

Tentative Rulings for August 31, 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).)

- 09 CECG 03895 *Diamond Auto Body and Paint, Inc. v. Duarte, et al.*
(Dept. 97A)
- 09 CECG 02038 *United Security Bank v. Rancho Grande Auto Center*
(Dept. 97B)
- 10CECG02454 *Lore Gerawan v. Hobbs Grove Inc.* (Dept. 97A)
- 10CECG02832 *TFS v. Zinc Financial* (Dept. 97C)
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The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

- 10 CECG 01055 *Dibuduo, et al. v. Bank of the West, et al.* is continued to
September 30, 2010 at 3:30 PM in Dept. 97A.
- 09CECG03427 *Anezinos v. Thomas J. Gearing, et al.* (motion to appoint
a receiver) is continued to September 2, 2010 at 3:30
p.m. in Dept. 97B.
- 09CECG02034 *Tina Fullbright v. Raj Mohammed* is continued to
Thursday, September 2, 2010 at 3:30 p.m. in Dept. 97D.
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(Tentative Rulings begin at the next page)

Tentative Ruling

Re: ***Royal Express, Inc. v. Endurance Worker's
Compensation Insurance Company***
Case No. 10 CE CG 01236

Hearing Date: August 31, 2010 (Dept. 97A)

Motion: Defendant Endurance Worker's Compensation Insurance
Company's Demurrer to Complaint

Tentative Ruling:

To overrule the demurrer to the first, second and fourth causes of action on the ground that there is another action pending between the same parties on the same cause of action. (CCP § 430.10(c).) To sustain the demurrer to the first and second causes of action on the ground that they fail to state facts sufficient to constitute a cause of action. (CCP § 430.10(e).) To grant leave to amend. Plaintiff shall file its first amended complaint within 10 days of the date of service of this order. All new allegations shall be in **boldface**.

Explanation:

Endurance argues that the court should sustain the demurrer to the three causes of action that plaintiff has pled against Endurance, on the basis of the fact that there is already an action pending before the Worker's Compensation Appeals Board on the same issues. CCP § 430.10(c) provides that a defendant may demur to a cause of action on the ground that there is another action pending before the same parties on the same cause of action. "When a special demurrer is interposed alleging another action pending... the court may take judicial notice of the pending suit. [Citation.] In such a case, the defendant must show that the parties, cause of action, and issues are identical, and the same evidence would support the judgment in each case. [Citations.]" (*California Union Ins. Co. v. Trinity River Land Co.* (1980) 105 Cal.App.3d 104, 108.)

"A plea in abatement pursuant to section 430.10, subdivision (c), may be made by demurrer or answer when there is another action pending between the same parties on the same cause of action. [Citation.] In determining whether the causes of action are the same for purposes of pleas in abatement, the rule is that such a plea may be maintained only where a judgment in the first action would be a complete bar to the second action. [Citation.] Where a demurrer is sustained on the ground of another action pending, the proper order is not a dismissal, but abatement of further proceedings pending termination of the first action. [Citations.]" (*Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 Cal.App.3d 781, 787-788.)

Here, however, Endurance has not pointed to anything showing that the parties, causes of action, and issues are identical in both the WCAB proceeding and the civil action. Nor has Endurance shown that a judgment in the WCAB proceeding would be a complete bar to the Superior Court action. Endurance asks the court to take judicial notice of certain documents filed with the WCAB, which the court intends to do, but the documents do not establish precisely which issues are pending before the WCAB or that the parties are the same in both actions. At most, the documents establish that there is a claim pending before the WCAB and that Royal Express and Endurance are parties to the pending action. (See Request for Judicial Notice.) However, it does not appear that the WCAB raises the same types of issues and claims as the Superior Court action. In fact, it would be highly unlikely that the WCAB action could raise the same claims or provide the same type of relief as the Superior Court action, since the WCAB only has jurisdiction to resolve issues of worker's compensation insurance coverage, not issues of damages to the employer from the insurer's alleged breach of the insurance contract. (*Aetna Casualty & Surety Co. v. Aceves* (1991) 233 Cal.App.3d 544, 550.) Therefore, to the extent that Endurance seeks to obtain a plea in abatement under CCP § 430.10(c), Endurance has failed to show that it is entitled to relief.

On the other hand, Endurance has sought relief under the doctrine of exclusive concurrent jurisdiction, which is similar to a plea in abatement, although broader in scope. "Under the rule of exclusive concurrent jurisdiction, 'when two superior courts have concurrent jurisdiction over the subject matter and all parties involved in litigation, the first to assume jurisdiction has exclusive and continuing jurisdiction over the subject matter and all parties involved until such time as all necessarily related matters have been resolved.' [Citations.] The rule is based upon the public policies of avoiding conflicts that might arise between courts if they were free to make contradictory decisions or awards relating to the same controversy, and preventing vexatious litigation and multiplicity of suits. [Citations.] The rule is established and enforced not 'so much to protect the rights of parties as to protect the rights of Courts of co-ordinate jurisdiction to avoid conflict of jurisdiction, confusion and delay in the administration of justice.' [Citation.] The rule of exclusive concurrent jurisdiction may constitute a ground for abatement of the subsequent action. [Citation.] [¶] 'An order of abatement issues as a matter of right not as a matter of discretion where the conditions for its issuance exist.' [Citation.] However, abatement is not appropriate where the first action cannot afford the relief sought in the second. [Citation.]" (*Plant Insulation Co. v. Fibreboard Corp. supra*, 224 Cal.App.3d at 786-787.)

"Although the rule of exclusive concurrent jurisdiction is similar in effect to the statutory plea in abatement, it has been interpreted and applied more expansively, and therefore may apply where the narrow grounds required for a statutory plea of abatement do not exist. [Citation.] Unlike the statutory plea of abatement, the rule of exclusive concurrent jurisdiction does not require absolute

identity of parties, causes of action or remedies sought in the initial and subsequent actions. [Citations.] If the court exercising original jurisdiction has the power to bring before it all the necessary parties, the fact that the parties in the second action are not identical does not preclude application of the rule. Moreover, the remedies sought in the separate actions need not be precisely the same so long as the court exercising original jurisdiction has the power to litigate all the issues and grant all the relief to which any of the parties might be entitled under the pleadings. [Citations.]” (*Id.* at 788.)

Also, it is not necessary to show that a judgment in the original action would be *res judicata* in the second action in order to find that the rule of exclusive concurrent jurisdiction applies to the actions. (*Id.* at 789.) “We agree with *Childs* that the *res judicata* test is not required for application of the rule of exclusive concurrent jurisdiction. Instead, we adopt the more expansive subject matter test applied in recent cases and by the trial court herein, which considers whether the first and second actions arise from the ‘same transaction.’” (*Ibid.*)

“ ‘An order of abatement issues as a matter of right [i.e., mandatory] not as a matter of discretion [i.e., discretionary] where the conditions for its issuance exist.’ [Citation.] This is the case whether a right to abatement exists under the statutory plea in abatement [citation] or the judicial rule of exclusive concurrent jurisdiction [citation]. Where abatement is required, the second action should be stayed, not dismissed. [Citation.]” (*People ex rel. Garamendi v. American Autoplan, Inc.* (1993) 20 Cal.App.4th 760, 770-771.)

“Mandatory actions of the trial court should be raised by demurrer or answer; discretionary actions should be raised by appropriate motion. [Citation.] Since the rule of exclusive concurrent jurisdiction and the statutory plea in abatement are mandatory and not discretionary judicial actions, these issues should be raised by demurrer where the issue appears on the face of the complaint and by answer where factual issues must be resolved.” (*Id.* at 771.)

Here, Endurance argues that, because both cases involve many of the same parties and arise out of the same transaction, namely the purchase of worker’s compensation insurance, the rule of exclusive concurrent jurisdiction applies and the second action must be stayed. However, again Endurance has not submitted sufficient judicially noticeable evidence that would tend to show that the parties and issues raised in both actions are so similar that the court should stay the second action. While the parties, causes of action, and remedies in the two actions do not have to be identical in order for the rule of exclusive concurrent jurisdiction to apply, the court in the original action must have the power to grant all of the relief to which the parties are entitled in the pleadings in the second action. (*Plant Insulation Co., supra*, at 788.)

In the present case, the WCAB does not have the power to grant money damages to Royal Express for the breach of contract and other claims that it has

raised in the civil action. Nor does it appear that the issues and causes of action raised in the WCAB action are substantially the same as the issues and claims in the Superior Court action, since the WCAB action, by its nature, only involves the issue of whether coverage exists. By contrast, the civil complaint seeks payment of money damages to compensate Royal Express for the alleged breach of contract, breach of the implied covenant of good faith and fair dealing, and negligent misrepresentation by Endurance. The WCAB does not have jurisdiction to resolve these types of claims or to grant money damages to the employer for the insurer's breach of contract or negligence. Thus, the court does not intend to sustain the demurrer to the first, second and fourth causes of action based on the doctrine of exclusive concurrent jurisdiction.

