p.m. in Dept. 97A.

(Tentative Rulings begin at the next page)

(5)

Tentative Ruling

Re: ***Guerra and Sanchez v. Impact Solutions dba Ramada Inn. et al.***
Superior Court Case No. 09 CECG 00559

Hearing Date: June 15, 2010 (**Dept.97A**)

Motion: By Defendants for summary judgment or in the alternative, summary adjudication

Tentative Ruling:

To deny the motion of the Defendants as to Plaintiff Guerra on the grounds that triable issues of material fact exist as to whether the conduct of Defendant Patel constituted sexual harassment. See Facts Nos. 6-13 of the Defendants' Separate Statement of Undisputed Facts supported by the deposition testimony of Plaintiff Guerra at pages 74-79. Given that these same facts are set forth in support of the claim for retaliation, see Fact No. 37, a triable issue of material fact exists as to whether Guerra was terminated in retaliation. The Defendants have not met their burden of proof pursuant to CCP § 437c(p)(2). **The evidentiary objections are rendered moot.** See infra.

To deny the motion of the Defendants as to Plaintiff Sanchez on the grounds that the Defendants have failed to address the allegation at ¶ 19 of the First Amended Complaint regarding Sanchez's complaints about the harassment of Guerra. Therefore, the Defendants have not met their burden of proof pursuant to CCP § 437c(p)(2). See *Laabs*, infra.

To treat the motion brought by Defendant Patel in his individual capacity, regarding the claims of retaliation, as a motion for judgment on the pleadings and to grant it with leave to amend. See *American Airlines, Inc. v. County of San Mateo* (1996) 12 C4th 1110, 1118. An amended complaint in strict conformity with the tentative ruling is to be filed within 5 days of notice of the ruling. The time in which the complaint can be amended will run from service by the clerk of the minute order. All new allegations in the second amended complaint are to be set in **boldface** type.

Explanation:

Summary Judgment Re: Employment Discrimination

In contrast to the initial burden at trial, when an employer seeks summary judgment, **the initial burden rests with the employer** to show that no unlawful

discrimination occurred. [CCP § 437c(p)(2); see *Guz v. Bechtel Nat'l, Inc.*, supra, 24 C4th at 354-355; *University of So. Calif. v. Sup.Ct. (Miller)* (1990) 222 CA3d 1028, 1036] **First**, the employer (moving party) must carry the burden of showing the employee's action has no merit (CCP § 437c(p) (2)). It may do so by evidence **either**:

--*negating* an essential element of the employee's claim (difficult to do, because prima facie case of discrimination is so flexible); **or**

--showing some '*legitimate, nondiscriminatory reason*' for the action taken against the employee. [See *Caldwell v. Paramount Unified School Dist.*, supra, 41 CA4th at 202-203]

If the employer meets this initial burden, to avoid summary judgment the **employee** must produce '*substantial responsive evidence* that the employer's showing was *untrue or pretextual*' ... thereby raising at least an *inference of discrimination*. [*University of So. Calif. v. Sup.Ct. (Miller)*, supra, 222 CA3d at 1036.] *Hersant v. California Dept. of Social Services* (1997) 57 CA4th 997, 1004-1005--employee must offer substantial evidence that employer's stated reasons were pretextual or evidence that employer acted with discriminatory intent, or a combination thereof. A plaintiff's '*suspicions of improper motives ... based primarily on conjecture and speculation*' are clearly not sufficient to raise a triable issue of fact to withstand summary judgment. [*Kerr v. Rose* (1990) 216 CA3d 1551, 1564]

Finally, where the employer presents direct evidence of a '*legitimate, nondiscriminatory reason*' for the action taken against the employee. summary judgment for the employer should be granted where, '*given the strength of the employer's showing of innocent reasons, any countervailing circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a rational inference that discrimination occurred.*' [*Guz v. Bechtel Nat'l, Inc.*, supra, 24 C4th at 362]

Federal Law and FEHA

In support of their motion, the Defendants rely to a certain extent upon federal law. See Table of Authorities in the Defendants' Memorandum of Points and Authorities. Of the 44 cases listed, 22 cases are federal. More importantly, it is the federal cases that Defendants rely upon **extensively** for their arguments that Patel's conduct was not severe or pervasive and that a hostile environment was not created. See pages 13-17. However, the Defendants ignore that federal decisions are not controlling on matters of **state law**. See *Scott v. Austin* (1922) 58 C.A. 643, 646, 209 P. 251; *Bank of Italy Nat. Trust & Savings Assn. v. Bentley* (1933) 217 C. 644, 653, 20 P.2d 940; *Ware v. Heller* (1944) 63 C.A.2d 817, 821, 148 P.2d 410; and *Estate of D'India* (1976) 63 C.A.3d 942, 948. **The**

Plaintiff is not suing under Title VII. She is suing for violations of Gov. Code § 12940 et seq.; to wit, the Fair Employment and Housing Act.

According to *Chin, Cathcart, Exelrod and Wiseman (The Rutter Group) California Practice Guide: Employment Litigation Chapter 7*: “Title VII and the FEHA use similar language in an attempt to eliminate the same conduct.” *Id.* at ¶ 7:10 citing *Price v. Civil Service Comm'n* (1980) 26 C3d 257, 271. But, the authors also note that Title VII rarely preempts FEHA and preemption would exist only to the extent that state law permitted practices prohibited by federal law. *Id.* at ¶ 7:11 citing *California Fed'l Sav. & Loan Ass'n v. Guerra* (1987) 479 US 272, 281-284, 107 S.Ct. 683, 689-691 and *Bohemian Club v. Fair Employment & Housing Comm'n* (1986) 187 CA3d 1, 17. In some instances, California courts may adopt the standards set by the United States Supreme Court under Title VII for proving intentional discrimination. *Id.* at 7:12 citing *Los Angeles County Dept. of Parks & Recreation v. Civil Services Comm'n* (1992) 8 CA4th 273, 280. However, California courts may refuse to follow federal decisions “where the distinctive language of the FEHA evidences a legislative intent different from that of Congress” or where Title VII case law “appears unsound or conflicts with the purposes of FEHA.” *Id.* at 7:13 citing *Page v. Sup.Ct. (3Net Systems, Inc.)* (1995) 31 CA4th 1206, 1215-1216 and *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 CA3d 590, 606. Indeed, the California Supreme Court recently noted that **Title VII and federal precedents are entitled to “little weight” in FEHA sexual harassment cases because Title VII (unlike the FEHA) does not specifically address sexual harassment.** See *State Dept. of Health Services v. Sup.Ct. (McGinnis)* (2003) 31 C4th 1026, 1040. Accordingly, the federal cases cited as authority in the Defendant’s Memorandum of Points and Authorities will not considered to the extent that they conflict with state law.

Motion Directed to Plaintiff Guerra

Quid Pro Quo Not Alleged

It has long been recognized that the pleadings determine what issues are material in a summary judgment motion. Therefore, the moving party's evidence must be directed to the claims or defenses raised in the pleadings. See *Keniston v. American Nat'l Ins. Co.* (1973) 31 CA3d 803, 812. The moving party must show that the undisputed facts, when applied to the issues framed by the pleadings, entitle the moving party to judgment. See *Juge v. County of Sacramento* (1993) 12 CA4th 59, 66. Contrary to Defendant’s theory in support of summary judgment, there are no allegations in the First Amended Complaint regarding a “quid pro quo” request made by Patel to Guerra. Instead, Guerra alleges that she was sexually harassed and then terminated in retaliation.

Conduct Constituting Sexual Harassment

Importantly, Defendants cite no California authority that requires sexual harassment to consist of explicit sexual advances. In the case at bench, the Defendants' own Separate Statement submits that Guerra claims that Patel harassed her by calling her into his office and asking personal questions such as her days off, telephone number, and who she lived with. He complimented her by telling her that she was young and attractive, looked nice and that he was attracted to her. He called her on her cell phone a number of times and asked her to meet him. He followed her out to her car one night. He asked her to meet him for a drink where he discussed his personal life such as the fact that his wife was out of town, he was in an arranged marriage and that he had not been able to be with a female he loves and likes. He ended the meeting by telling her not to tell anyone about the discussion and that she saved her job by meeting with him. See Facts Nos. 6-13 supported by the deposition of Guerra at pages 74-79.

