

Tentative Rulings for September 2, 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).)

- 10 CECG 02443 *In re Lanare Community Service District* (Dept. 97D)
- 09CECG03427 *Anezinos v. Genaring, et al.* (Dept. 97B). (There is no tentative ruling for the motion to appoint a receiver; see below for the tentative ruling on motion to compel further production.)
- 09CECG03537 *Shannon D. Fleck and Sheryl L. Fleck v. Vartanian Auto & Marine, Inc., et al.* (Dept. 97B)
- 09CECG01515 *Javier Cristobal v. Michael Dion Roe* (Dept. 97A)
- 10CECG02011 *FUSD v. Dugal* (Dept. 97C)
- 10CECG02439 *Susan Gremminger v. Fresno County Sheriffs* (Dept. 97C)
- 10cecg02454 *Lore Gerawan v. Hobbs Grove Inc.* (Dept. 97A)
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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.

- 07CECG02071 *Kalmbach v. Sportsmobile* – the motion to quash is continued to September 14, 2010 at 3:30 p.m. in Dept. 97D. The tentative for the motion to compel is below.
- 09CECG04467 *Dias v. Barajas* is continued to September 16, 2010 at 3:30 p.m. in Dept. 97B.
- 09CECG04581 *Henry Rojas v. Jack M. Ramos, et al.* is continued to September 8, 2010 at 3:30 p.m. in Dept. 97C.
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(Tentative Rulings begin at the next page)

[10]

Tentative Ruling

Re: **John Ochoa v. Valley Health Team Inc.**
Superior Court Case No. 09 CECG 00299

Hearing Date: Thurs., Sept. 2, 2010 (**Dept. 97 D**)

Motion: Motion for Summary Judgment/Adjudication brought by Defendant Valley Health Team Inc.

Tentative Ruling:

To DENY the motion for summary judgment. To DENY the motion for summary adjudication as to the first and second causes of action. The GRANT the motion for summary adjudication as to the third cause of action. (CCP 437c.)

Explanation:

This is a wrongful termination action. Plaintiff John Ochoa was employed as a Facilities Manager for Defendant Valley Health Team Inc., a health care provider located in San Joaquin, California. He worked at VHT for about five years from June 2002 to March 2007. Another employee, medical assistant Jasbir Bains, confided in him that she had been sexually harassed by the Medical Director Dr. Hussam Kaileh. He advised her to report the incident as a violation of VHT's policy against sexual harassment.

He later reported the incident to his supervisor Sylvia Disney and was advised to put his report in writing so that it could be investigated. VHT hired outside counsel to initiate an investigation, but did not permit the lawyer to interview Dr. Kaileh. Before the investigation was completed, VHT stopped the investigation and hired a new lawyer. The new lawyer terminated Plaintiff John Ochoa's employment and accused Ochoa of filing a false report.

Ochoa maintains he was fired in retaliation for filing the report regarding sexual harassment complaints against Dr. Kaileh and VHT. On 1/22/09, Plaintiff filed his Complaint alleging three causes of action

- (1) Retaliation (FEHA, Gov. Code 12940, et seq.)
- (2) Defamation and Slander
- (3) Preventing Subsequent Employment by Misrepresentation (Labor Code 1050).

Defendant VHT moves for summary judgment/adjudication as to all three causes of action.

First, VHT moves for summary judgment/adjudication as to the First Cause of Action for RETALIATION on the ground that Ochoa's report was a complete lie.

VHT maintains that Ochoa fabricated the lie in order to undermine Dr. Kaileh. Ochoa and Human Resources Director Fred Alcorta were close friends and supporters of VHT CEO Sylvia Disney. At that time, the Fresno Bee was reporting that CEO Disney was receiving excessive compensation unbeknownst to a majority of the board of directors, and that VHT was experiencing financial difficulties. The trio suspected that Dr. Kaileh was the source of leaks to the Fresno Bee and concocted the scheme to undermine him.

FEHA, the California Fair Employment and Housing Act, prohibits employers from terminating employees in retaliation for such protected activities as reporting harassment or discrimination. (Gov. Code 12940 (h).) To prove a claim of retaliation, the plaintiff must show he engaged in a single protected activity, he was subjected to an adverse employment action, and there was a causal link between the protected activity and the employer's action. (**Yanowitz v. L'Oreal USA Inc.** (2005) 36 Cal.4th 1028, 1042.)

But in order for Ochoa's report to constitute protected activity, it had to have been made REASONABLY and in GOOD FAITH. (**Yanowitz v. L'Oreal USA Inc.** (2005) 36 Cal.4th 1028, 1042; **Miller v. Dept. of Corrections** (2005) 36 Cal.4th 446, 473-474.)