Endurance cites to several cases in which the courts have applied the doctrine of exclusive concurrent jurisdiction to matters where there were cases pending before the WCAB and the Superior Court at the same time. (*Scott v. Industrial Accident Commission* (1956) 46 Cal.2d 76; *Yavitch v. WCAB* (1983) 142 Cal.App.3d 64; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1178-1179; *Aetna Casualty & Surety Co. v. Aceves, supra*, 233 Cal.App.3d 544.) However, these cases involved situations where there were actions filed before the WCAB and in Superior Court that both related to work-related injuries suffered by an employee. (*Scott v. Industrial Accident Commission, supra*, 46 Cal.2d 76: employee sued employer in state court for damages arising out of his work-related injuries and employer filed a claim with the Industrial Accident Commission regarding the same injuries; *Yavitch v. WCAB, supra*, 142 Cal.App.3d 64: employee filed claim with WCAB regarding job related injuries, then the employer filed an action in Superior Court regarding the same injuries; *Rymer v. Hagler, supra*, 211 Cal.App.3d 1171: employee filed claim against employer with the WCAB for work related injuries, then filed a complaint in Superior Court based on the same injuries claiming that the employer failed to obtain worker's compensation insurance; *Aetna Casualty & Surety Co. v. Aceves, supra*, 233 Cal.App.3d 544: insurer filed declaratory relief action in Superior Court to determine that there was no coverage for an injured employee under the worker's compensation policy, employee then filed an action with the WCAB and argued that the Superior Court lacked jurisdiction to determine insurer's liability because the WCAB had exclusive jurisdiction to determine insurer's liability.)

By contrast, the present Superior Court action does not raise the question of whether the employees' are entitled to damages for their injuries, or even whether there was worker's compensation insurance available to cover the claimed injuries. Rather, the issues raised by the Superior Court complaint are whether the employer can recover against the insurer for rescinding the worker's compensation policy. These are not issues that can be raised in the WCAB proceeding, which is limited to the issue of whether there is worker's compensation insurance coverage for the employees' injuries. (*Aetna, supra*, at

(5)

Tentative Ruling

Re: ***LaFleur v. Castaneda***
Superior Court Case No. 08 CECG 00766

Hearing Date: August 31, 2010 (**Dept. 97A**)

Motion: By Defendant seeking “cost of proof” sanctions pursuant to CCP § 2033.420

Tentative Ruling:

To deny the motion. To overrule the objections of Plaintiff to the Declaration of Hickey.

Explanation:

Opposition was Timely Served and Delivered

In the instant case, the opposition was served by mail on August 18, 2010. See proof of service. According to the objection of the Defendant, it was not received until August 20, 2010. See Declaration of Hickey at ¶ 6. To be timely, the opposition should have been filed and served at least 9 court days before the hearing. See CCP § 1005(b). The day of service is not counted but the date of the hearing is counted. See CCP § 12. In the instant case, the opposition should have been filed and served no later than August 19th. They were filed and served on August 18th. Therefore, the papers were timely served. According to CCP § 1005(c), opposition and reply papers should be served in a manner “reasonably calculated to ensure delivery to the other party or parties not later than the close of the **next** business day after the time the opposing papers or reply papers, as applicable, are filed.” Accordingly, the opposition was timely delivered—August 20th, the next business day after the last day to serve the opposition. Thus, the opposition will be considered.

Merits

If the portions of the deposition of the third-party witness, Captain Gibson are examined, he testified that the Plaintiff did stop at the stop sign. See Deposition of Gibson at page 13 lines 1-21. This contradicts the testimony of the Defendant that the Plaintiff “blew” the stop sign. See Deposition of Castaneda at page 40 lines 5-11. Accordingly, sufficient evidence has been submitted to find that the Plaintiff denied Nos. 16 and 18 of the RFAs based upon “*reasonable grounds to believe* that (he or she) would prevail on the matter”. Therefore, the motion will be denied.

Tentative Ruling

Re: ***Ortega v. Yonas***
Case No. 10 CE CG 00373

Hearing Date: August 31, 2010 (**Dept. 97D**)

Motion: Plaintiff's Application for Default Judgment

Tentative Ruling:

To deny the application for default judgment, without prejudice.

Explanation:

Plaintiff has not yet filed a dismissal of the Doe defendants, and therefore the court cannot enter the default judgment until all defendants against whom plaintiff does not seek judgment have been dismissed. (CRC 3.1800(a)(7).)

Also, plaintiff has not yet filed the mandatory Judicial Council form application for default judgment. (CRC 3.1800(a).) Nor has plaintiff submitted a form memorandum of costs, although counsel has submitted copies of receipts and invoices regarding court costs. (CRC 3.1800(a)(4); Exhibit 10 to Chatoian decl.)

More importantly, plaintiff has not presented sufficient evidence to support his claimed damages of \$200,000. While plaintiff has provided considerable evidence of medical expenses, which total over \$82,000, plaintiff has not submitted any evidence to support his claims for lost earnings, loss of earning capacity, or pain and suffering.

Therefore, the court intends to deny the application for default judgment without prejudice.

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 **8-30-10** _____.
(Judge's Initials) (Date)

(23)

Tentative Ruling

Re: ***Ronald and Gloria Toomajian v. Valley Boat Emporium, Inc., et al.***
Superior Court Case No. 09 CECG 04391

Hearing Date: August 31, 2010 (**Dept. 97D**)

Motions:

- (1) Plaintiff Ronald Toomajian's Motion to Compel Further Responses from Defendant Ron Monteverde to Form Interrogatories, Set One, and Request for Monetary Sanctions
- (2) Plaintiff Ronald Toomajian's Motion to Compel Further Responses from Defendant Ron Monteverde to Demand for Production, Set One, and Request for Monetary Sanctions
- (3) Plaintiff Ronald Toomajian's Motion for Deemed Admissions, to Compel Further Responses from Defendant Ron Monteverde to Request for Admissions, Set One, and Request for Monetary Sanctions

Tentative Ruling:

To GRANT Plaintiff's Motion to Compel Further Responses from Defendant to Form Interrogatories, Set One, and to order Defendant to provide a further response to Form Interrogatory No. 15.1. (Code of Civil Procedure § 2030.310(b)-(c).) Defendant is ordered to omit any preliminary statements from its further responses.

To GRANT Plaintiff's Motion to Compel Further Responses from Defendant to Demand for Production, Set One, and to order Defendant to provide a further response to Category Nos. 1 through 7. (Code of Civil Procedure § 2031.310(a)-(b).)

To GRANT Plaintiff's Motion for Deemed Admissions. (Code of Civil Procedure § 2033.280(b)-(c).) The genuineness of the documents specified in Request for Admissions for Genuineness of Documents, Set One, Nos. 2, 3, and 4 are deemed admitted.

To DENY Plaintiff's Motion to Compel Further Responses from Defendant to Request for Admissions of Fact, Set One. (Code of Civil Procedure § 2033.290(a).)

To GRANT Plaintiff's Request for Monetary Sanctions in the amount of \$1,330.00 against Defendant Ron Monteverde, and in favor of Plaintiff Ronald Toomajian. Sanctions are due and payable to Plaintiff within 30 days of service of this Court's order.

Explanation:

Plaintiff's Motion to Compel Further Responses to Form Interrogatories, Set One

Preface to Defendant's Responses to Form Interrogatories, Set One

Defendant's initial responses to Form Interrogatories, Set One, contained a general preface statement consisting of a statement that the Defendant has not fully completed his investigation of this case, an admission that the Defendant limited his responses to information "presently available to" and "specifically known" to the Defendant, and a purported reservation of various "rights." However, the Code of Civil Procedure does not permit any prefaces to responses or any "general objections" and so any similar preface to responses is also not permitted.

Code of Civil Procedure § 2030.210 requires that a responding party "shall respond in writing ... separately to each interrogatory[.]" Additionally, Code of Civil Procedure § 2030.220(a) and (c) state that each answer to an interrogatory shall be "complete and straightforward as the information reasonably available to the responding party permits" and that, if the responding party does not have the personal knowledge to respond fully, the responding party is required to make a "reasonable and good faith effort to obtain the information by inquiring to other natural persons or organizations." These statutes mean that, since an investigation must be done when the interrogatory is received, it is not acceptable for a responding party to state they will only provide information in their current possession. (Weil & Brown, California Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008), ¶ 8:1061. See *Deyo v. Kilbourne* (1978) 84 Cal. App. 3d 771, 782.)