While the Defendants accurately submit that Patel did not touch Guerra in an offensive way nor make offensive remarks nor asked her to have sex with him, this does not mean that the conduct set forth as Facts Nos. 6-13 was not harassment as a matter of law and that summary judgment must be granted. Instead, CACI No. 2523 states:

Harassing conduct *may* include [any of the following:]

[a. Verbal harassment, such as obscene language, demeaning comments, slurs, [or] threats [or] [*describe other form of verbal harassment*];] [or]

[b. Physical harassment, such as unwanted touching, assault, or physical interference with normal work or movement;] [or]

[c. Visual harassment, such as offensive posters, objects, cartoons, or drawings;] [or]

[d. Unwanted sexual advances;] **[or]**

[e. [*Describe other form of harassment if appropriate*].]

It has been held that "harassment consists of a type of conduct not necessary for performance of a supervisory job. Instead, harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job." See *Reno v. Baird* (1998) 18 Cal.4th 640, 645-646 and see *Roby v. McKesson* (2007) 146 Cal.App.4th 63. In other words, there is no "bright

line” test that identifies conduct that can be considered sexual harassment and conduct that is safe.

CACI No. 2524 "Severe or Pervasive" Explained

"Severe or pervasive" means conduct that alters the conditions of employment and creates a hostile or abusive work environment.

In determining whether the conduct was severe or pervasive, you should consider all the circumstances. You **may** consider **any or all** of the following:

- (a) The nature of the conduct;
- (b) How often, and over what period of time, the conduct occurred;
- (c) The circumstances under which the conduct occurred;
- (d) Whether the conduct was physically threatening or humiliating;
- (e) The extent to which the conduct unreasonably interfered with an employee's work performance.

"We have agreed with the United States Supreme Court that, to prevail, an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex. The working environment must be evaluated in light of the totality of the circumstances: '[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 462.

Moving Parties' Burden

It has been determined that the opposing party has no burden to controvert the moving party's declarations if such declarations themselves, through inferences reasonably drawn therefrom, disclose a "triable issue" of fact. See *Maxwell v. Colburn* (1980) 105 Cal.App.3d 180, 185. See also *Sesma v. Cueto* (1982) 129 CA3d 108, 114. Summary judgment cannot be granted on the

basis of reasonable inferences deducible from the evidence if contradicted by *other reasonable* inferences. See *Hepp v. Lockheed–California Co.* (1978) 86 CA3d 714, 718.

In the instant case, there is no “bright line” test as to conduct that is prohibited and conduct that is permitted. With regard to the requirement that the conduct be “severe or pervasive”, if the conduct at bench is viewed in the totality of the circumstances, it must be noted that from the start, Plaintiff Guerra had a difficult time performing her job duties and was criticized by her immediate supervisor, McIntyre. Patel, the General Manager obtained her personal information from her and began to call her on her cell phone. He called her at home. He asked if he could visit her at home. He told her that she was attractive and that he was attracted to her. He asked her to go out with him for a drink. He told her his wife was out of town and that his marriage was arranged. He told her that he had never been with a woman that he both “loved and liked”. He told her not to tell anyone about the meeting and their conversation. He told her that she had saved her job by going out with him. See Facts Nos. 6-28 and the deposition of Guerra in support.

A reasonable inference can be drawn that a woman in a vulnerable position such as Guerra might construe Patel’s actions as an invitation to have a sexual relationship. She might be reluctant to complain because she needed her job. See *Hepp*, supra. While it is true that the conduct was short in duration, so was Guerra’s term of employment—less than 90 days. Accordingly, triable issues of material fact exist as to whether the conduct of Patel set forth in Facts Nos. 6-13 supported by the deposition testimony of Plaintiff Guerra at pages 74-79 constitutes sexual harassment. Given that these same facts are set forth in support of the claim for retaliation, see Fact No. 37, a triable issue of material fact exists as to whether Guerra was terminated in retaliation. The motion will be denied as to Plaintiff Guerra. The Defendants have not met their burden of proof pursuant to CCP § 437c (p)(2).

“There is no obligation on the opposing party ... to establish anything by affidavit unless and until the moving party has by affidavit stated facts establishing *every element* ... necessary to sustain a judgment in his favor.” See *Consumer Cause, Inc. v. SmileCare* (2001) 91 CA4th 454, 468. Therefore, there is no need to examine the Plaintiffs’ opposition or the reply. As a result, the evidentiary objections are moot.

Motion Directed to Plaintiff Sanchez

Single Cause of Action for Retaliation

The rules of pleading offer some assistance as to the nature of Sanchez’s claim. Where a general allegation is proper, either because it is deemed an ultimate fact (e.g., negligence), or because it is a permissible conclusion of law

(e.g., due performance of condition precedent), the safest plan is to accept the benefit of the rule and plead generally. But, if the pleader adds specific details or other explanatory averments and there is an inconsistency between the general allegations and the specific allegations, the specific allegations control, and a complaint that might have been sufficient with the general allegations alone may be rendered defective if the specific averments negate an element of the cause of action. See *Little v. Union Oil Co.* (1925) 73 Cal.App. 612, 619 and *Careau & Co. v. Security Pac. Business Credit* (1990) 222 Cal.App.3d 1371, 1389. In addition, if the title or label of the pleading, or its prayer or demand for relief, is inconsistent with the allegations, the allegations control. See *Buxbom v. Smith* (1944) 23 C.2d 535, 542; *Bank of America v. Gillett* (1940) 36 C.A.2d 453, 455; and *Estergren v. Sager* (1940) 39 C.A.2d 401, 404, 103 P.2d 177. When the First Amended Complaint is examined, it is revealed that the specific allegations at ¶ 19 support only a cause of action for retaliation on behalf of Sanchez.

CACI No. 2505 Retaliation (Gov. Code, § 12940(h)) states:

[*Name of plaintiff*] claims that [*name of defendant*] retaliated against [him/her] for [*describe activity protected by the FEHA*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of plaintiff*] [*describe protected activity*];
2. [That [*name of defendant*] [discharged/demoted/[*specify other adverse employment action*]] [*name of plaintiff*];]

[or]

[That [*name of defendant*] engaged in conduct that, taken as a whole, materially and adversely affected the terms and conditions of [*name of plaintiff*]'s employment;]

3. That [*name of plaintiff*]'s [*describe protected activity*] was a motivating reason for [*name of defendant*]'s [decision to [discharge/demote/[*specify other adverse employment action*]] [*name of plaintiff*]/conduct];
4. That [*name of plaintiff*] was harmed; and
5. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.

An employee who complains of, or opposes, conduct she reasonably

believes to constitute unlawful harassment or discrimination may be protected from *retaliation* by the employer, even if a court or jury subsequently determines the conduct in question was *not prohibited* by the FEHA. See *Miller v. Department of Corrections* (2005) 36 C4th 446 at 473–474 and *Flait v. North American Watch Corp.* (1992) 3 CA4th 467, 477.

In the instant case, the Defendants again have incorporated facts from one section of the Separate Statement into another. See Fact No. 38 that incorporates by reference Facts Nos. 33-36 into the section of the Separate Statement that addresses the cause of action for retaliation. These facts state that Sanchez does not allege that Patel or anyone else directed sexual advances or conduct of a sexual nature towards her. Other than the alleged incidences involving Guerra, Sanchez acknowledges that she has not observed any acts of discrimination or sexual harassment of anyone at Ramada. The harassment, which Sanchez alleges to have observed, involved Sanchez allegedly overhearing a phone call received by Guerra from Patel while at lunch. She contends that she listened to 3 voice mail messages on Guerra's phone from Patel. See Facts Nos. 33-36 and the depositions of Guerra and Sanchez in support.