Defendant VHT makes a prima facie showing that Ochoa's report was a complete fabrication which was not made reasonably or in good faith. VHT presents the declaration of Jasbir Bains who states that she was never sexually harassed by Dr. Kaileh and never told Ochoa that she had been sexually harassed by Kaileh. (See generally Bains Decl.) Bains believes that Ochoa made up these lies to help save CEO Disney's job and to divert the attention of the public and the board of directors away from the scandal involving Disney's excessive compensation and VHT's financial difficulties. (See generally Bains Decl.) VHT also presents the declaration of Dr. Kaileh who denies that he ever had any sexual relationship or sexual contact with Bains or that he harassed her in any way. (See generally Kaileh Decl.) (Facts 4, 12, 13, 14.)

VHT also notes that the timing of Ochoa's claim was inherently suspicious because the alleged conversation with Bains supposedly occurred in June 2005, but Ochoa did not report the incident until Jan. or Feb. of 2007, some two years later. (Fact 1.)

This showing negates an element of Plaintiff's retaliation claim. So the burden shifts back to Plaintiff Ochoa to show that there are triable issues of material fact as to whether he reported the incident of sexual harassment reasonably and in good faith, so that his report constituted protected activity under FEHA.

In Opposition, Plaintiff John Ochoa submits his own declaration stating that he told the truth when he reported that Bains confided in him about Dr. Kaileh sexually harassing her. Ochoa also states that he believed Bains. She seemed to be upset about the incident and appeared to be telling the truth. Ochoa states that he did not report the incident initially because Bains had asked him not to. But two years later, he reported it to protect her from sexual harassment.

Accordingly, Plaintiff Ochoa has submitted evidence sufficient to create a triable issue of material fact as to whether Bains really did confide in him about harassment by Dr. Kaileh and as to whether Ochoa reasonably and in good faith reported the incident to Disney.

The motion for summary adjudication as to the First Cause of action is DENIED. And the motion for summary judgment is also DENIED.

Second, Defendant VHT moves for summary adjudication as to the Second Cause of Action for SLANDER and DEFAMATION.

In his Complaint, Ochoa alleges that he has been unable to find another job because VHT has slandered and defamed him to prospective employers. He alleges that when he applies for other positions and is asked why he left his prior job, he is forced to disclose that VHT falsely accused him of making a false sexual harassment report and wrongfully terminated him. Ochoa seems to allege that he himself is forced to republish these falsehoods because of the initial misconduct and false allegation by VHT.

Defendant VHT presents evidence that VHT did not disclose any information about Ochoa to any of his prospective employers. To the best of VHT's knowledge, it was never contacted by any of Ochoa's prospective employers. (Facts 23-24; See generally Griffin Decl.) And Ochoa himself admits that he is not aware of anyone at VHT who disclosed any information regarding his prior employment to the Dept. of Corrections or to any future or prospective employer. (Facts 25-26, 36-37; Ryan Decl. at Ex. C, Ochoa Depo at p. 59.)

Defendant makes a prima facie showing that VHT did not directly publish false, slanderous, or defamatory statements about Ochoa to any of his prospective employers. Accordingly, the burden of production shifts to Ochoa to show that there is a triable issue of material fact as to whether VHT did publish such statements directly, or to show that as a matter of law, Ochoa's own

republication of the false accusations constituted a kind of indirect or constructive slander or defamation.

In Opposition, Plaintiff argues correctly that a plaintiff employee may state a claim for compelled self-defamation or compelled self-slander, where the employer has slandered or defamed an employee and where the employer knew or should have known that the employee would be forced to disclose the slanderous or defamatory information to prospective employers. This kind of indirect or constructive slander and defamation is recognized under California law. And the plaintiff employee's self-publication of the slander or defamation is sufficient to support a cause of action. There is no requirement that the employer must have directly re-published the slanderous or defamatory information to prospective employers. (**McKinney v. Santa Clara County** (1980) 110 Cal.App.3d 78; **Live Oak Publishing Co. v. Cohagan** (1991) 234 Cal.App.3d 1277, 1285.)

Accordingly, the motion for summary adjudication as to the Second Cause of Action is DENIED.

Third, VHT moves for summary adjudication as to the Third Cause of Action for Preventing Subsequent Employment by Misrepresentation under Labor Code 1050.