Here, the Defendant has prefaced his responses with a statement that he is providing only information "presently available" and "specifically known" to him. The Defendant fails to state which interrogatories he lacks sufficient personal knowledge to fully respond to, or what efforts the Defendant went to in order to obtain information to fully answer the interrogatories as required by Code of Civil Procedure § 2030.220(c). Therefore, this preface statement does not comply with Code of Civil Procedure §§ 2030.210 and 2030.220, and is overruled, without prejudice to a *Deyo*-type response to each specific interrogatory where a complete response is not possible, if there even are any. Any preface must be omitted from any future further or supplemental responses.

Form Interrogatory No. 15.1

Plaintiff Ronald Toomajian seeks a further response from Defendant Ron Monteverde to Form Interrogatory No. 15.1. In his original response to Form Interrogatory No. 15.1, the Defendant simply states that the rules of pleading allow a general denial to an unverified complaint and that all of the Defendant's affirmative defenses are based on the proposition that Plaintiff has not used his best efforts to re-rent the space. However, the Court finds that the Defendant's response is incomplete and a further response is required.

When it comes to the denials of Plaintiff's material allegations, the Defendant states that the rules of pleading allow a general denial to an unverified complaint. That statement is accurate and the Defendant was free to file a general denial to the Plaintiffs' original complaint and Plaintiffs' first amended complaint. However, the rules of pleading that allowed Defendant to file a general denial do not allow Defendant to refuse to provide a substantive response to Form Interrogatory No. 15.1. Rather, the Defendant must identify each material allegation in Plaintiffs' first amended complaint that the Defendant denies, state the facts upon which Defendant bases his denial, state the name, address, and telephone number of all people who have knowledge of the facts upon which Defendant bases his denial, and identify all documents and tangible things that support Defendant's denial and the name, address, and telephone number of each person who has the document or tangible thing.

When it comes to Defendant's affirmative defenses, Form Interrogatory No. 15.1 requires that the Defendant identify each of his affirmative defenses from his answer, and, for each individual affirmative defense, state the facts upon which Defendant bases each individual affirmative defense, state the name, address, and telephone number of all people who have knowledge of the facts that support the affirmative defense, and identify all documents and tangible things that support Defendant's affirmative defense and the name, address, and telephone number of each person who has the document or tangible thing. Rather than provide that information, the Defendant simply states that all of his affirmative defenses, which he does not specifically identify, are supported by a single conclusory allegation. Further, the Defendant has failed to state if there are any people who have knowledge of the facts supporting his affirmative defenses and if there are any documents or tangible things supporting his affirmative defenses.

For these reasons, the Defendant's response to Form Interrogatory No. 15.1 is incomplete and the Defendant is ordered to provide a further response.

Plaintiff's Motion to Compel Further Responses to Request for Production of Documents, Set One

Plaintiff Ronald Toomajian seeks a further response to Demand for Production, Set One, Category Nos. 1 through 7 from Defendant Ron

Monteverde. In his original response, Defendant objected to all 7 categories of documents sought by Plaintiff in the Demand for Production.

First, the Court must determine if the Plaintiff has established good cause to justify the document production. Code of Civil Procedure § 2031.310(b)(1) states: “The motion shall set forth specific facts showing good cause justifying the discovery sought by the inspection demand.” To establish good cause, the burden is on the moving party to show both: (1) relevance to the subject matter; and (2) specific facts justifying discovery. (Weil & Brown, California Practice Guide: Civil Procedure Before Trial, ¶ 8:1495.6 (Rutter Group, 2006).) The Court determines if there is good cause based on the evidence submitted with the motion – usually, a declaration filed with the motion that sets forth specific facts demonstrating why the documents should be produced. (See Weil & Brown, California Practice Guide: Civil Procedure Before Trial, ¶ 8:1495.7 (Rutter Group, 2006).)

Here, the Plaintiff presents his case for good cause in the declaration of Gregory Altounian, the Plaintiff’s counsel. In his declaration, Altounian states that good cause exists for the production of all of the categories of documents because the documents reasonably should contain information that is directly relevant to Plaintiffs’ alter ego and fraud claims against Monteverde and the documents cannot reasonably be sought from any other source but Monteverde. Altounian goes on to state that he expects the documents to show, at a minimum, (1) Monteverde’s knowledge that Valley Boat Emporium, Inc. is, and has been for years, a suspended corporation which was not capable of entering into the business transactions undertaken by Monteverde on the corporation’s behalf with plaintiffs; (2) Monteverde’s self-dealing and failure to observe corporation formalities and separateness with Defendant Valley Boat Emporium, Inc.; and (3) any tangible support for Monteverde’s contention that he cannot be held liable to the plaintiffs in this action. Altounian further states that the documents sought will necessarily assist in trial preparation, both as trial evidence and to identify any further discovery that needs to be sought, and serve to prevent surprise at trial in regards to the issues identified herein and any new issues that may be revealed by the documents themselves. (Altounian Decl. ¶ 5.) With these facts, the Court finds that the Plaintiff has established good cause justifying the discovery sought by the production demands.

Second, as the Plaintiff has established that there is good cause to justify the documents sought by the production demands, the burden shifts to the Defendant to justify its objections. (*Coy v. Superior Court* (1962) 58 Cal. 2d 210, 220-21.) The Defendant objects to all 7 categories of documents on the grounds that the documents sought are irrelevant and the document demands are burdensome and oppressive.

The Defendant cannot justify its objections because the Defendant’s objections to the document demands were untimely. Pursuant to Code of Civil

Procedure § 2031.300(a), once the Defendant failed to serve a timely response to the document demands, all objections to the demands were waived. As this Court has not relieved the Defendant from this waiver, the Defendant's objections are improper and are overruled.

Consequently, as the Plaintiff has established good cause for the document production and the Defendant cannot justify his objections, the Court should grant the Plaintiff's motion to compel further responses to Demand for Production, Set One, Category Nos. 1 through 7.

Plaintiff's Motion for Deemed Admissions

On April 8, 2010, Plaintiff Ronald Toomajian mail-served Defendant Ron Monteverde with Requests for Admission, Set One. Defendant had until May 13, 2010 to timely respond. However, Defendant failed to provide any response to Request for Admission of the Genuineness of Documents, Nos. 2, 3, and 4. (Altounian Decl. ¶¶ 7, 10.) Accordingly, an order that the genuineness of the documents specified in Request for Admission of the Genuineness of Documents, Nos. 2, 3, and 4 are deemed admitted is warranted.

Plaintiff's Motion to Compel Further Responses to Request for Admissions, Set One

Plaintiff Ronald Toomajian seeks a further answer to Request for Admissions of Fact, Set One, No. 7 from Defendant Ron Monteverde. In his original response, Defendant denied Request for Admissions of Fact No. 7. In this motion, the Plaintiff argues that the Defendant's answer is patently incomplete and evasive given that, in Defendant's response to Form Interrogatory No. 17.1, Defendant states that he denied Request for Admissions of Fact No. 7 because "he did sign a personal guarantee," which might require Defendant to pay certain amounts, but not necessarily the full amount of the least, under certain circumstances.

However, the Court must deny Plaintiff's motion to compel a further answer to Request for Admissions of Fact, Set One, No. 7. It appears that Plaintiff is impliedly arguing that, based on Defendant's response to Form Interrogatory No. 17.1, it is clear that Request for Admissions of Fact, Set One, No. 7 is true and the Defendant must admit Fact No. 7 in a further answer. However, Defendant clearly and straightforwardly denied Fact No. 7 and "[a] court [cannot] force a litigant to admit any particular fact if he is willing to risk a perjury prosecution or financial sanctions [under Code of Civil Procedure § 2033.420]." (*Holguin v. Superior Court* (1972) 22 Cal. App. 3d 812, 820.) Consequently, the Court declines to compel a further answer to Request for Admissions of Fact, Set One, No. 7.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 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** 8-30-10.
(Judge's initials) (Date)

(23)

Tentative Ruling

Re: ***Janet Ward and Jacqueline Rincon v. Al's Café, et al.***
Superior Court No. 08 CECG 01325

Hearing Date: August 31, 2010 (**Dept. 97A**)

Motion: Plaintiffs Janet Ward's and Jacqueline Rincon's Demurrer to Defendants Al's Café's, Al Contreras', the Estate of Mary Contreras', and Anna Contreras' Answer to Plaintiff's Second Amended Complaint

Tentative Ruling:

To OVERRULE Plaintiffs' demurrer to the Defendants' first affirmative defense pursuant to Code of Civil Procedure § 430.20(a).

To SUSTAIN with leave to amend Plaintiffs' demurrer to the Defendants' second through twentieth affirmative defenses pursuant to Code of Civil Procedure § 430.20(a).

To OVERRULE the Plaintiffs' demurrer to the first and tenth affirmative defenses pursuant to Code of Civil Procedure § 430.20(b).

To SUSTAIN with leave to amend the Plaintiffs' demurrer to the Defendants' second, third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, and twentieth affirmative defenses pursuant to Code of Civil Procedure § 430.20(b).