However, as stated *supra*, a summary judgment motion must show that the “*material facts*” are undisputed (CCP § 437c (b)(1)). The pleadings serve as the “outer measure of materiality” in a summary judgment motion, and the motion may not be **granted** or denied on issues not raised by the pleadings. See *Government Employees Ins. Co. v. Sup.Ct. (Sims)* (2000) 79 CA4th 95, 98, fn. 4 and *Laabs v. City of Victorville* (2008) 163 CA4th 1242, 1258. Therefore, the moving party's evidence must be directed to the claims or defenses raised in the pleadings. See *Keniston v. American Nat'l Ins. Co.* (1973) 31 CA3d 803, 812. The moving party must show that the undisputed facts, when applied to the issues framed by the pleadings, entitle the moving party to judgment. See *Juge v. County of Sacramento* (1993) 12 CA4th 59, 66. It is alleged at ¶ 19 that Sanchez complained about the harassment of Guerra “to Defendants and each of them” and as a result, she was demoted to a part-time position. The Defendants do not address the allegation regarding Sanchez's complaints about the harassment of Guerra. Therefore, the Defendants have not met their burden of proof pursuant to CCP § 437c (p)(2). See *Laabs*, *supra*. The motion must be denied. To reiterate, it is not necessary to examine the opposition and the reply. The evidentiary objections are rendered moot.

Motion by Defendant Patel

Defendant Patel asserts that under *Reno v. Baird* he cannot be held liable for retaliation because he did not employ Sanchez or Guerra. See Fact No. 50 of the Defendants' Separate Statement. However, in opposition, the Plaintiffs assert that Patel is an owner of the “business”. See Plaintiff's response to Fact No. 50 supported by the deposition of Patel at pages 14- 19 and page 32

(21)

Tentative Ruling

Re: ***Muguerza, et al., v. Central Valley Regional Center, Inc., et al.***
Superior Court Case No. 10 CECG 00737

Hearing Date: Tuesday, June 15, 2010 (**Dept. 97D**)

Motion: Defendant Central Valley Regional Center, Inc.'s
Demurrer

Tentative Ruling:

To find Defendant Central Valley Regional Center, Inc.'s demurrer moot in light of the First Amended Complaint filed May 21, 2010. (Code Civ. Proc. § 472.) The hearing on the demurrer is off calendar.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DRF on 6-13-10.
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Pleasant Mattress Company, Inc. v. Consolidated Resources, Inc.***
Superior Court Case No.: 07CECG01244

Hearing Date: June 15, 2010 (**Dept. 97D**)

Motion: By Defendant Consolidated Resources Group for reconsideration of April 6, 2010, order denying its motion for summary adjudication

Tentative Ruling:

Since the court did not issue a ruling on the statute of limitations issue in its original ruling, the court will reconsider the motion for summary adjudication on its own motion and reconsider. The court intends to issue an order after hearing.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DRF on 6/14/10.
(Judge's initials) (Date)

Tentative Ruling

Re: ***Robles v. Gateway Business Bank***
Case No. 09 CE CG 04396

Hearing Date: June 15th, 2010 (Dept. 97A)

Motion: Defendant Gateway Business Bank's Demurrer to First Amended Complaint and Motion to Strike Prayer for Physical and Emotional Damages in First Amended Complaint

Tentative Ruling:

To strike the plaintiff's **second amended complaint** on the court's own motion, because it was improperly filed without leave of court. (CCP §§ 436; 472; 473(a)(1).)

To sustain the demurrer as to all three causes of action in the **first amended complaint** for failure to allege facts sufficient to state a cause of action and uncertainty. (CCP § 430.10(e), (f).) The court intends to deny leave to amend as to the first and second cause of action, and grant leave to amend the third cause of action. The plaintiff shall file his **second amended complaint** within 10 days of the date of service of this order. All new allegations shall be in **boldface**.

To grant the motion to strike the prayer for physical and emotional damages from the **first amended complaint**, as well as the reference to such damages in paragraph 17 of the FAC. The court intends to deny leave to amend with regard to the physical and emotional distress damages.

Explanation:

First, the court intends to strike plaintiff's second amended complaint sua sponte, since plaintiff filed it without first obtaining leave of court. Under CCP § 472, "Any pleading may be amended **once** by the party of course, and without costs, at any time before the answer or demurrer is filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, and the time in which the adverse party must respond thereto shall be computed from the date of notice of the amendment." (CCP § 472, emphasis added.) However, if a party wishes to file any further amended pleadings, the party must first obtain leave of court. (CCP § 473(a)(1).) Here, plaintiff filed the second amended complaint without first seeking leave of court, so the second amended complaint is not properly before the court and it is subject to being stricken as improperly filed. (CCP § 436.)

Therefore, because the court intends to strike the second amended complaint *sua sponte*, it will then rule on the demurrer and motion to strike the first amended complaint.

Next, the court intends to sustain the demurrer as to all three causes of action in the first amended complaint. With regard to the first two causes of action for account stated and money had and received, plaintiff has failed to state facts sufficient to constitute a cause of action, and the claims are also vague and uncertain. Nor has plaintiff alleged any new facts to support the first two causes of action despite having been given leave to amend once before, which indicates that he is unable to truthfully allege any facts that would allow him to state a claim against the bank for account stated or money had and received. As a result, the court intends to sustain the demurrer to the first two causes of action without leave to amend.

The essential allegations of a common count are (1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment. (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460.) "A cause of action is stated for money had and received if the defendant is indebted to the plaintiff in a certain sum 'for money had and received by the defendant for the use of the plaintiff.'" (*Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1623.)

One of the usual situations in which a claim for "money had and received" is where there is a valid express contract, but the plaintiff elects the remedy of restitution after the defendant's breach or failure of consideration. (Witkin, California Procedure (4th Ed.) "Pleading §522; see also S.C.V. Peat Fuel Co. v. Tuck (1878) 53 Cal. 304, 305.) The use of the common count in lieu of or as an alternative to a breach of contract claim is proper where the "contract" has been fully executed on plaintiff's part and all that remains is for the defendant to pay the money (either a sum identified in the contract or the "reasonable value" of goods or services furnished.) (Witkin, supra, at § 515.)

"In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers." (*Farmers Insurance Exchange v. Zerin, supra*, 53 Cal.App.4th at 460; see also *Weitzenkorn v. Lesser* (1953) 40 Cal.2d 778, 793.) However, a demurrer does lie where the common count is nothing more than an alternative pleading of a cause of action that is itself demurrable and rests on the same facts. (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394-395.) In other words, a common count of money had and received must be considered in connection with the detailed facts in other causes of action on which it relies. If the statements of those facts do not support a cause of action a demurrer is properly sustained as to the common count as well. (*Orloff v. Metropolitan Trust Co.* (1941) 17 Cal.2d 484, 489.)

In the present case, plaintiff attempts to state claims for account stated and money had and received by alleging that, “within 4 years last past [sic], at Fresno, California, defendants and each of them became indebted to the Plaintiff in the sum of \$3,205 for money lent by Plaintiffs to the defendants at their request.” (FAC, ¶¶ 6, 10.) Plaintiff also alleges that he demanded payment of the sums owed, and defendants refused to pay. (*Id.* at ¶¶ 7, 11.) Finally, plaintiff alleges that there is now due and owing a sum of \$3,205, including principal and interest. (*Id.* at ¶ 8.)

These allegations fail to allege the basic elements of common counts for money had and received and account stated. While plaintiff alleges a sum of indebtedness and nonpayment, he does not allege that he received any consideration, such as goods, services or payment of interest in return for the loan of money. (*Farmers Ins. Exchange v. Zerín, supra*, 53 Cal.App.4th at 460.)

Plaintiff cites to *McFarland v. Holcomb* (1898) 123 Cal. 84 for the proposition that a common count is not subject to demurrer. However, in *McFarland*, the plaintiff had at least alleged that she provided services to the decedent for several years before his death, and that she was owed money by the estate for her services. (*McFarland, supra*, at 87.) The court found that these allegations were sufficient to state a claim for assumpsit, and that the demurrer should not have been sustained. (*Ibid.*)

However, those allegations offer far more detail than the allegations in the present complaint, where plaintiff simply alleges that he loaned money to defendants sometime in the last four years, and they refused to pay him back. Plaintiff fails to allege any facts about the purpose or terms of the loan, when it was made, or whether he received any type of consideration in return for the loan.