Labor Code 1050 provides that: "Any person, or agent or officer thereof, who, after having discharged an employee from the service of such person or after an employee has voluntarily left such service, by any misrepresentation prevents or attempts to prevent the former employee from obtaining employment, is guilty of a misdemeanor." A violation exposes the violator to treble damages.

As with the second cause of action above, VHT argues correctly that Ochoa admits that he has no evidence that VHT ever directly communicated with or made any misrepresentations to any of Ochoa's prospective employers. So the initial burden of production shifts to Plaintiff.

In Opposition, Plaintiff appears to rely on the **McKinney** case once again. But the holding of **McKinney** only applies to slander and defamation actions. Plaintiff cites no authority for the proposition that a plaintiff's self-republication of a false statement to prospective employers is actionable as a misrepresentation by the employer under Labor Code 1050. The plain language of Labor Code 1050 seems to apply only to direct misrepresentations by an employer.

The reasoning of the **McKinney** court was that it was foreseeable that the initial slanderous or defamatory statement would likely be republished. Slander and defamation actions are common law torts so that it is appropriate to apply a common law foreseeability analysis. In the case of a Labor Code statute, however, it's unclear whether the traditional tort foreseeability analysis applies or

should apply. It is clear that the act of republication is foreseeable, but it is unclear whether the act of republication by the employee constitutes a misrepresentation by the employer, under the language of the statute.

The court finds that, based on the plain language of the statute and based on the evidence presently before the court, Defendant VHT has made a prima facie showing that Plaintiff cannot show that VHT directly made affirmative misrepresentations to any of Ochoa's prospective employers. Plaintiff has failed to rebut this prima facie showing.

Accordingly, the court GRANTS VHT's motion for summary adjudication as to the Third Cause of Action.

Along with its Opposition, Plaintiff John Ochoa has filed objections to evidence. Ochoa objects to certain evidence submitted by Defendant VHT in support of its motion for summary judgment.

Bains Declaration

Objection 1: Overruled. The evidence is not admissible to prove the truth of the matter asserted, but is admissible to establish a possible motive of CEO Sylvia Disney and her friends for slandering or defaming Dr. Kaileh.

Objection 2 Overruled.

Objection 3 Overruled.

Kaileh Declaration

Objection 4 Overruled.

Objection 5 Overruled.

Objection 6 Overruled.

Objection 7 Overruled.

Objection 8 Overruled.

Griffin Declaration

Objection 9 Overruled.

Objection 10 Overruled.

Objection 11 Overruled.

Along with its Reply brief, Defendant VHT has filed objections to evidence. VHT objects to certain evidence submitted by Ochoa in support of his Opposition. The court declines to rule on these objections as they are not in the proper format required by **CRC 3.1354**. The objecting party must set forth verbatim the language to which it is objecting, so that the court is not required to refer back and forth to multiple separate documents. The objecting party must also submit a proposed order, setting forth a section for the court's ruling on the objection, with blank lines for the options to sustain or overrule. Defendant VHT does not appear to have complied with these two requirements.

[10]

Tentative Ruling

Re: **A.J. Rassamni v. Town & Country Car Wash, et al.**
Superior Court Case No: 10 CECG 00250

Hearing Date: Thurs., Sept. 2, 2010 (**Dept. 97 A**)

Motions: Defendant Karr Noble Avenue Inc.'s.

- (1) Motion to Compel Plaintiff's Further Responses to Second Set of RFP's 1-30
- (2) Motion to Compel Plaintiff's Further Responses to Third Set of RFP's 1-4
- (3) Request for Monetary Sanctions.

Tentative Ruling:

If the parties have not already done so, the parties shall meet and confer regarding the language of an appropriate protective order and confidentiality agreement. If the parties are unable to agree on the terms of the protective order, then 7 calendar days prior to the hearing date set forth below, the parties shall lodge with the court their proposed versions, along with a memo in support outlining points of disagreement. The court will set a hearing date of Oct. 5, 2010 at which time the court, if necessary, shall rule on the final terms of the protective order.

To GRANT both motions to compel further responses. (**CCP 2031.310.**) Within 10 calendar days after the protective order is in place, [or, if a protective order is already in place, then within 10 days after the clerk's service of this minute order], Plaintiff shall personally serve responsive documents, without objection, and shall produce a privilege log as to documents protected by the attorney-client or work product privilege. Any documents containing private, confidential, or proprietary information must still be produced, subject to the protective order and confidentiality agreement.

To GRANT the request for monetary sanctions. (**CCP 2131.310 (h); 2023.010 (d), (f), (h).**) Within 30 calendar days, Plaintiff will pay \$920.00 in monetary sanctions to Defendant Karr Noble Avenue Inc., through Defendant's counsel of record.