To GRANT Defendants 10 days, running from service of the minute order by the clerk, to file a first amended answer. (Code of Civil Procedure § 472a(c).) All new allegations in the first amended answer are to be set in **boldface** type.

Explanation:

Defendants Al's Café, Al Contreras, individually and dba Al's Café, the Estate of Mary Contreras, and Anna Contreras, individually and dba Al's Café assert the following affirmative defenses: (1) failure to state a cause of action; (2) failure to mitigate; (3) supervening event; (4) privilege; (5) failure to join necessary party; (6) consent; (7) assumption of risk; (8) comparative negligence; (9) estoppel; (10) waiver; (11) laches; (12) unclean hands; (13) offset; (14) ratification; (15) discharge of obligation; (16) statute of limitations; (17) condition precedent; (18) election of remedies; (19) federal preemption; and (20) third-party intervening negligence.

a. *Code of Civil Procedure § 430.20(a)*

Plaintiffs Janet Ward and Jacqueline Rincon demur to all twenty of the Defendants' affirmative defenses on the ground that the answer fails to state facts sufficient to constitute an affirmative defense. The general rule is that the same pleading of "ultimate facts" rather than evidentiary matter or legal conclusions is required in pleading an answer as in pleading a complaint. The affirmative defenses in an answer must aver facts "as carefully and in as much detail as the facts which constitute the cause of action and which are alleged in the complaint." Conclusions of law are not sufficient to state a valid affirmative defense, and will not withstand a general demurrer. (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal. App. 3d 367, 384.)

While the Defendants' first affirmative defense for failure to state facts sufficient is an objection to the complaint which qualifies as new matter, no facts need to be alleged to support the first "affirmative defense." Rather, for this objection to the complaint, a conclusory statement that the causes of action in the Plaintiffs' pleading fail to state sufficient facts to constitute causes of action is sufficient. Therefore, the Court overrules Plaintiffs' demurrer to the Defendants' first affirmative defense pursuant to Code of Civil Procedure § 430.20(a).

When it comes to the Defendants' second through twentieth affirmative defenses, the Court finds that the Defendants' second through twentieth affirmative defenses fail to state facts sufficient to constitute viable affirmative defenses. In fact, the Defendants have only pled conclusory allegations in support of their second through twentieth affirmative defenses. As the Defendants have failed to allege any supporting facts, the Court sustains with leave to amend the Plaintiffs' demurrer to Defendants' second through twentieth affirmative defenses pursuant to Code of Civil Procedure § 430.20(a).

b. *Code of Civil Procedure § 430.20(b)*

Plaintiffs Janet Ward and Jacqueline Rincon demur to all twenty of the Defendants' affirmative defenses on the ground that the Defendants' affirmative defenses are uncertain. Plaintiffs contend that all twenty of the Defendants' affirmative defenses are uncertain because all of them fail to identify the cause or causes of action that the defense purports to challenge.

Code of Civil Procedure § 431.30(g) states that: "The defenses shall be separately stated, and the several defenses shall refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished." In this case, the Defendants have separately stated each of their twenty affirmative defenses. Further, in the Defendants' first and tenth affirmative defenses, the text of each affirmative defense clearly states that the affirmative defense is alleged against "each and every [] cause of action[.]"

(19)

Tentative Ruling

Re: ***Ruiz v. Bethke***
Superior Court Case No. 09CECG01523

Hearing Date: August 31, 2010 (**Dept. 97D**)

Motion: by defendant to compel deposition, production of documents, and/or monetary sanctions and terminating sanctions against plaintiff Isaac Ruiz

Tentative Ruling:

To grant in part and to deny in part.

Explanation:

California Rules of Court, Rule 3.1110(f), states: "Each exhibit must be separated by a hard 8 1/2 x 11 sheet with hard paper or plastic tabs extending below the bottom of the page, bearing the exhibit designation. An index to exhibits must be provided. Pages from a single deposition and associated exhibits must be designated as a single exhibit." (Emphasis added.)

Defendant is admonished to follow the Rules of Court in the future.

The request for attorneys' fees is denied for failure to provide evidentiary support in the declaration accompanying the motion. See Code of Civil Procedure section 2023.040 at the last sentence, requiring that any motion for sanctions be "accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought."

Code of Civil Procedure section 2025.450(b)(1) states: "The motion shall set forth specific facts showing good cause justifying the production for inspection of any document or tangible thing described in the deposition notice."

Defendant's counsel's declaration is devoid of such facts. However, the complaint and the answer do show specific relevance of many requests, with the exception of Nos. 6 and 7. Nos. 6 and 7 seek privileged tax returns and business information, for which a declaration is necessary, but absent.

Plaintiff is ordered to appear for his deposition with all responsive documents other than those requested in Items 6 and 7 on a date chosen by defense counsel during last two weeks of September, 2010.

(6)

Tentative Ruling

Re: ***Anguiano v. Homeq Servicing***
Superior Court Case No.: 09CECG01313

Hearing Date: August 31, 2010 (**Dept. 97D**)

Motion: Demurrer by Defendant Barclays Capital Real Estate, Inc., dba Homeq Servicing

Tentative Ruling:

To sustain as to the first cause of action for injunctive relief, with leave to amend, and to overrule as to the second cause of action, with Plaintiffs granted 10 days' leave to amend. 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 first amended complaint are to be set in **boldface** type.

Explanation:

The first cause of action for injunction fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc. §430.10, subd. (e).) The demurrer to the first cause of action for injunctive relief is sustained, with leave to amend.

Here, the facts alleged in the complaint are that Plaintiffs were junior lienors on the property who foreclosed and took title subject to the senior lien. It is well established in California that a successor in interest to the trustor or a junior lienholder takes an interest in the property subject to the prior deed of trust. (*Homestead Savings v. Darmiento* (1991) 230 Cal.App.3d 424, 436; *R-Ranch Markets #2, Inc. v. Old Stone Bank* (1993) 16 Cal.App.4th 1323, 1327.) When Plaintiffs received their deed, they succeeded to the interests of the trustor, Byron Hachigan, and thus took the property subject to the first deed of trust.

Thus, the statement in the complaint that Plaintiffs assumed the first deed of trust in the complaint after they bought the property at their own foreclosure sale at ¶¶24-25, is an incorrect legal conclusion. Although a demurrer admits the truth of all material facts properly pleaded, it does not admit contentions, deductions, or conclusions of law. (*Aubry v Tri-City Hospital District* (1992) 2 Cal.4th 962, 966-967; *Adelman v. Associated International Insurance Company* (2001) 90 Cal.App.4th 352, 359.)

Further, the face of the complaint as currently alleged, shows that any request for injunctive relief is moot. The complaint, as currently drafted, seeks to enjoin a trustee's sale set for April 20, 2009, at 10:30 a.m. (Complaint, ¶26, and

Tentative Ruling

(17)

Re: ***Lanas v. Hye Development Co. LLC et al.***
Superior Court Case No. 10 CECG 00885

Hearing Date: August 31, 2010 (**Dept. 97A**)

Motion: Bank of the Sierra & BanCorp's Demurrer to Complaint
Hye Development Co. LLC and Rainwater Defendant's
Motion for Judgment on the Pleadings

Tentative Ruling:

To sustain the demurrer with leave to amend. To deny the motion for judgment on the pleadings. An Amended Complaint shall be filed within 10 days of service of this order by the clerk. New allegations shall be in boldface type font.

Explanation:

Demurrer:

A demurrer is made under Code of Civil Procedure section 430.10, and is used to test the legal sufficiency of the complaint or other pleading. (Weil & Brown, *Civil Procedure Before Trial* (Rutter Group 2009) "Attacking the Pleadings" § 7:5.) The demurrer admits the truth all material facts properly pleaded, but not mere contentions, deductions or conclusions of fact or law. In addition to the face of the pleading, the court may also consider matters judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

On general demurrer, the court determines if the essential facts of any valid cause of action have been stated. (Weil & Brown, *supra*, § 7:39; *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 572; Code Civ. Proc. § 430.10(e).) Leave to amend should be granted if there is a reasonable possibility that plaintiff could state a cause of action. (*Blank v. Kirwan, supra*, 39 Cal.3d at 318.)

A special demurrer may be made on the ground that the allegations are uncertain. (Code Civ. Proc. § 430.10(f).) Even though a complaint may be in some respects uncertain, a demurrer for uncertainty will ordinarily be overruled if the allegations are sufficient to apprise the defendant of the issues that he is to meet. (5 Witkin, *California Procedure* (4th Ed.) "Pleading", § 929.) Demurrers for uncertainty will be sustained only where the complaint is so bad that the defendant cannot reasonably respond to the complaint, i.e., determine what issues must be admitted or denied or what counts or claims are directed against him or her. Where the demurrer relates to a matter that may be readily clarified

through discovery, a demurrer for uncertainty will ordinarily be strictly construed. (*Khoury v. Maly's of Calif.* (1993) 14 Cal.App.4th 612, 616.)