Also, as discussed above, the court must consider the other facts alleged in the complaint when ruling on the sufficiency of the common counts. (*Orloff, supra*, 17 Cal.2d at 489.) Here, the allegations of the breach of contract cause of action appear to be inconsistent with the allegations of the common count causes of action. Plaintiff alleges in the breach of contract claim that he contracted with defendants to purchase a home, and that defendants agreed to loan him money. (FAC, ¶¶ 13, 14.) However, this allegation is inconsistent with the earlier allegation that plaintiff loaned money to defendants, and defendants refused to pay it back. (*Id.* at ¶¶ 6, 7, 8, 10, 11.) Therefore, plaintiff has inconsistently alleged on the one hand that he loaned money to defendants, and on the other hand that defendants agreed to loan money to him. Consequently, the causes of action for common counts are vague, ambiguous and uncertain, as well as failing to state facts constituting a cause of action.

Nor has plaintiff been able to allege any new facts to support his first two causes of action, despite receiving leave to amend. Therefore, the court intends to sustain the demurrer to the first two causes of action without leave to amend.

The third cause of action for breach of contract also fails to state a claim. In order to allege a cause of action for breach of a written contract, the plaintiff must either attach a copy of the contract or allege the making of the contract and its essential terms. (4 Witkin, Cal. Procedure (5th Ed. 2008), Pleading, §§ 518 - 520, pp. 650-651.) “Where a party relies upon a contract in writing, and it affirmatively appears that all the terms of the contract are not set forth in *hoec verba*, nor stated in their legal effect, but that a portion which may be material has been omitted, the complaint is insufficient.” (*Gilmore v. Lycoming Fire Ins. Co.* (1880) 55 Cal. 123, 124.)

Here, plaintiff alleges that the parties entered into a written contract for the purchase of a home, and that defendants agreed to loan plaintiff money to purchase the home. (FAC, ¶¶ 13, 14.) He also alleges that defendants breached the agreement by canceling the loan and purchase contract, causing him damages, including loss of the down payment, loss of money spent on repairs to the home, loss of home inspection fees, loss of appraisal fees, loss of FHA fees, and \$35,000 in “physical and emotional damages.” (*Id.* at ¶¶ 16, 18.)

However, since plaintiff has alleged that the parties entered into a written contract to purchase the home and loan money, he must either attach a copy of the written agreement or allege the making of the contract and the essential terms of the contract and their legal effect. (4 Witkin, Cal. Procedure, *supra*, Pleading, §§ 518-520, pp. 650-651.) While plaintiff alleges that he entered into a contract with defendants to purchase a home and to borrow money, he does not specify any of the essential terms of the contract, such as the amount he was borrowing, the interest rate, the terms of repayment, or whether the defendants had the right to cancel the loan under specific circumstances. Because plaintiff has failed to allege all of the relevant terms of the agreement, the complaint fails to state a cause of action for breach of contract.

Plaintiff has now added allegations that defendants have kept the writings “to the exclusion of plaintiff.” (FAC ¶ 18.) He also alleges that the only writing plaintiff has of the contract is a copy of an email, which is attached to the FAC as an exhibit. However, while the email does appear to refer to a loan made by Mission Hills Mortgage Bankers to plaintiff, the email does not describe the amount being loaned, the purpose of the loan, or any of the essential terms of the loan agreement. Nor has plaintiff alleged the terms of the loan in his complaint. Therefore, the court intends to sustain the demurrer to the third cause of action. However, the court intends to grant leave to amend the third cause of action, since it is possible that plaintiff might be able to state the terms of the loan agreement if given another chance.

Finally, defendants have also moved to strike the prayer for damages from the FAC on the ground that the plaintiff has improperly sought damages for physical and emotional injuries as part of his breach of contract cause of action. Defendants are correct that, generally speaking, a plaintiff cannot recover physical and emotional damages suffered in connection with a breach of contract, unless the breach of contract also constituted a breach of a duty independent of the contract arising from principles of tort law. (*Erllich v. Menezes* (1999) 21 Cal.4th 543, 551.) Here, plaintiff has not alleged the breach of any duty independent of the duty created by the contract, so he has not alleged any facts showing that he can recover tort damages. Therefore, the court intends to grant the motion to strike the prayer for emotional and physical damages from the complaint. Nor has plaintiff stated that he can truthfully allege any basis for such damages in his opposition, so the court intends to grant the motion to strike without leave to amend.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: _____ **AMC** _____ on _____ **June 10, 2010** _____.
(Judge's Initials) (Date)

Tentative Ruling

Re: ***The Warner Co., Inc. v. Wachner***
Superior Court Case No. 08CECG03802

Hearing Date: June 15, 2010 (**Dept. 97C**)

Motion: By plaintiff to compel defendant's attendance at deposition, to compel response to form interrogatories, for order deeming matters admitted, and for monetary sanctions

Tentative Ruling:

To order defendant to attend a re-noticed deposition and give testimony and to respond within 10 days to the form interrogatories that are marked on exhibit B to the moving papers; to deem the matters listed in exhibit C as admitted if response is not received by plaintiff's counsel by the date and time scheduled for this hearing; to order defendant to pay monetary sanctions of \$310 within 30 days of this order.

Explanation:

The moving papers show that the discovery at issue was properly served on defendant at her address of record, that though not required, plaintiff's counsel attempted to "meet and confer" about the lack of response, and that in connection with the failed deposition, there was an inquiry into the non-appearance as required by CCP §2025.450(b)(2).

Plaintiff is therefore entitled to the requested relief. However in relation to monetary sanctions, Mr. Zamora's declaration doesn't explain the additional \$82.50 for "filing and serving" the moving papers as he is already requesting the \$40 filing fee and service appears to have been by regular mail. And an appearance should not be necessary for this unopposed motion which will eliminate both the Court Call charge and the 3 hours of attorney time.

The court will therefore grant the motion and order defendant to appear and testify at a deposition at a time and place specified in a new deposition notice to be served following this order.

Defendant is also ordered to serve written response to the specified form interrogatories within 10 days of service of this order.

And the Requests for Admission will be deemed admitted if responses are not received by plaintiff's counsel before the time scheduled for this hearing.

(14)

Tentative Ruling

Re: ***MStone v. Smart & Final***
Superior Court Case No. 09CECG 00727

Hearing Date: Tuesday, June 15, 2010 (**Dept. 97C**)

Motion: For terminating sanctions

Tentative Ruling:

The motion has been taken off calendar at the request of the moving party.

(20)

Tentative Ruling

Re: ***Central Valley Young Men's Christian Association, Inc. v. the Sequoia Lake Conference and Young Men's Christian Associations et al.***
Superior Court Case No. 10CECG00746

Hearing Date: **June 15, 2010 (Dept. 97D)**

Motion: Petition to Compel Arbitration

Tentative Ruling:

To grant the petition to arbitrate and to stay the action.

Explanation:

There is no dispute that the actions complained of in this action fall within the scope of the arbitration agreement found at Art. 13.4 of the National YMCA Organization's National Committee on Membership Standard's *Policies and Procedures Manual* ("Manual").

Plaintiff contends that the arbitration provision is not binding on it for two reasons. First, plaintiff argues that this action is grounded on actions taken by defendants on 7/11/09 (when defendants expelled plaintiff from the Sequoia Lake Conference) – one month after plaintiff's charter was revoked by the national YMCA. Since the Manual applies by its terms to "Member Associations" (Manual p. 2, para. 2), and plaintiff was no longer a member at the time of defendants' allegedly improper actions, plaintiff argues that it is not bound by the mediation and arbitration provision.