Time shall run from the clerk's service of the minute order.

Explanation:

This is an action for fraud, breach of contract, and misappropriation of trade secrets. Plaintiff A.J. Rassmani owns Great American Investments Inc. dba Great American Car Wash. He alleges that two former employees Juan Ramirez and Rafael Vazquez stole his trade secrets, service marks, and copyrighted information and disclosed it to his business competitors Bob Arroyo, Town & Country Car Wash, and Stonebrook Car Wash.

Defendant Karr Noble Avenue Inc. brings two motions to compel Plaintiff's further responses to their Second and Third Requests for Production of Documents.

The initial burden is on the moving party to present specific facts showing GOOD CAUSE to compel further answers or further production of the requested documents -- that is, that the requested facts or documents are relevant. (Weil & Brown, Civil Procedure Before Trial, ¶¶8:1155, ¶¶ 8:1495; CRC 3.1020 (c); CCP 2031.310 (b)(1); *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.). Then the burden shifts to the responding party to justify the objections or any failure to answer the interrogatories or produce the requested documents. (Weil & Brown at ¶¶ 8:1157; 8:1179; *Coy v. Superior Court* (1962) 58 Cal.2d 210, 220-221; *Fairmont Ins. Co. v. Superior Court* (2000) 22 Cal.4th 245, 255.)

The Second Set of RFPs 1-30 seek business and financial documents related to Plaintiff's car wash business, such as contracts, proprietary information, marketing material, bank statements, business ledgers, accounting records, bookkeeping records, and financial records.

The Third Set of RFP's 1-4 seek documents relating to the employment and termination of Defendants Vazquez and Ramirez.

Defendant makes a prima facie showing that the documents they have requested are relevant to the litigation. The burden shifts to Plaintiff to justify his objections and failure to respond. But in his Opposition, Plaintiff fails to submit a separate statement or a privilege log and fails to justify any of the objections set forth in his discovery Responses.

In his unverified Responses, Plaintiff raised 7 boilerplate objections. Without identifying any specific documents, Plaintiff raised the following blanket objections, to the extent that the requested documents:

- (1) are protected by attorney-client or work product privilege
- (2) are irrelevant
- (3) call for legal conclusions
- (4) are unduly burdensome, oppressive, or harassing
- (5) the definitions and instructions impose obligations beyond those

required

- (6) seek information protected by the privacy privilege or are otherwise privileged or immune
- (7) are vague, ambiguous or unintelligible

Objections (2), (3), (5), and (7) are simply incorrect. The requests are clearly relevant. They are document requests, not interrogatories, so they cannot possibly call for a response which constitutes a legal conclusion. And the requests contain no complicated language which would call for any legal interpretation or conclusion in order to comply. The definitions and instructions are not extensive or confusing in any way, so that they are not objectionable. And the requests are not vague or ambiguous. They are written in plain English in a clear and straightforward manner. Plaintiff has failed to justify these objections.

Regarding objection (4), if the requests are overbroad and burdensome, then the burden is on the objecting party to prove specific facts showing exactly how expensive or time-consuming it would be to respond to the discovery request. It must be shown that the burden of responding is so unjust that it amounts to oppression. (**West Pico Furniture Co. v. Superior Court** (1961) 56 Cal.2d 407, 418.) Plaintiff has failed to justify this objection.

Objections (1) and (6) cannot be invoked in an open-ended way, through a blanket statement. They must be claimed as to a specific, identifiable documents. And those documents must be disclosed in a privilege log. The burden is on the party opposing disclosure to prepare the privilege log. Any specific documents which are protected by the attorney client or work product privilege need not be disclosed, but must be identified in a privilege log. (**Wellpoint Health Network Inc. v. Superior Court** (1997) 59 Cal.App.4th 110, 130; CCP 2031.240.)

Similarly, Plaintiff may not raise a blanket privacy objection, but must identify specific documents entitled to privacy protection and must still disclose them pursuant to the confidentiality agreement. Privacy concerns may valid as to certain documents, but privacy rights can be adequately protected with a properly drafted confidentiality agreement. To the extent discovery requests seek documents that may be confidential, an adequately drafted protective order is sufficient to protect any privacy right. (**Richards v. Superior Court** (1978) 86 Cal.App.3d 265, 272, 150 Cal.Rptr. 77, 81.) Even if a document contains confidential or proprietary information, Defendant must still produce the requested document pursuant to a stipulated protective order. (**G.T., Inc. v. Superior Court** (1984) 151 Cal.App.3d 748, 755.)