Second Cause of Action – Fraudulent Transfer

The UFTA permits defrauded creditors to reach property in the hands of a transferee. (*Mejia v. Reed* (2003) 31 Cal.4th 657, 663.) “A fraudulent conveyance under the UFTA involves” a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim.” [Citation.]” (*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 829.) Under the UFTA, “[c]reditor” means a person who has a claim” (Civ. Code, § 3439.01, subd. (c).) “Claim,” means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” (*Id.*, § 3439.01, subd. (b).)

“A transfer made ... by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made ... , if the debtor made the transfer ... as follows: [¶] (1) With actual intent to hinder, delay, or defraud any creditor of the debtor.” (Civ. Code, § 3439.04, subd. (a)(1).) Alternatively a transfer made without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor either: was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due. Under section 3439.04, subdivisions (a)(1) and (a)(2), it does not matter whether the creditor's claim arose before or after the transfer was made.

Defendants Banks of the Sierra and BanCorp demur to this cause of action on the grounds that it fails to state sufficient facts to constitute a cause of action and is uncertain. They allege that the cause of action fails to assert any wrongful action on the part of the Bank defendants and that any of the property was ever transferred to the Bank defendants.

Paragraph 9 of the complaint alleges that Bank of the Sierra holds an unknown interest in the real property. (Complaint ¶ 9.) However, the complaint never alleges that the Bank defendants received this interest in a wrongful manner. The second cause of action pleads an adequate cause of action as to the actions of “transferee defendants,” without defining this term. While plaintiff argues that the complaint, by defining a class of transferor defendants, necessarily defines the remaining defendants as transferee defendants, this is not the only possible conclusion and the Bank is forced to guess that it is alleged to be a transferee defendant.

The cause of action both fails to state sufficient facts and is uncertain.

However, leave to amend is granted.

Judgment on the Pleadings:

Code of Civil Procedure 438 codifies and sets specific criteria for the procedure to challenge the sufficiency of the pleadings after the time for demurrer has expired. Prior to 1994, a motion for judgment on the pleadings had no statutory basis but was well recognized under case law as an alternative to a demurrer, used primarily where a demurrer would be untimely. (Weil & Brown, *supra*, §7:276 [citing *Colberg, Inc. v. California* (1967) 67 Cal.2d 408, 412].)

A motion for judgment on the pleadings has the same function as a general demurrer in that it is used to challenge pleadings that do not state facts sufficient to constitute a cause of action. (Code Civ. Proc. § 438, subd. (c).) Since the motion has the same function as a general demurrer, the rules governing demurrers apply as well to these motions unless the statute provides otherwise. (*Id.* at § 7:275.) As with a demurrer or motion to strike, the grounds must appear on the face of the pleading or from facts subject to judicial notice. (Weil & Brown, *supra*, § 7:292.) The court reviews the complaint liberally, giving it a "reasonable interpretation, reading it as a whole and its parts in their context." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1323; Code Civ. Proc., § 452.)

Modification

Civil Code section 1698, subdivision (a) provides that "[a] contract in writing may be modified by a contract in writing." An original contract and a subsequent contract that modifies the original contract in certain particulars are to be construed together as part of one contract and the subsequent contract supersedes the original contract whenever it is inconsistent therewith (*Hawes v. Lux* (1931) 111 Cal.App. 21, 24.) Moving defendants relying on the language of paragraph 17 of the complaint: "Additionally, a written modification was entered into between plaintiff and Jerry, whereby Jerry further agreed to make payments to plaintiff in the amount of \$2,500 a month until the entire \$50,000 was paid to plaintiff. ..." However, the actual modification agreements are attached to the complaint. "Where written documents are the foundation of an action and are attached to the complaint and incorporated therein by reference, they become a part of the complaint and may be considered on demurrer." (*City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 800.)

The offer letter by Jerry Kutumian states: "In lieu of the proposal made in my earlier letter of \$5,000 per month being made to your client, my client would like to propose \$2,500 per month to your client. Jerry does not believe that he can afford \$5,000 per month in light of the current real estate market and economy. He will also pay your client \$5,000 *per home that closes escrow (as originally agreed)* following the first closing whereby your client shall receive \$10,000." (emphasis added.)

The acceptance letter states: "I have had an opportunity to review your clients' offer to pay to the Lanas' \$2,500.00 per month toward the total monies owing, *in addition to the terms previously agreed to as outlined in your letter and as originally agreed to in the settlement agreement.*" (emphasis added.)

The offer and acceptance letters are to be read together. (Civ. Code, § 1642 ["several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together"].) Thus, both letters reference the terms of the original agreement, specifically contemplating that the \$2,500 would be in addition to any payment to be made by virtue of homes closing escrow. The modification did not supplant any payments by moving defendants of funds to be paid from home sales.

Novation

"A novation is a substitution by agreement of a new obligation for an existing one with the intent to extinguish the latter." (*Meadows v. Lee* (1985) 175 Cal.App.3d 475, 482, fn. 1.) Under principles of novation, a new contract may be substituted for an old contract by "the substitution of a new obligation between the same parties, with intent to extinguish the old obligation" or by "the substitution of a new debtor in place of the old one, with intent to release the latter." (Civ. Code, § 1531, subd. (1) & (2).) A novation is made pursuant to the rules governing contract formation in general. (Civ. Code, § 1532.) Thus, a novation is a "new contract which supplants the original agreement and 'completely extinguishes the original obligation. . .'" (*Wells Fargo Bank v. Bank of America* (1995) 32 Cal.App.4th 424, 431.)

To satisfy the intent requirement of a novation, it must clearly appear that the parties intended to extinguish, rather than merely modify, the original agreement. (*Wells Fargo Bank v. Bank of America, supra*, 32 Cal.App.4th at p. 432.) The question of whether the necessary elements for novation are present is one of fact. (*Wade v. Diamont A Cattle Co.* (1975) 44 Cal.App.3d 453, 457; see also *Howard v. County of Amador* (1990) 220 Cal.App.3d 962, 980 [where there is conflicting evidence, the question as to whether the parties to an agreement entered into a modification or a novation is a question of fact].) However, where the issue turns upon the meaning of a written instrument and there is no conflicting extrinsic evidence, then the question is one of law, upon which a reviewing court may exercise its independent judgment. (*Ibid.*)

Moving defendants argue that the fact that the letters reference only "Jerry" and "he" as the source of the payments shows an intent that only Mr. Kutumian was to be liable for the payments. This is not clear from the documents. First, Mr. Kutumian signed the settlement agreement on behalf of Hye Development, Summitt Ranch Estates, Sunrise Summitt Homes, and Barrington Homes. Use of his name could easily have been shorthand for all

Tentative Ruling

Re: ***Cortina, et al v. North American Title Co.***
Superior Court Case No. 07CECG01169

Hearing Date: August 31, 2010 (Dept. 97A)

Motion: By plaintiff for leave to amend

Tentative Ruling:

To grant leave to name North American Services LLC as additional defendant and to name the 8 additional plaintiffs, subject to the conditions described below.

Explanation:

Defendant doesn't appear to be opposing the amendment to the extent it seeks to add the claim for overtime pay at an improper rate, an amended definition of the classes, and deletion of the claim for injunctive relief. The only two issues are whether plaintiffs should be allowed to name additional "class representatives," and whether they should be allowed to name the four additional defendants.

On the latter issue, the court is not convinced from the evidence offered by plaintiffs that North American Asset Development Corp. or North American Title Group are in fact "employers" under the definition described in ***Martinez v. Combs*** (2010) 49 Cal.4th 35. Though they are identified in the Handbooks as "parent companies," that fact alone, without any actual exertion of control over the day to day wages and working conditions of NATC employees doesn't make them liable as employers.

The fact that one entity is a subsidiary of the other doesn't automatically make the parent company liable for the conduct of the subsidiary. As explained in 9 Witkin ***Summary of California Law*** (10th Ed.) "Corporations" at §15, "stock ownership is not enough; the subsidiary may be wholly owned, but may nevertheless be independently managed and controlled, and in that case the separate corporate entity will be recognized."

Witkin cites ***Marr v. Postal Union Life Ins. Co.*** (1940) 40 Cal.App.2d 673, 681, and ***Northern Natural Gas Co. v. Superior Court*** (1976) 64 Cal.App.3d 983, as holding that the entity can be disregarded and the corporations treated as one only if "in addition to ownership there is a relatively complete management and control by the parent." This is essentially the same test as for alter ego liability, and in ***Marr***, the factors held to establish such liability were that the subsidiary engaged in practically no independent business, all of its work was

done by employees of the parent and the same attorney was employed by both, they used common offices and the parent owned both the building and the furniture used by the subsidiary, and in a complaint in a prior action the parent had alleged that the subsidiary was its agent.