However, plaintiff is not relieved from its obligation to arbitrate any disputes just because it was no longer a chartered YMCA member at the time its cause of action against defendants allegedly accrued. In *Muh v. Newburger, Loeb & Co.* (9th Cir. 1976) 540 F.2d 970, the court held that a plaintiff's resignation from the New York Stock Exchange does not vitiate the arbitration requirement in the exchange's constitution and rules. The court discussed the enforceability of the arbitration requirement as follows:

It would seem strange indeed that with such a significant integrated method of dispute settlement one party could frustrate the purpose of the Exchange rules and the federal policy favoring arbitration by the mere expediency of resignation from the Exchange. It does not surprise us that we are not alone in holding that subsequent resignation does not vitiate the arbitration requirement. In *Isaacson v. Hayden, Stone, Inc.*, 319 F. Supp. 929 (S.D.N.Y. 1970) a former

allied member and officer of a brokerage firm which had been a member of the New York Stock Exchange sued to enforce an agreement to purchase his shares of stock. Although the agreement had been executed while both parties were members, the breach occurred after the plaintiff ceased to be a member and he argued that the arbitration provisions should therefore not be binding. The court rejected this argument. It held:

The controversy flows from and is predicated upon the business relationship between the parties which arose during their mutual membership in the Exchange. If the obligation then undertaken by the defendant persists for the purpose of enforcement after termination of those memberships, it also persists as a membership obligation subject to the Constitution of the Exchange. ***Osborne & Thurlow v. Hirsch & Co.***, 10 Misc.2d 225, 226, 172 N.Y.S.2d 522, 523 (S. Ct.N.Y. County 1958). The fact that the plaintiff commenced this action after he ceased to be a member of the Exchange does not impair or destroy the obligation to arbitrate his controversies with the defendant concerning their business relationship assumed by him while he was a member of the Exchange. ***In re Sartorius***, 265 App.Div. 997, 39 N.Y.S.2d 996 (1st Dept. 1943), aff'g Shientag J. in 107 N.Y.L.J., 1385 (S. Ct.N.Y. County 1942).

319 F. Supp. at 930. We agree and hold that the parties in this case are bound by the arbitration agreement.
(***Muh, supra***, 540 F.2d at 973.)

Though we deal here with plaintiff's involuntary removal and charter revocation, rather than a voluntary resignation, the controversy in this action flows from and is predicated on the relationship between plaintiff and defendants which arose during their memberships in the YMCA organization. Plaintiff's YMCA charter was revoked due to its unpaid debt to defendant, and plaintiff was removed from the Sequoia Lake Conference because it was no longer a chartered YMCA. The debt accrued in the years 2007 and 2008, and on 7/17/08 plaintiff entered into an agreement to resolve the debt. Though plaintiff's removal from the Sequoia Lake Conference occurred one month after the national YMCA revoked plaintiff's charter, that action was the culmination of the relationship between the parties evolving since 2007, which relationship was directly connected to and arose out of the relationship of the parties as YMCA members. Accordingly, the court finds that plaintiff is bound by the Manual's mediation and arbitration provisions.

Second, plaintiff points out that the Manual attached to the Petition to Compel states that it is "effective July 9, 2009". Because the effective date of the

Tentative Ruling

Re: ***Jennifer Hall, et al. v. City of Fresno, et al.***
Case No. 07CECG03911

Hearing Date: June 15, 2010 (Dept. 97C)

Motion: By defendant Jim Crawford Construction Company, Inc. (Crawford) for terminating and monetary sanctions against plaintiff Jennifer Hall, or in the alternative, to compel compliance with the court's April 8, 2010 order on the motions to compel

Tentative Ruling:

To deny the motion for terminating sanctions. To award monetary sanctions against plaintiff Jennifer Hall and in favor of defendant in the amount of \$340.00, which are to be paid within 30 days of this order.

Explanation:

Under California Code of Civil Procedure (CCP) section 2031.300(c), upon the failure of the party to obey the court's earlier order to respond to requests for production, the court may make such orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction. Lesser sanctions than terminating sanctions are warranted. In connection with the motion to compel further responses in this case that the court denied due to inadequate attempts by defendant to informally resolve the outstanding discovery, plaintiff requested more time to comply. (See *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 796.) Plaintiff previously was a self-represented litigant, and now counsel represents her. (*Ibid.*) Under *Thomas v. Luong* (1986) 187 Cal.App.3d 76, 81 it is an abuse of discretion to impose a terminating sanction where there is no showing that a lesser sanction would not protect the legitimate interests of the party harmed by the failure to provide discovery. Therefore, terminating sanctions are denied.

Yet, monetary sanctions are warranted based on plaintiff's failure to comply with the court's April 8, 2010 order compelling responses to defendant's requests for production. Under CCP section 2031.230(c) if a party fails to obey an order compelling production, the court may make those orders that are just, including imposing an issue sanction, an evidence sanction, or a terminating sanction. In lieu of such sanctions or in addition to them, the court may impose a monetary sanction. If a motion to compel is granted to avoid sanctions the party who refuses to comply must show substantial justification for the refusal. (See

(23)

Tentative Ruling

Re: ***Arthur Semendinger v. California Department of Corrections and Rehabilitation, et al.***
Superior Court No. 08 CECG 03039

Hearing Date: Tuesday, June 15, 2010 (**Dept. 97D**)

Motions: (1) Defendants Daniel May's and Gregory Mills' Motion to Vacate Judgment

(2) Defendants Daniel May's and Gregory Mills' Motion to Set Aside Amended Default Judgment pursuant to Code of Civil Procedure § 473(b)

Tentative Ruling:

To STAY Defendants' motions to vacate judgment and to set aside amended default judgment while Defendants' appeal is pending.

Explanation:

On April 22, 2010, Defendants Daniel May and Gregory Mills filed an appeal from the default judgment entered on January 21, 2010 and the amended default judgment entered on April 2, 2010. Consequently, before the Court reaches the merits of the Defendants' motions, the Court must decide if the motions are stayed by the Defendants' appeal or not.

Code of Civil Procedure § 916 states: "Except as provided in [statutes not implicated here], the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order." (Code of Civil Procedure § 916(a).) "[W]hether a matter is 'embraced' in or 'affected' by a judgment [or order] within the meaning of [section 916] depends on whether postjudgment [or postorder] proceedings on the matter would have any effect on the 'effectiveness' of the appeal." (*In re Marriage of Horowitz* (1984) 159 Cal. App. 3d 377, 381.) "If so, the proceedings are stayed; if not, the proceedings are permitted." (*Betz v. Pankow* (1993) 16 Cal. App. 4th 931, 938.) "The purpose of the rule depriving the trial court of jurisdiction during the pending appeal is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. The rule prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it. [Citation.]" (*Elsea v. Saberi* (1992) 4 Cal. App. 4th 625, 629.)

(19)

Tentative Ruling

Sutherland v. Dan Gamel, Inc. et al..

05CECG00043

Hearing Date: June 15, 2010 (97A)

Motion: by plaintiff for determination of award of attorney's fees

Tentative Ruling:

To grant, but to reduce the lodestar to \$199,843.33. To exercise the Court's discretion to apply multiplier of 40%, for a total of \$290,605.00, inclusive of the fees incurred to bring this motion. No multiplier was applied to the hours spent on this motion.

Explanation:

1. No Apportionment is Needed

a. Applicable Law

"When a cause of action for which attorney fees are provided by statute is joined with other causes of action for which attorney fees are not permitted, the prevailing party may recover only on the statutory cause of action. However, the joinder of causes of action should not dilute the right to attorney fees. Such fees need not be apportioned when incurred for representation of an issue common to both a cause of action for which fees are permitted and one for which they are not. All expenses incurred on the common issues qualify for an award." *Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1133, citing *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130. "Attorneys fees need not be apportioned between distinct causes of action where plaintiff's various claims involve a common core of facts or are based on related legal theories." *Drouin v. Fleetwood Enterprises* (1985) 163 Cal.App.3d 486, 493.

Apportionment is not required when the issues in the fee and nonfee claims are so inextricably intertwined that it would be impractical or impossible to separate the attorney's time into compensable and noncompensable units. *Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 687; *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111.

b. Evidence of Other Misconduct by Gamel Personnel

It is quite true that the law permits evidence of other nefarious conduct to prove the fraudulent intent of a person or a company towards an individual. And the importance of such evidence was confirmed when the U.S. Supreme Court

issued its opinion in *State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408 (“*Campbell*”), which required a showing of significant similarity between the misconduct towards the plaintiffs.