Accordingly, the court GRANTS both motions to compel further responses.

Tentative Ruling

Re: ***Cuellar, et al v. Cingular Wireless***
Superior Court Case No. 07CECG03153

Hearing Date: September 2, 2010 (**Dept. 97D**)

Motion: By defendant for summary judgment or summary adjudication of each plaintiff's claims

Tentative Ruling:

To deny summary judgment and summary adjudication of cause of action for sexual harassment, retaliation, failure to prevent harassment, and the punitive damage claim; to grant summary adjudication of cause of action for sex discrimination; to order plaintiffs' counsel to show cause why they shouldn't be sanctioned for failure to comply with CRC Rule 3.1350(f) in relation to Prado and Gutierrez.

Explanation:

Defendant is correct that the way plaintiffs have responded to the motion and specifically, to the statements of undisputed facts, makes it difficult both for defendant to reply and for the court to determine whether and to what extent material facts are disputed by admissible evidence. CRC Rule 3.1350(f) provides:

Each material fact claimed by the moving party to be undisputed must be set out verbatim on the left side of the page, below which must be set out the evidence said by the moving party to establish that fact, complete with the moving party's references to exhibits. On the right side of the page, directly opposite the recitation of the moving party's statement of material facts and supporting evidence, the response must unequivocally state whether that fact is "disputed" or "undisputed." An opposing party who contends that a fact is disputed must state, on the right side of the page directly opposite the fact in dispute, the nature of the dispute and describe the evidence that supports the position that the fact is controverted. That evidence must be supported by citation to exhibit, title, page, and line numbers in the evidence submitted.

Here, especially in the opposition by Prado and Gutierrez-Tamez, plaintiffs' counsel has utterly failed to comply with these requirements in that each fact is listed as "disputed" based on all of the evidence submitted, without any explanation of the nature of the dispute or what specific evidence supports plaintiffs' position. And while Cuellar's responsive statement is somewhat better, she still fails to identify the nature of the facts identified as disputed and in most cases fails to identify what *specific* evidence supports her position.

However a defendant moving for summary judgment has the initial burden to show that either:

- one or more elements of the “cause of action...cannot be established”; or
- there is a complete defense to that cause of action.

CCP § 437c(p)(2).

Once if defendant meets this burden does the burden shifts to plaintiff to prove the existence of a triable issue of fact regarding that element of its cause of action or that defense.

The moving party's declarations and evidence will be strictly construed in determining whether they negate (disprove) an essential element of plaintiff's claim “in order to resolve any evidentiary doubts or ambiguities in plaintiff's (opposing party's) favor.” **Johnson v. American Standard, Inc.** (2008) 43 Cal.4th 56, 64.

Defendant must support its motion with discovery admissions or other admissible evidence showing that “plaintiff does not possess, and cannot reasonably obtain needed evidence.” **Aguilar v. Atlantic Richfield Co.** (2001) 25 Cal.4th 826, 854. It is not enough for defendant to show merely that plaintiff “has no evidence” on a key element of plaintiff's claim. Defendant must also produce evidence showing plaintiff cannot reasonably obtain evidence to support that claim. **Gaggero v. Yura** (2003) 108 Cal.App.4th 884, 891.

And a defendant does not satisfy its burden of proof by producing discovery responses that do not exclude the possibility that plaintiffs may possess or may reasonably obtain evidence sufficient to establish their claim. **Weber v. John Crane, Inc.** (2006) 143 Cal.App.4th 1433, 1441–1442.

Here, defendant argues that plaintiffs' failure to have included in their interrogatory responses all the incidents of harassment or discrimination that they ultimately testified to precludes them from relying on additional incidents now, even though such incidents were included in their deposition testimony. It also claims that plaintiffs can't now suggest dates for certain events when they couldn't previously remember them.

But those issues go to their credibility, not to the admissibility of plaintiffs' evidence. And the court notes that in some cases the evidence cited in support of facts listed in defendant's separate statement doesn't support the facts defendant asserts. See e.g. fact #9 in support of the motion against Prado, where defendant claims that Prado never reported any further conduct by Hash prior to her leave of absence. The cited testimony doesn't say that. And see fact #26 in the same statement, claiming that Prado doesn't recall Hash engaging in any inappropriate conduct after the 2006 complaint was sent. Again the cited testimony doesn't establish that fact.