See also ***Laird v. Capital Cities/ABC*** (1998) 68 Cal.App.4th 727, which held, in the context of an attempt to hold a parent company liable for unlawful discrimination or harassment:

An employee who seeks to hold a parent corporation liable for the acts or omissions of its subsidiary on the theory that the two corporate entities constitute a single employer has a heavy burden to meet under both California and federal law. Corporate entities are presumed to have separate existences, and the corporate form will be disregarded only when the ends of justice require this result. (***Mesler v. Bragg Management Co.*** (1985) 39 Cal. 3d 290, 300; *Mid-Century Ins. Co. v. Gardner* (1992) 9 Cal. App. 4th 1205, 1212.) In particular, there is a strong presumption that a parent company is not the employer of its subsidiary's employees. (*Frank v. U.S. West, Inc.* (10th Cir. 1993) 3 F.3d 1357, 1362.

Laird v. Capital Cities/ABC, supra, 68 Cal. App. 4th at 737.

Here, plaintiffs appears to be saying that since the handbook identifies NATC as a subsidiary of those two companies as well as Lennar, and since all employees are required to follow the wage and hour policies outlined in the parent companies' handbook, the parent companies do control the wages and hours of NATC employees (and thus the plaintiff class).

But in relation to the payroll responsibilities of Lennar, the fact that a corporation processes payroll information provided to it by the employer doesn't make the provider of payroll services a co-employer. [If processing payroll was enough, that would have made People Soft an employer as well, and in this case Lennar didn't take over that responsibility until 2008, a year after this action was filed.]

Plaintiffs did know about Lennar, North American Asset Development and North American Title Group being "parent companies" of NATC three years before this motion was filed. While they claim they just learned that all NATC employees were responsible to follow the policies, that was made clear from the handbook itself, which was issued to each plaintiff. See page 4 of the handbooks.

Nor have plaintiffs identified why they need to name those defendants, since this is not a case where NATC is potentially insolvent and there would be an injustice if they were the only defendant found liable.

On the other hand the relationship between NATC and North American Services LLC does appear to be recently acquired information that wouldn't have

Tentative Ruling

Re: ***Volvo Financial Services v. Singh***
Superior Court Case No. 08CECG04197

Hearing Date: August 31, 2010 (**Dept. 97B**)

Motion: By plaintiff for attorney's fees

Tentative Ruling:

To grant fees of \$24,363.40.

Explanation:

Plaintiff's counsel has complied with the court's prior order and submitted a supplemental declaration and exhibits that resolve the issues previously raised. He states in his current declaration that he is asking for \$25,785 (the \$28,492 he originally requested, less the \$2,707 for the unnecessary appearance at the summary judgment hearing).

But using the "lodestar" figure of \$21,898.40 included in exhibit 1, and even adding the full \$3,335.00 for preparing moving papers and attending a hearing on a motion for fees, that only comes to \$25,233.40, not \$25,785, leaving \$551.60 unaccounted for.

And there is no need for a hearing on this motion since it is unopposed, so plaintiff is only be entitled to the base \$21,898.40, plus the \$1,885.00 for preparing the motion for fees, and not the \$1,450 for attending a hearing on the motion for fees.

He is also entitled to additional time for preparing the supplemental papers. At two hours, that would be \$580. The court will therefore award plaintiff the following in attorney's fees:

\$21,898.40	(the lodestar amount described in current exhibit 1)
\$ 1,885.00	(for the 6.5 hours for the preparation of the motion for fees)
\$ 580.00	(for preparing of the supplemental declaration)
Total: \$24,363.40	

Pursuant to California Rules of Court, Rule 3.1312, subd. (a) 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

DSB

8-30-10

Issued By: _____ **on** _____ .
(Judge's initials) (Date)

Tentative Ruling

(17)

Re: ***Dick v. Kaiser Foundation Hospitals et al.***
Superior Court Case No. 10 CECG 00272

Hearing Date: August 31, 2010 (**Dept. 97A**)

Motion: Motion to Stay; Compel Arbitration

Tentative Ruling:

To deny.

Explanation:

Stay

Any party to a judicial proceeding “is entitled to a stay of those proceedings whenever (1) the arbitration of a controversy has been ordered, and (2) that controversy is also an issue involved in the pending judicial action.” (*Marcus v. Superior Court* (1977) 75 Cal. App. 3d 204, 209.) “The purpose of the statutory stay is to protect the jurisdiction of the arbitrator by preserving the status quo until arbitration is resolved.” (*Federal Ins. Co. v. Superior Court* (1998) 60 Cal.App.4th 1370, 1374.) “In the absence of a stay, the continuation of the proceedings in the trial court disrupts the arbitration proceedings and can render them ineffective.” (*Id.* at p. 1375.)

A “controversy” is “any question arising between parties to an agreement whether such question is one of law or of fact or both.” A controversy can be a single question of law or fact, and a stay shall be issued upon proper motion if the court has ordered arbitration of a controversy that is also an issue involved in an action or proceeding pending before it. (*Heritage Provider Network, Inc. v. Superior Court* (2008) 158 Cal.App.4th 1146, 1152-1153.)

Ignoring the fact that the Kaiser arbitration is not “court ordered” arbitration, there is still no common controversy between the arbitration proceedings and the instant court action. The arbitration concerns actions occurring from April 4, 2008 to April 28, 2008 and is a claim for wrongful death. The instant action concerns activities that happened after Mrs. Disk died and involves the plaintiff’s individual claims for damages. They are entirely factually distinct and the resolution of one will not affect the resolution of the other.

Arbitration

The Supreme Court has interpreted the phrase "involving commerce" very broadly, holding that it extends beyond "persons or activities within the flow of interstate commerce" to include anything that affects commerce. (See *Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 273, 277.) Kaiser provides coverage authorized by Medicare, a federal statute exercising the Commerce power, thus the Senior Advantage plan evidences a transaction involving commerce, and that the FAA is therefore applicable. (*Clay v. Permanente Med. Group* (2007) 540 F.Supp.2d 1101, 1105.)

Simply put, "[t]he question whether the parties have submitted a particular dispute to arbitration, i.e., the 'question of arbitrability,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.' " (*Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 83, italics omitted; accord, *McCarroll v. L. A. County etc. Carpenters* (1957) 49 Cal.2d 45, 65–66.) "[A] party can be compelled to submit a dispute to arbitration only where he has agreed in writing to do so. [Citation.] While arbitration is a favored method of resolving disputes, the policy favoring arbitration cannot displace the necessity for an agreement to arbitrate" (*Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 Cal.App.4th 1266, 1271.) Moreover, a party's right to select a judicial forum instead of arbitration is one that will not lightly be deemed waived. (*Woolfs v. Superior Court* (2005) 127 Cal.App.4th 197, 205.)

Unless the parties have clearly and unmistakably provided otherwise, the question whether they agreed to arbitrate a particular dispute is to be decided by the court, not by the arbitrator. (*Howsam v. Dean Witter Reynolds, Inc.*, *supra*, 537 U.S. at pp. 83-84; see also *Litton Financial Printing Div. v. NLRB* (1991) 501 U.S. 190, 208.) This requires the court to examine the underlying agreement. In cases subject to the FAA, courts apply ordinary state law contract principles in deciding whether the parties agreed to arbitrate a particular dispute. (*First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 944.)

Absent conflicting facts or extrinsic evidence, the question of whether an arbitration agreement applies to a particular controversy is a question of law, requiring the court to apply its own independent judgment. (*American Federation of State, County & Municipal Employees v. Metropolitan Water Dist.* (2005) 126 Cal.App.4th 247, 257.) The court interprets an arbitration agreement just as it would any other contract, giving effect to both the parties' intent and the plain meaning of the agreement's language. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264; *Crowell v. Downey Community Hospital Foundation* (2002) 95 Cal.App.4th 730, 734; § 1281.) In determining whether a particular dispute is subject to arbitration, the contract should be read as a whole. Even if broadly drafted, however, an arbitration clause does not apply to disputes unrelated to matters covered in the contract. (*Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501, 1506; see Cal. Civ. Code § 1648 (contract "extends

only to those things concerning which it appears that the parties intended to contract".)

In the present case, the Evidence of Coverage governs the provision of health care services by Kaiser to its members. The Evidence of Coverage states that it "describes our Senior Advantage health care coverage provided under the Group Agreement (Agreement) between Health Plan and your Group (the entity with which Health Plan has entered into the Agreement.)" It provides information regarding how to use the plan, details of "premiums" and "how to obtain services," a summary of "covered services," a description of the benefits offered for each of the covered services, a list of medical services that are not covered, and a description of various dispute resolution procedures and procedures regarding the continuation of coverage in the event of discontinuation of group membership.