California has found such evidence admissible for some time. In *Delos v. Farmers Ins. Group, Inc.* (1979) 93 Cal. App. 3d 642, the Court ruled that “evidence of defendants’ conduct which occurred before and after the transactions involving plaintiffs . . . was relevant since direct proof of fraudulent intent is often impossible, the intent may be established by reference from the acts of the party.” (*Id.* at 658.)

See also *Cobian v. Ordonez* (1980) 103 Cal. App. 3d. Supp. 22, holding that evidence of misrepresentations to other customers admissible to prove fraudulent intent of car salesman. The California Supreme Court found such evidence to be discoverable due to reasonable likelihood it would be admissible on punitive damages issues in *Colonial Life & Accident Ins. Co. v. Superior Court* (1984) 31 Cal. 3d 785.

Because of the fact evidence of like misrepresentations or other misconduct is admissible to prove ill intent on the sale to the Sutherlands, as well as to support a punitive damages claim, all legal work to obtain, review, or present such evidence represents hours for which recovery of fees is proper.

b. Certification Proceedings

As with efforts to offered into evidence similar instances of misconduct, class certification requires arguments of similarity of the claims of others to the claim of the named plaintiffs, the presence of predominantly common facts and law. While certification did not occur here because it could not be shown that all class members were exposed to the misrepresentations, the vetting of information obtained did serve to solidify the issues and facts available to show that the Sutherlands were subjected to a pattern and practice of fraudulent behavior in RV sales by Gamel. The fact the pattern and practice evidence was not universal does not change that.

2. Cross-Check Against Recovery Not Appropriate Here

It is true that here the proper “amount at stake” to be considered is the individual claim, not the class claims. The recovery in this case of \$25,000 is, however, a **settlement** recovery, not the “amount at stake,” and a recovery based on the insolvency of the defendant. The “amount at stake” on the individual claim would include all damages available for fraud, including emotional distress and punitive damages. That casts the recovery in a different light than that urged by defendant.

One California Court found that reduction of a fee award due to the recovery was not permissible where there was an individual recovery rather than a class recovery, and distinguished *Lealao v. Beneficial California, Inc.* (2000) 82 Cal. App. 4th 19 on that basis. See *Northwest Energetic Svcs. v. FTB* (2008) 159 Cal. App. 4th 841. And at the page cited by defendant, the *Lealao* case also supported use of the “amount at stake” figure rather than the ultimate recovery figure:

“[I]ntermediate appellate courts in this state have, in effect, adopted the common federal practice of ‘cross-checking’ the lodestar against the value of the class recovery (which is not duplicative because the amount or value of the recovery is not reflected in the basic lodestar), because the award is still ‘anchored’ in the time spent by counsel on the case, and the practice is therefore consistent with the mandate of *Serrano III*. Thus, California courts often use ‘**the amount at stake**, and the result obtained by counsel’ as relevant factors justifying enhancement of a lodestar fee through use of a multiplier (see, e.g., *City of Oakland v. Oakland Raiders* (1988) 203 Cal. App. 3d 83 [249 Cal. Rptr. 606]), as do their federal counterparts.”

Lealao, supra, 82 Cal. App. 4th at 45 – emphasis added.

The *Vo v. Las Virgenes Mun. Water Dist.* (2000) 79 Cal. App. 4th 440 cited by plaintiff is also instructive. There, the parties also left the issue of attorney’s fees to the judge, who awarded ten times the amount recovered on the individual claim. The judge reduced the lodestar by a small amount for unsuccessful claims, but refused to lower it further because it viewed the other claims as all arising from the same core facts. The plaintiff prevailed at trial on his claims for a hostile work environment and failure to prevent harassment or discrimination. He lost on his claims for retaliation and discriminatory denial of promotion. The jury awarded him a total of \$40,000.00.

A settlement includes express recognition that a defendant pays less than it would at a successful trial. *Tech-Bilt, Inc. v Woodward-Clyde & Associates* (1985) 38 Cal. 3d 488, 499. Even if the Court were to use the cross-check method for determining the amount of attorney’s fees in this case, the figure to “cross-check” against here is an estimation of what the Sutherlands might have recovered at trial against a solvent entity. Application of the either criteria supports the amount sought here rather than calls for a reduction.

3. Calculation of Lodestar

A court assessing attorney’s fees begins with a touchstone or lodestar figure, based on the ‘careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case.’ *Serrano v. Priest* (*Serrano III*) (1977) 20 Cal.3d 25, 48.

As our Supreme Court has repeatedly made clear, the lodestar consists of "the number of hours *reasonably expended* multiplied by the *reasonable* hourly rate. . . ." *PLCM Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084, 1095, italics added; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1134. The California Supreme Court has noted that anchoring the calculation of attorney fees to the lodestar adjustment method "'is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.'" *Serrano III, supra*, 20 Cal.3d at p. 48, fn. 23.

The "experienced trial judge is the best judge of the value of professional services rendered in his court." *Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 832. Based on a consideration of various factors, the trial court may rely on its own expertise and knowledge to calculate reasonable attorney fees. *Niederer v. Ferreira* (1987) 189 Cal. App. 3d 1485, 1507. "When the trial court is informed of the extent and nature of the services rendered, it may rely on its own experience and knowledge in determining their reasonable value." *In re Marriage of Cueva* (1978) 86 Cal. App. 3d 290, 300. The court is not limited to the affidavits submitted by the attorney. *Melnyk v. Robledo* (1976) 64 Cal. App. 3d 618, 625.

The hourly fees sought by counsel here are appropriate to those charged in the community by similarly experienced counsel. The hours shown on the billing submitted by moving party are also reasonable to the tasks listed, and are supported by the Court's review of its own multi-volume file in this matter.

While reduction of the lodestar by apportionment is not appropriate, the fees charged for the paralegal, Barbara Kosinski, are not recoverable in this Court's view. That reduces the lodestar by \$10,029.17. The Court does note that the propriety of recovering paralegal costs as "attorney's fees" is not a settled issue. Cases seemingly against such recovery are *Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal. App. 4th 1095; *Ripley v. Pappadopoulos* (1994) 23 Cal. App. 4th 1616, 1624; *First Nationwide Bank v. Mountain Cascade* (2000) 77 Cal. App. 4th 871, 876-877- rejecting earlier contrary authority. *Benson v. Kwikset Corp.* (2007) 152 Cal. App. 4th 1254, 1280, confirms the issue is not settled.

The training and legal knowledge of an experienced legal secretary are invaluable, often more so than that of a paralegal. It is the Court's view that as the expenses for legal secretary time are not compensable, that for paralegals is not property sought as "attorney's fees" either.

Omitting the paralegal charges, the lodestar is \$199,843.33. The Court has not included the fees sought for this motion in that figure.

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Tentative Ruling

State Farm General Ins. Co. v. Smiley
09CECG03252

Hearing Date: June 15, 2010 (97C)

Motion: Motion for Judgment on the Pleadings

Tentative Ruling:

To grant with leave to amend. An amended pleading, if any, is to be filed by plaintiff no later than July 6, 2010.

Explanation:

The Court set this matter for a motion for judgment on the pleadings on its own motion via its ruling on May 13, 2010, inviting plaintiff to avoid same by filing an amended pleading prior to this date. Plaintiff has not done so, nor has it filed any papers arguing against a grant of this motion. The cause of action asserted is one for subrogation.

“Subrogation is the substitution of another person in place of the creditor or claimant to whose rights he or she succeeds in relation to the debt or claim. In the case of insurance, subrogation takes the form of an insurer’s right to be put in the position of the insured in order to pursue recovery from third parties legally responsible to the insured for a loss which the insurer has both insured and paid. The subrogated insurer is said to ‘stand in the shoes’ of its insured, because it has no greater rights than the insured and is subject to the same defenses assertable against the insured. Thus, an insurer cannot acquire by subrogation anything to which the insured has no rights, and may claim no rights which the insured does not have.”

Interstate Fire & Casualty Ins. Co. v. Cleveland Wrecking (2010)
182 Cal. App. 4th 23, 32.