An alternative means of obtaining summary judgment in favor of a defendant is to “show” a complete defense, but the defendant must present admissible evidence of each essential element of the defense upon which it bears the burden of proof at trial. ***Anderson v. Metalclad Insulation Corp.*** (1999) 72 Cal.App.4th 284, 289. Thus, where a defense has several elements, lack of substantial evidence on any element bars relief ... “even if the plaintiff failed to introduce a scintilla of evidence challenging that element.” ***Huynh v. Ingersoll–Rand*** (1993) 16 Cal.App.4th 825, 831.

That applies here in relation to defendant’s “avoidable consequences” claim, in that even if it were undisputed that plaintiffs didn’t contact management or HR until 4/26/06, a fact that does appear disputed by admissible evidence, defendants have offered no specific evidence on the other points needed to establish that defense, i.e. that plaintiffs acted unreasonably and that defendant had effective and well understood policies in place that would have prevented further harassment had they been utilized.

In this case, the court finds substantial evidence of widespread sexual harassment in the workplace that plaintiffs tried to complain about (both to the supervisors/harassers and to appropriate HR or management personnel), and that management failed to take seriously until several women wrote a letter demanding redress.

While there is some equivocal testimony concerning when and in what form the complaints were made, there is enough to defeat summary judgment or adjudication of the issues of whether unlawful harassment occurred, whether the defendant had effective procedures in place that would have prevented further harassment had they been used, and whether plaintiffs acted “reasonably” in seeking relief.

The court also finds sufficient evidence that defendant failed to do everything reasonably necessary to prevent harassment, in violation of Govt. Code §12940(k), and that it allowed Hash, Zepeda and Richardson to retaliate against plaintiffs for their having complained of the harassment. While it may be true that the fact that the assistant manager chose to replace Zepeda was a woman, shows that the decision was not based on gender discrimination, there is evidence that Richardson’s failure to consider the applications of Cuellar and Prado may have been in retaliation for their complaints, as was the additional scrutiny of plaintiffs following their complaints, as both they and Escoto observed.

And while the evidence offered by plaintiffs in support of the claim that management “ratified” the harassment and misconduct is somewhat equivocal, the fact that defendant failed to offer facts or evidence showing that there was no ratification of the misconduct, or that Stoeffel or Watkins were not “managing agents, in its separate statement of facts, shows that it has not met its initial burden of proof on that issue.

However the court finds that defendant has met its initial burden to show that there was no gender discrimination that materially affected the conditions of plaintiff's employment, in that they offered legitimate non-discriminatory reasons for the practice concerning "key holders" (which in any case was not a position with additional benefits), and the selection of a female for the assistant manager position demonstrates that the motive was not discrimination against women.

While plaintiffs' arguments concerning the run-around they got from Richardson on that job opening may support their claim for retaliation, it does not establish a triable issue of fact on sex discrimination. And plaintiffs' complete failure to offer specific evidence and facts in opposition to those offered by defendant supports a finding that defendant is entitled to summary adjudication of the sex discrimination claim.

As for defendant's evidentiary objections, except to the extent that defendant can show at the hearing that specific statements in the current declarations were in direct factual conflict with prior discovery responses, or that statements not made from personal knowledge were offered for their truth, as opposed to for the fact that the statements were made, the objections will be overruled.

In the recent Supreme Court decision of *Reid v. Google* (2010) 50 Cal.4th 512, the court offers the following comments on the submission of voluminous evidentiary objections in relation to a summary judgment motion:

We recognize that it has become common practice for litigants to flood the trial courts with inconsequential written evidentiary objections, without focusing on those that are critical. Trial courts are often faced with "innumerable objections commonly thrown up by the parties as part of the all-out artillery exchange that summary judgment has become." (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 711-712.) Indeed, the Biljac procedure itself was designed to ease the extreme burden on trial courts when all "too often" "litigants file blunderbuss objections to virtually every item of evidence submitted." (Citations omitted.) To counter that disturbing trend, we encourage parties to raise only meritorious objections to items of evidence that are legitimately in dispute and pertinent to the disposition of the summary judgment motion. In other words, litigants should focus on the objections that really count. Otherwise, they may face informal reprimands or formal sanctions for engaging in abusive practices. At the very least, at the summary judgment hearing, the parties—with the trial court's encouragement—should specify the evidentiary objections they consider important, so that the court can focus its rulings on evidentiary matters that are critical in resolving the summary judgment motion.

Reid v. Google, Inc., supra, 50 Cal. 4th at 532-533. Those comments apply to the objections raised in defendant's reply, and the court will therefore decline to

sustain any specific objection unless defense counsel can identify specific objections at the hearing that are both meritorious and material to the court's ruling on the motion.