It appears that the purpose of the Evidence of Coverage is to disclose the medical services available under the Kaiser Health Plan, and to explain to the Plan members how to utilize the services under the Plan. The Evidence of Coverage states that it requires arbitration of any claim that "arises from or is related to an alleged violation of any duty incident to or arising out of or relating to" the Evidence of Coverage or the member's "relationship to Kaiser." It then states that these claims that are required to be arbitrated include claims for "medical or hospital malpractice," claims for "premises liability," or claims "relating to the coverage for, or delivery of, services or items," regardless of the legal theories upon which the claim is asserted.

Kaiser puts the emphasis on the phrase "delivery of services, irrespective of the legal theories upon which the claim is asserted" and argues that arbitration is required. This is not a fair interpretation of the arbitration clause. The part of the sentence that defines the claims to be arbitrated is "arises from or is related to an alleged violation of any duty incident to or arising out of or relating to this Evidence of Coverage or a Member Party's relationship to Kaiser Foundation's Health Plan Inc. (Health Plan)." In other words, unless the claim arises out of, relates to, or is incident to the Evidence of Coverage or the member's relationship to Kaiser, there is no mandatory arbitration. Mere delivery of services will not invoke arbitration, only delivery of services incident to the Evidence of Coverage will invoke arbitration.

Here, the Evidence of Coverage states: "[w]e cover the Services described in the "Benefits and Cost Sharing" section ..." The listed services are: "preventive medicine, diagnosis and treatment," routine preventive hearing tests, glaucoma screenings, family planning visits, outpatient surgery, outpatient procedures, voluntary termination of pregnancy, manual manipulation of the spine, emergency and urgent care visits, house calls, blood and blood products, administered drugs, vaccines, wound care supplies, preventive health screenings, group appointments, hospital inpatient care, ambulance services,

Tentative Ruling

(24)

Re: ***HerSchy Environmental, Inc. v. Darrell Mann***
Court Case No. 09CECG03011

Hearing Date: August 31, 2010 (**Dept. 97C**)

Motion: Defendant's Motion for Order Setting Aside Judgment, or
Alternatively, Deeming Judgment Satisfied

Tentative Ruling:

To grant defendant's motion for an order setting aside the judgment entered on January 22, 2010. To deny request to enforce Settlement Agreement pursuant to CCP §664.6, and therefore to deny the requests for attorney fees by both parties. Enforcement of the parties' Settlement Agreement must take place in a new action.

Explanation:

Timeliness of Plaintiff's Opposition to Motion:

The opposition papers were filed timely. Opposition is to be filed 9 court days before the date of the hearing, which is measured backward from the date of hearing. [CCP §1005(b)] Nine court days from August 31st is August 18 (when opposition was indeed filed), not August 17. However, defendant is correct as far as plaintiff having mailed the documents to counsel at the wrong address (2100 Tulare Street, Suite 304, instead of 2125 Kern Street, Suite 304). But to the extent that defendant was able to adequately reply to the opposition, he was not unduly prejudiced by plaintiff's error. Therefore, the opposition brief and supporting declaration have been considered.

Standard of Ruling on a Motion to Set Aside a Confession of Judgment:

Generally, a court cannot render judgment against a defendant without according the due process rights of notice and an opportunity to be heard, unless the defendant voluntarily, knowingly, and intelligently waives these rights [*Isbell v. County of Sonoma* (1978) 21 Cal.3d 61, 64, 66, 74; *Efstratis v. First Northern Bank of Dixon* (1997) 59 Cal.App.4th 667, 672] In light of its inconsistency with due process, a confessed judgment is considered an extreme procedure, and courts construe the authorizing statutes strictly [*Efstratis v. First Northern Bank of Dixon, Supra*; *Wax v. Infante* (1982) 138 Cal.App.3d 138, 140]

Thus, there are various procedural safeguards to prevent abuse of this mechanism, including: 1) requiring that an attorney "independently representing the defendant" must sign a certificate that he or she has advised the defendant

with respect to the waiver of rights and defenses under the confession of judgment procedure and has advised defendant to utilize the procedure. [See CCP § 1132(b)]; and 2) requiring that defendant must sign an affidavit authorizing the entry of judgment for a specific sum, stating concisely the facts showing that the sum confessed is “justly due.” [See CCP § 1133]

These requirements are strictly construed, and failure to comply invalidates a judgment entered by confession. [*Rivercourt Co., Ltd. v. Dyna-Tel, Inc.* (1996) 41 Cal.App.4th 1477, 1482]

Here, the procedural safeguards were met because the court would not enter the judgment by confession until they had been complied with. Both the confession and the attorney certificate have been signed under penalty of perjury.

Was Judgment by Confession Authorized:

However, since the entry of this judgment was only authorized by an express condition in the contract between plaintiff and defendant (a Settlement Agreement from an earlier lawsuit), the pertinent question is whether or not plaintiff was appropriately authorized under the terms of that Agreement to enter this judgment. Defendant argues, in requesting that the judgment be set aside, that plaintiff had no right to enter the judgment because the conditions under ¶3(J) for its entry were not met.

Namely, the Settlement Agreement at ¶3(J) authorized plaintiff to enter the Confession of Judgment as a new action against Defendant “if Mann fails to make payment for the Food Mart Site claim, as per ¶3(H) of this Agreement and/or Mann does not fulfill his obligations pursuant to this Agreement . . .”

Plaintiff argues that entry of the Confession of Judgment was authorized on 2 bases: 1) because Mann ceased making monthly payments under ¶3(H) in March 2007; and 2) Mann has also not fulfilled his obligation under ¶3(A) to designate plaintiff as “Remediation Contractor.”

Taking the second point first, (failure to designate), it is not clear this is the sort of “obligation” that would even implicate ¶3(J), since this does not appear to be a material breach warranting entry of a Confession of Judgment (especially at the stage where apparently all or most of the work on the project has been performed). Moreover, plaintiff has not established that there actually was a breach of this provision (counsel’s evidence is her letter wherein she states that there is “apparently” another remediator at the site—so it is not even clear that fact is within her personal knowledge). Even if this statement were admissible evidence, it would not establish a breach by plaintiff in designating plaintiff as “Remediation Contractor.”

Therefore, the only basis for plaintiff's claim of right to enter the Confessed Judgment is defendant's decision to stop making the monthly payments under ¶3H. But it is important to note that the authority to enter the confessed judgment depends on Mann's failure to "make payment for the Food Mart Site Claim, as per ¶3(H)," which means as per the whole paragraph.

The first sentence of ¶3(H) sets forth defendant's obligation to pay plaintiff the total amount of \$38,691.62 (without interest), in 24 monthly payments of \$1,612.15 each. But the last sentence of this paragraph is also crucial in analyzing the issues presented. It states: "**If, however, the Food Mart Site is accepted into the State Fund, Mann's obligation shall be reduced to one-half of the un-reimbursed amount.**" This last sentence deals with Mann's obligation to "make payment for the Food Mart Site Claim," just as much as the first one. And the use of the phrase "If, however" reasonably implies that this sentence provides a condition that will have some impact (as opposed to no impact) on the preceding sentence.

So, while ¶3(H) *does* spell out a simple payment arrangement, it also by its express terms contemplates conditions occurring that might reduce this obligation, and make the amount to be paid *incalculable* until the State Fund made a decision. Plaintiff's simplified narration of the terms of the Settlement Agreement (when it requested judgment) did not sufficiently set forth the complexities and conditions (and ambiguities) of this agreement, and a fuller narration of contract terms and the facts of the case seems especially necessary when as drastic a remedy as a Confession of Judgment (with no opportunity for opposition and a hearing) is being considered.

And on this motion, defendant has established that the condition established by the last sentence (acceptance into the State Fund) had occurred, and was the very reason defendant stopped making the monthly payments. On these facts, we must consider whether this is, in fact, a material or total breach of the Agreement triggering the provisions of ¶3(J) (entry of confessed judgment), and also whether plaintiff's failure to act on it as a breach *for over a year*, coupled with its signing of the Reimbursement Contract, constituted a waiver of the breach (or alternatively, a waiver of performance of the payment term).

A breach of contract may be total or partial, and each is actionable if there are measurable damages resulting from the breach. [*Borgonovo v Henderson* (1960) 182 Cal.App.2d 220, 231] Clearly this was not a total breach, since defendant was performing the other major part of his duties (i.e., applying to the State Fund). It is not even clear that there were "measurable damages" at the point of this breach, since defendant's actual out-of-pocket obligation could not be determined until the State Fund determined the reimbursement amount, and it was entirely possible that defendant had already paid all the cash he would be required to pay from his own pocket. At best, then, this was a partial breach, and not material.