That case also held that the first element of a subrogation cause of action is that “the insured suffered a loss for which the defendant is liable, either as the wrongdoer whose act or omission caused the loss or because the defendant is legally responsible to the insured for the loss caused by the wrongdoer.” (*Id.* at 33.)

The May 13th ruling denied plaintiffs’ discovery motions on the basis of lack of clarity of its complaint, among other reasons, including the fact that the complaint failed to state facts sufficient to support the underlying claim of negligence on which the subrogation demand was made. Plaintiff contended that it was subrogated to its insured’s claim for negligence by the fact it made payments pursuant to its policy based on the damages caused by defendants’ negligence.

Tentative Ruling

(RA#24)

Re: **Robert Rodriguez v. Fresno Unified School District**
Court Case No. 09CECG04159

Hearing Date: **June 15, 2010 (Dept. 97A)**

Motion: Defendant Fresno Unified School District's Demurrer to First Amended Complaint

Tentative Ruling:

To overrule defendant's demurrer to the First Amended Complaint, with defendant Fresno Unified School District granted 10 days' leave to file its answer to the complaint. The time in which the answer can be filed will run from service by the clerk of the minute order.

Explanation:

The concepts of "citizenship" and "place of birth" are closely tied, since one's place of birth generally determines one's original citizenship. But that does not mean they are always the same thing, since "citizenship" can change, but "place of birth" cannot. *Espinoza* clearly ruled that a claim of discrimination based on citizenship is not encompassed within Title VII (and thus FEHA). [*Espinoza v. Farah Mfg. Co.* (1973) 414 U.S. 86] Cases subsequent to it have found that an attempt to allege national origin discrimination against an American that is in reality based on citizenship (even if the term "American national origin" is used) will not be actionable. [See, e.g., *Vicedomini v. Alitalia Airlines*, 1983 U.S. Dist. LEXIS 11550 (S.D.N.Y. Nov. 18, 1983)]

However, courts have also clearly found an American can be discriminated against based on his or her national origin. [*Bilka v. Pepe's Inc.*, 601 F.Supp. 1254 (N.D. Ill. 1985); *Earnhardt v. The Commonwealth of Puerto Rico* (1st Cir. 1984) 744 F.2d 1] While the court in *Vicedomini, supra*, opined (in *dicta*, at p. 10-11) that "the implication of *Espinoza* is that the national origin of a person born in the United States is determined by looking only to his ancestry," other courts in later opinions have found that this is not the only way to determine it. The *Bilka* and *Earnhardt* cases cited by plaintiff are authority for the proposition that a claim of national origin discrimination against an American can be stated, and that "discriminating against an employee for being born an American is no less reprehensible than discriminating against one for being born an Italian, Mexican, or any other nationality." [*Id.* at 1257, emphasis added.] Thus, these rulings show that the concepts of "citizenship" and "place of birth"

can be decoupled when analyzing a discrimination claim under Title VII and FEHA.

One of the cases cited by defendant used a commonsense method to determine if the claim as stated was regarding “national origin” or “citizenship.” In *Novak v. World Bank*, 1979 U.S. Dist. LEXIS 11742 (D.D.C. June 13, 1979), plaintiff claimed he was denied promotions and ultimately dismissed from his job at the World Bank based on the bank’s policy of discriminating against U.S. citizens, which he claimed was national origin discrimination under Title VII. The court found that this did not state a claim of national origin discrimination because it was based only on citizenship, which under *Espinoza* was not actionable. The court noted that the way the plaintiff’s complaint was phrased, persons from other countries who became naturalized U.S. citizens would be subject to the same pattern of discrimination that he had encountered. Likewise, an American who became a citizen of another country would *benefit* from the discrimination. Thus, the court found that this was in actuality only a claim of discrimination based on citizenship. [*Id.*, page 3-4] It is worth noting that the court in *Novak* did not state that a claim of national origin discrimination against an American citizen would not be possible, but rather that *as stated*, the claim was entirely dependent upon citizenship.

In our case, however, it is clear that plaintiff’s claim of discrimination is not based on the citizenship status he or the preferred employees had. Instead, it was based on where he was born (the U.S.) versus where the preferred employees were born (Mexico). While the complaint does not expressly state that any of the Mexican nationals who were given the jobs were also naturalized citizens, this is at least one susceptible meaning of the phrase used throughout the complaint to describe the preferred class—“Mexican Nationals born in Mexico and now legally in the U.S.” [See, e.g., FAC ¶¶ 13, 16, 17, 18, 19, 20, 21, and 22] For purposes of ruling on demurrer, the complaint must be construed liberally by drawing reasonable inferences from the facts pleaded. [*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517] Using the same reasoning the court applied in *Novak, supra*, it appears that the citizenship status of the preferred class (i.e., whether they were just legal residents or whether they were naturalized citizens) had nothing to do with whether or not they received the preferred treatment. Instead, it was dependent on *where they were born—Mexico*. This strengthens an argument that the complaint is not based on claims of the citizenship status of *either* the preferred class or the class discriminated against.

Thus, plaintiff has not made a claim based on his citizenship as an American, but rather based on the fact that he was “born an American.” Furthermore, the claim is clearly not based on his own Mexican heritage, since he alleges at ¶21 that his supervisor discriminated against “U.S. born Hispanic and Caucasian employees” in favor of applicants born in Mexico.

Tentative Ruling

(RA#24)

Re: Oeun Pok v. Chelsea Arcos, et al.
Court Case No. 09CECG04213

Hearing Date: June 15, 2010 (**Dept. 97D**)

Motion: Petitions to Approve Compromises of Disputed Claims of Minors

Tentative Ruling:

To grant with corrections on net awards of minors and attorney's fee, as noted below. Corrected Orders have been signed. Hearing off calendar.

The petitions for compromise of the claims of Malay Pong and Sunny Pong are dismissed.

Explanation:

Pursuant to the information provided by the Petitions as to the settlement amounts offered to the plaintiffs from the various sources is as follows:

Source	Total	Per Child
21st Century Insurance (Arcos' car insurance)	\$25,000.00	(calculated below, based on total)
Western United (underinsured motorist coverage)	\$25,000.00	(calculated below, based on total)
Los Perico's, Arcadio Navarro and Jose Navarro, collectively	\$5,000.00	(calculated below, based on total)
Robert Arcos, personal contribution	\$10,000.00	(calculated below, based on total)
TOTAL:	\$65,000.00	÷ 7 = \$9,285.71

Each child's net share is determined as follows:

Settlement:	\$9,285.71
Medical expenses:	\$0.00
Court Costs (attorney is absorbing these):	\$0.00
Attorney fees:	\$2,321.42
Total Expenses	\$2,321.42
Balance to minors (blocked accounts):	\$6,964.29

The court should approve the compromise of the following minors' claims:

Name of child	DOB	Age	Date attains 18
Justin Bunthoeun	6/9/02	7	6/9/2020
Junior Neavia Touch	12/21/98	11	12/21/2016
Vuthy Jesse Touch	12/21/98	11	12/21/2016
Netha Christina Bun	1/24/96	14	1/24/2014
Veasnia Johnathan Bun	5/15/94	16	5/15/2012

The petitions for compromise of the claims of Malay Poug and Sunny Poug should be dismissed, pursuant to request from their counsel, Chinh T. Vo, since they have each attained the age of majority, and can approve this settlement without the court's involvement.

Pursuant to California Rules of Court, Rule 3.1312 and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DRF on 6-13-10 .
(Judge's initials) (Date)

Tentative Ruling

(#24)

Re: **Guadalupe Moreno v. Aurora Loan Services, LLC, et al.
Court Case No. 09CECG02318**

Hearing Date: **June 15, 2010 (Dept. 97B)**

Motion: Aurora Loan Service's Demurrer to the First Amended
Complaint

Tentative Ruling:

To overrule defendant Aurora Loan Services, LLC's demurrer to the First, and Second causes of action of the Second Amended Complaint. Defendant is granted 10 days' leave to file its answer to the Second Amended Complaint. The time in which the answer can be filed will run from service by the clerk of the minute order.