And finally, plaintiffs' counsel is ordered to show cause why they should not be sanctioned under CRC Rule 2.30(b) for their complete failure to comply with Rule 3.1350(f). Violation of this Rule placed an unreasonable burden on both defense counsel and the court in responding to and deciding these motions.

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

Issued By: DRF on 9-1-2010.
(Judge's initials) (Date)

(20)

Tentative Ruling

Re: ***Whitlock v. Chavez et al.***
Superior Court Case No. 08CECG02831

Hearing Date: **September 2, 2010 (Dept. 97C)**

Motion: Defendant Khamsaysoury's Motion for Summary Judgment and/or Summary Adjudication

Tentative Ruling:

To grant summary judgment.

Explanation:

This is a personal injury case, arising out of a seven vehicle collision that occurred on Highway 99 on 8/29/06. Plaintiff Ernest Whitlock has sued the drivers of the other vehicles, one of whom was defendant Amy Khamsaysoury. Plaintiff's complaint alleges one cause of action for motor vehicle negligence.

Khamsaysoury's evidence shows that as the vehicles in front of her came to a stop in traffic, she also came to a full and complete stop before defendant Matthew Sampietro struck the vehicle behind Khamsaysoury, essentially causing a domino effect resulting in defendant Mark Lawrence being pushed into plaintiff's vehicle. Plaintiff has no personal knowledge as to whether Khamsaysoury stopped prior to any impact felt by plaintiff. (See Khamsaysoury's Undisputed Material Fact ("UMF") numbers 1-18.)

The court finds this evidence sufficient to shift the burden to plaintiff to raise a triable issue of fact as to whether Khamsaysoury breached her duty of care and was the legal cause of plaintiff's alleged injuries.

Plaintiff relies on his expert witness, Matthew King, who says that he reviewed the traffic collision reports (none of which are attached to his declaration), the deposition testimony of Khamsaysoury, Goodman, and photographs of the vehicles involved in the accidents (which also are not provided). (King Dec. ¶¶ 5, 8.)

The facts supporting King's conclusions are these: (1) Khamsaysoury testified that she was driving 65-70 mph; (2) Khamsaysoury testified that she maintained a distance of 1½ car length behind the car in front of her; and (3) Khamsaysoury testified that she was braking hard, but did not lock her brakes. (King Dec. ¶¶ 9-11.)

Based on these facts, King concluded that Khamsaysoury needed a minimum of 300 feet to come to a complete stop from the point when she observed the brake lights in front of her. (King Dec. ¶ 13.) Based on Khamsaysoury's testimony that she allowed 1½ car lengths between her vehicle and Goodman's, she would have been at least 50 feet short of a complete stop when she struck the Goodman vehicle. Khamsaysoury would not have been able to come to a complete stop without striking Goodman's vehicle in front of her. (King Dec. ¶ 13.)

King also says that photographs of the damages to the vehicles are consistent with Khamsaysoury contributing to causing the chain reaction that resulted in an impact to Whitlock's vehicle and with Khamsaysoury's testimony that the two impacts were nearly simultaneous. Accordingly, King concludes that evidence shows that Khamsaysoury was still in motion when she hit Goodman's vehicle, before or simultaneously with the impact by Vista. (King Dec. ¶ 14.)

In adjudicating summary judgment motions, courts are "not bound by expert opinion that is speculative or conjectural. [Citations.] Plaintiffs cannot manufacture a triable issue of fact through use of an expert opinion with self-serving conclusions devoid of any basis, explanation, or reasoning. [Citation.]" (*McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1106 [120 Cal.Rptr.2d 23].) "The evidence must be of sufficient quality to allow the trier of fact to find the underlying fact in favor of the party opposing the motion for summary judgment. [Citation.]" (*Id.* at p. 1105.) The plaintiff does not meet his burden of demonstrating a triable issue where his evidence merely provides "a dwindling stream of probabilities that narrow into conjecture." (*Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1421 [37 Cal.Rptr.2d 902].) (*Nardizzi v. Harbor Chrysler Plymouth Sales, Inc.* (2006) 136 Cal.App.4th 1409, 1415.)

The King declaration suffers from these very deficiencies. The declaration is riddled with unstated assumptions that render the declaration speculative, failing to provide sufficient explanation for the conclusions reached. Even assuming that King correctly calculated how many feet Khamsaysoury had to come to a complete stop based on her rate of speed and how hard she braked (King Dec. ¶ 12), there is no indication how King concluded that Khamsaysoury would not have been able to come to a complete stop without hitting Goodman's vehicle (¶ 13). King makes unstated and unexplained assumptions about where Goodman was, how fast Goodman was driving, when Goodman applied her brakes in relation to when Khamsaysoury applied her brakes, and how hard Goodman applied her brakes. King could conceivably have been correct in reaching his conclusions, but he does not show how he reached them.