As to waiver, a performance or breach of a contract term may be waived by the party for whose benefit the provision is made. [*Galdjie v Darwish* (2003) 113 Cal.App.4th 1331, 1339] Waiver of the other party's performance of one or more contract terms or conditions may be made verbally or by conduct. Further, a party may be estopped by words or conduct to deny that he or she has waived the other party's performance or breach. [*Bettelheim v Hagstrom Food Stores, Inc.* (1952) 113 Cal.App.2d 873] "To be valid a waiver must be a clear expression made with full knowledge of the facts and an intent to waive the right.... Doubtful cases will be decided against the one who claims a waiver." [*Spellman v Dixon* (1967) 256 Cal.App.2d 1, 5] Strict compliance may be waived, but then reinstated later by a definite notice or equivalent conduct. [*Call v Alcan Pac. Co.* (1967) 251 Cal.App.2d 442, 447]

No evidence has been presented showing that plaintiff ever gave defendant any indication that it regarded the breach as material, so as to give defendant an opportunity to begin making payments and avoid the judgment. Plaintiff's long wait between the time defendant stopped making payments in March 2008 and plaintiff calling this a breach (August 2009) raises at least a colorable argument that plaintiff did not oppose defendant's interpretation of the Agreement's language (i.e., his stance that he had the freedom to choose not to make payments now that the State claim was pending).

Furthermore, plaintiff's signing of the Reimbursement Contract in August 2009 is affirmative conduct indicative of waiver of the breach. Plaintiff does not dispute that this Contract was signed by the parties to address the State's need for either proof from Mann that HerSchy had been paid, or written assurance from HerSchy that it agreed to wait for payment. This contract clearly seeks to address the latter; otherwise, it would not have satisfied the State's concerns. The mere fact that the contract states that it "in no way negates the existing settlement agreement" does not change the analysis: interpreting this as an agreement to wait for payment simply does nothing to "negate the settlement agreement."

Therefore, this Contract operates as a waiver of the breach, creating an estoppel against plaintiff to deny that it has waived defendant's performance of making the monthly payments (or alternative, has waived its breach), and this argues in favor of setting aside the judgment.

On balance, it does not appear that conditions existed which made it appropriate to plaintiff to utilize the provisions of ¶3(J) to seek entry of the Confession of Judgment against Defendant.

“Surprise” and Timeliness of the set aside motion:

The documents in the file reflect that defendant had notice that plaintiff was seeking to enter the confessed judgment as early as August 2009, since proofs of service are attached to the documents filed in August and October 2009. Furthermore, defendant and his attorney were necessarily aware of plaintiff needing to obtain new declarations (the confession and the attorney certification), since they were contacted for their signatures.

However, the fact that defendant and his counsel were willing to sign the new declarations should not prejudice defendant’s right to seek to set aside the judgment, since that was something they were obligated to do under the Settlement Agreement. To refuse to sign the replacement confession and attorney certification might have prevented entry of the confessed judgment, but it would only have subjected defendant and his counsel to a motion to enforce settlement pursuant to CCP §664.6, and resulting sanctions, and no doubt additional claims for breach of contract.

So, in effect, defendant had no choice but to sign the replacement declarations, await the entry of the Confessed Judgment, and take action after that point to set it aside. The nearly six month delay between entry of the judgment (in January 2010) and filing of this motion (July 2010) is not overly problematic, since during that time defendant 1) received the State Fund payments, 2) paid plaintiff from these funds, and 3) attempted to obtain a voluntarily dismissal of the judgment. This delay in filing does not negate defendant’s “surprise,” in learning, in and around August 2009, that despite plaintiff’s agreement to wait to be paid, plaintiff was deeming defendant’s 2007 decision to stop the monthly payments as a breach, and was using that as a basis to obtain judgment which provided for payment of pre-judgment interest, under ¶3(J) unlike the provision for payment under either ¶3(E) or ¶3(H) (which did not provide for payment of interest).

On balance, the motion is deemed timely filed, and “surprise” sufficiently established.

CCP §664.6 not applicable:

The Settlement Agreement in this case cannot be enforced pursuant to CCP §664.6 because the parties failed to properly retain the court’s jurisdiction for this purpose. The court, sua sponte, takes judicial notice of the court’s file in Case #06CECG02038. [Ev.Code §§ 452, 453] This record can be judicially noticed on the Court’s own motion, provided notice is given to the parties (since both have requested relief under §664.6) along with a chance to respond to the fact the Court intends to take such notice. [*Pedus Bldg. Servs. v. Allen* (2002) 96 Cal.App.4th 152, 156; Ev. Code §455]

(23)

Tentative Ruling

Re: ***City of Kingsburg v. SKE Properties, LLC, et al.***
Superior Court No. 09 CECG 00927

Hearing Date: Tuesday, August 31, 2010 (**Dept. 97B**)

Motion: Plaintiff City of Kingsburg's Motion to Amend Judgment

Tentative Ruling:

To DENY Plaintiff City of Kingsburg's Motion to Amend Judgment.

To SET ASIDE and VACATE the "Interlocutory Judgment for Judicial Foreclosure on Special Assessment Bond" signed by the Court on November 13, 2009 as void pursuant to Code of Civil Procedure § 580(a). The Plaintiff is directed to prepare and submit a new proposed default judgment against Defendants Anastacio and Vincent Chagoya within 30 days of service of the Court's order.

Explanation:

On November 13, 2009, the Court signed an "Interlocutory Judgment for Judicial Foreclosure on Special Assessment Bond" in this action. This judgment ordered Defendants Anastacio and Vincent Chagoya to pay the following sums: the total of \$175,950.19, plus costs and attorney's fees, and the costs and fees of the levying officer and ordered that the subject property described in the judgment be sold at a foreclosure sale with a minimum bid price of \$200,000.00. Further, the judgment provides that it may be amended at any time before the sale to add additional assessments, penalties, fees, and costs pursuant to Streets and Highways Code section 8832(c).

On July 22, 2010, Plaintiff City of Kingsburg filed a motion to amend the interlocutory judgment pursuant to Streets and Highways Code § 8830(c). However, the Court denies the Plaintiff's motion to amend the default judgment because the amount of penalties, interest and unpaid taxes sought by the proposed first amended judgment is greater than the prayer for relief in the Plaintiff's first amended complaint. Code of Civil Procedure § 580(a) provides that:

The relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in the complaint, in the statement required by Section 425.11, or in the statement provided for by Section 425.115; but in any

other case, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue.

“It is a fundamental concept of due process that a judgment against a defendant cannot be entered unless he was given proper notice and an opportunity to defend. [Citations.] California satisfies these due process requirements in default cases through section 580.” (*In re Marriage of Lippel* (1990) 51 Cal. 3d 1160, 1166.) The primary purpose of Section 580 is “to guarantee defaulting parties adequate notice of the maximum judgment that may be assessed against them. ... The notice requirement of section 580 was designed to insure fundamental fairness. ... Since *Becker*, the Courts of Appeal have insisted that due process requires formal notice of potential liability; actual notice may not substitute for service of an amended complaint.” (*Greenup v. Rodman* (1986) 42 Cal. 3d 822, 826.) “[Code of Civil Procedure section 580, and related sections 585, 586, 425.10, and 425.11, aim to ensure that a defendant who declines to contest an action does not thereby subject himself to open-ended liability. Reasoning that a default judgment that exceeds the demand would effectively deny a fair hearing to the defaulting party, the Courts of Appeal have consistently read the code to mean that a default judgment greater than the amount specifically demanded is void as beyond the court’s jurisdiction.” (*Barragan v. Banco Bch* (1986) 188 Cal. App. 3d 283, 305.)

In Plaintiff’s first amended complaint, the Plaintiff prayed for a judgment that the sum of \$86,276.55 in unpaid assessments, plus additional unpaid assessments as may come due to the date of the foreclosure sale and for a judgment that the sum of \$24,256.82 in further unpaid taxes and penalties, plus \$1,000.00 per month of additional penalty until the date of the foreclosure sale. Finally, the Plaintiff prayed that the judgment include “Any other amounts which are required by law to be bid in order that the subject property may be sold.”

In this motion, the Plaintiff moves for a first amended judgment against the defaulted Defendants. The proposed first amended judgment seeks unpaid assessments of \$48,274.43, unpaid penalties and interest of \$109,063.84, unpaid property taxes, fees and penalties to the County of Fresno in the amount of \$36,846.50, and \$1,500.00 for April 16, 2010 cleanup costs. However, the Court finds that the proposed amounts of unpaid penalties and interest to Plaintiff City of Kingsburg and unpaid taxes and penalties to Defendant County of Fresno are greater than the amounts prayed for in the Plaintiff’s first amended complaint. Additionally, the Plaintiff never prayed for cleanup costs in the first amended complaint and such imposition of this amount in a judgment would be improper.

Further, the Court vacates and sets aside the “Interlocutory Judgment for Judicial Foreclosure on Special Assessment Bond” signed by the Court on November 13, 2009 as void pursuant to Code of Civil Procedure § 580(a). “Section 580 operates as a limitation on the court’s jurisdiction. ... Accordingly,