Explanation:

Defendant argues that plaintiff's fraud allegations are not pled with sufficient specificity and details, and that plaintiff has not adequately alleged that defendant made any representations beyond a promise to postpone the sale to March 18, 2010.

With the Second Amended Complaint, plaintiff has added detail as to the first names of the agents he spoke with, the department he was speaking to, the number he faxed documents to, dates these events occurred. Defendant argues that giving only the first names of the agents is not sufficient; however, plaintiff can only allege what he knows, and if the person spoken to only gave their first name, that is all plaintiff can allege. That information, plus the dates the conversations took place, and the department that the person worked for, gives defendant enough information to investigate the allegations more thoroughly, which is one of the purposes of requiring the detail to begin with. And where it is clear from the nature of the allegations that "defendant must necessarily possess full information concerning the facts of the controversy" (such as here, where it is reasonable to assume that defendant kept records of such phone calls with customers) the specificity requirements as to this element are mitigated. [See, e.g., *Committee on Children's Television Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216; *Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 158]

As to the promise or representations made by defendant, plaintiff has alleged more than defendant's promise to postpone the sale to March 18, 2009. He alleges that after that time defendant undertook transactions with the surgeon buyer that plaintiff had located, to the extent of opening an escrow, approving the

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Tentative Ruling

Re: ***Najarian v. Piaggio USA, Inc.***
Case No. 09 CE CG 03504

Hearing Date: June 15, 2010 (**Dept. 97D**)

Motion: Defendant Wilson's Motorcycles' Motion for Leave to File
Cross-Complaint

Tentative Ruling:

To grant defendant Wilson's motion for leave to file the cross-complaint. (CCP § 426.50.) Defendant shall serve and file his cross-complaint within 10 days of the date of service of this order.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: _____ **DRF** _____ on **6-14-10** _____.
(Judge's Initials) (Date)

Tentative Ruling

(17)

Re: ***Macias v. TAG Auto Center, Inc et al.***
Superior Court Case No. 07 CECG 02392

Hearing Date: June 15, 2010 (Dept. 97C)

Motion: Plaintiff's Motion to Compel Further Responses to Requests for
Production

Tentative Ruling:

To grant. Defendant Estes Automotive Group 1, Inc. dba TAG Auto.com shall provide verified further responses to Requests for Production, Set two, Nos., 15-25 within 30 days of service of this order. Defendant Estes Automotive Group 1, Inc. dba TAG Auto.com and its counsel Coleman & Horowitz shall pay sanctions of \$3,575.00 to Kemnitzer, Barron & Krieg LLP within 30 days of service of this order.

Explanation:

A motion to compel lies where the responses to the interrogatories or request for production are deemed improper by the propounding party, i.e., objections, evasive or incomplete answers. (Code Civ. Proc. §§ 2030.300, 2031.310.)

A motion to compel must "set forth specific facts showing good cause justifying the discovery sought by the inspection demand." (Code Civ. Proc. §2031.310, subd. (b)(1).) Absent a privilege issue or claim of attorney work product, that burden is met simply by a fact-specific showing of relevance. (*Glenfed Dev. Corp. v. Superior Court* (1997) 53 Cal.App.4th 1113, 1117.) If "good cause" is shown by the moving party, the burden is then on the responding party to justify any objections made to document disclosure. (*Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.)

The requests are relevant to the allegations of the complaint which alleges that vehicles were sold without disclosure of prior daily rental use. Documents which disclose rental use are relevant to this topic. EAG claims that the documents are not relevant to plaintiff's claims against it. This is irrelevant. Discovery may relate to any claim or defense of the party seeking discovery; a party is not required to limit its discovery against another party to claims between the two parties. (See Code Civ. Proc. § 2017.010.)

The discovery does relate to the pre-certification of the class. Section 382 of the Code of Civil Procedure authorizes class suits in California when "the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court."

To obtain certification, "a party must establish the existence of both an ascertainable class and a well-defined community of interest among the class members." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)

"[Courts] have acknowledged the significance of the class certification decision, in that it 'frequently determines whether the case has continuing viability.' . . . Accordingly, . . . due process requires 'an opportunity to conduct discovery on class action issues before . . . documents in support of or in opposition to the motion must be filed,' and 'a full opportunity to brief the issues and present evidence.'" (*Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 827.) "A party is entitled to such discovery before the class is certified, not after. . . . Whether the common questions are sufficiently pervasive to permit adjudication in a class action rather than in a multiplicity of suits . . . cannot realistically be made until the parties have had a chance to conduct reasonable investigation." (*Id.* at p. 836, internal quotation marks omitted; accord, *Union Mut. Life Ins. Co. v. Superior Court* (1978) 80 Cal. App.3d 1, 11-13.)

The requested documents are not, as defendant argues, "premature." Because the complaint alleges non-disclosure as well as deceit and inducement to purchase one of the critical issues on the class certification motion will be whether there is sufficient commonality in the transactions such that class treatment is appropriate and desirable. (See *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 809 [" . . . the right of each individual to recover may not be based on a separate set of facts applicable only to him."]; see also *Brown v. Regents of University of California* (1984) 151 Cal.App.3d 982, 989.) To make this determination, plaintiff must present, and the court must review, documents relating to the sale of the vehicles to the class.

Defendant's objections regarding overbreadth, burden, oppression and irrelevancy are without merit. The scope of discovery is four years prior to filing the complaint, which is the length of the longest statute of limitations (Bus. & Prof. Code § 17208.)

The objection that the discovery "potentially" invades the privacy rights of third parties is not substantiated. Where good cause is shown by the moving party, the burden on the responding party to justify any objections made to document disclosure. (*Kirkland v. Superior Court, supra*, 95 Cal.App.4th at p. 98.) EAG objects that no Notice to Consumer has been sent pursuant to Code of Civil Procedure section 1985.3. This section does not apply. Section 1985.3 applies only to "personal records of a consumer". "Personal records" are defined, generally, as those kept by medical personal and institutions, banks, savings and loans, anyone authorized to make real property secured loans, insurance companies, title insurance companies, attorneys, accountants, utilities, and schools. Auto dealerships are not among the defined classes. Moreover,

section 1985.3 applies only when records are sought by subpoena, not as here, when the records are sought by a request for production.

EAG alludes to the fact that consumer finance contracts and credit applications might be produced under this category of documents, but makes no actual showing by attaching a redacted copy of such documents that such documents ever contained the specified information. Accordingly, the conclusion that the request even calls for sensitive financial information is speculative.

The fact that a person bought a vehicle is not subject to a right of privacy, particularly where there is litigation over the means and manner of the sale or the quality of the goods sold. In *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, the Supreme Court considered the extent to which California's constitutional right to privacy protected purchasers of possibly defective DVD players, who had already complained to the seller, "from having their identifying information disclosed to plaintiff during civil discovery proceedings in a consumers' rights class action against the seller." (*Id.* at p. 363.) The court observed that the disclosure "involves no revelation of personal or business secrets, intimate activities, or similar private information, and threatens no undue intrusion into one's personal life, such as mass-marketing efforts or unsolicited sales pitches." (*Id.* at p. 373.)

EAG has not made an appropriate showing that any documents are, or contain trade secrets. "The Legislature has defined trade secrets as 'information, including a formula, pattern, compilation, program, device, method, technique, or process that: [P] (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and [P] (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.' (Civ. Code, § 3426.1, subd. (d).)" (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 300.) No attempt to satisfy this showing has been made as to this category of documents, nor indeed any other.

EAG claims that the information is readily available from other sources, citing *Alpine Mut. Water Co. v. Superior Court* (1968) 259 Cal.App.2d 45, 53, which the court held that a party did not have to search public records and compile them to provide a response. EAG did not raise this as a specific ground for objection and it is waived. Moreover, it would not apply if EAG in fact, has custody, control or possession of the documents.

This brings us to the substantive response: that EAG does not have possession of the documents. Code of Civil Procedure section 2031.230 provides that a representation of inability to comply with a request for production shall affirm that a diligent search and reasonable inquiry has been made in an effort to comply with the demand. "This statement shall also specify whether the inability to comply is because the particular item or category has never existed,