Tentative Ruling

Re: ***Escalante v. Entrepreneurial Ventures, Inc.***
Case No. 08 CE CG 04349

Hearing Date: September 2nd, 2010 (Dept. 97D)

Motion: Plaintiff's Motion to Set Aside Dismissal Without Prejudice

Tentative Ruling:

To grant the motion to set aside the dismissal without prejudice. (CCP § 473(b).)

Explanation:

It appears that the dismissal was entered due to counsel's excusable neglect (CCP § 437(b)), since counsel asked the clerk to take the dismissal hearing off calendar when counsel set the new hearing date for the minor's compromise petition. Although counsel should have double checked to make sure that the dismissal hearing was actually off calendar, under the circumstances the mistake was reasonable.

In any event, the court does not wish to penalize the plaintiff and minor child for the mistake of their attorney, particularly since the case has already settled and the court simply needs to approve the minor's compromise. Therefore, the court intends to grant relief and set aside the dismissal.

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 9-1-10.
(Judge's Initials) (Date)

(19)

Tentative Ruling

Re: ***Chase Bank USA v. Bonilla***
Superior Court Case No. 09CECG02972

Hearing Date: September 2, 2010 (**Dept. 97C**)

Motion: by plaintiff for summary judgment

Tentative Ruling:

To grant. Plaintiff must submit a judgment conforming to the below, with a separately filed proof of service on defendant.

Explanation:

Plaintiff has specifically stated it waives all causes of action for breach of contract, those being the First, Third, Fifth, and Seventh. See Clark Declaration paragraph 3. The Court therefore dismisses those causes of action.

The remaining causes of action allege four open book accounts. Code of Civil Procedure 337a states:

“The term ‘book account’ means a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and shows the debits and credits in connection therewith, and against whom and in favor of whom entries are made, is entered in the regular course of business as conducted by such creditor or fiduciary, and is kept in a reasonably permanent form and manner and is (1) in a bound book, or (2) on a sheet or sheets fastened in a book or to backing but detachable therefrom, or (3) on a card or cards of a permanent character, or is kept in any other reasonably permanent form and manner.”

The Trottman declaration and exhibits A, C, E, and G thereto do not establish that such exhibits are the contract at issue. None are signed by defendant, nor is any application incorporating them provided. However, Exhibits B, D, F, and H show the existence of a contractual relationship whereby plaintiff extended credit to defendant, who made certain payments as requested up until February of 2009. That is sufficient to establish a contract between the parties for purposes of Code of Civil Procedure section 337a.

(18)

Tentative Ruling

Re: *Gwartz, et al. v. Weilert, et al.*
Case no. 09CECG01032

Hearing Date: **September 2, 2010 (Dept. 97C)**

Motions: (1) By defendants Michael Weilert and Genevieve Weilert (“Weilert defendants”) and a non-party entity, Belle Reve, LLC: motion to quash deposition subpoena directed at Wells Fargo Bank (“WFB”) and for monetary sanctions; and (2) by non-party entity, Belle Reve, LLC: motion to quash deposition subpoena for personal appearance of the person most knowledgeable (“PMK”) of Belle Reve, LLC with production of documents, and for monetary sanctions

Tentative Ruling:

To deny both motions to quash, and to deny monetary sanctions.

Explanation:

As a threshold matter, for purposes of both motions, it appears to the court that as to plaintiffs have filed proofs of service demonstrating compliance with the requirements in California Code of Civil Procedure (“CCP”) section 2025.200(b). That is, it appears that all other parties who have appeared have been served with the subpoenas that are targeted by these motions. The court directs counsel to present any evidence to the contrary at the hearing on these motions.

One motion to quash before the court targets a subpoena that requests bank records held at WFB of non-party Belle Reve, LLC for the period of January 1, 2000 to present. The court finds that because this subpoena is directed to a bank, WFB, each of the records requested of WFB inherently is a financial record. As to the other motion presently before the court that targets requests for production of documents and matters for examination of the PMK of Belle Reve LLC, the court finds that some of the documents and matters involve financial transactions and arrangements, and some do not. Put another way, the following requests for production involve financial transactions and arrangements of non-party Belle Reve LLC: 2, 9, 10, 11, 12, 16, 17, 18, 19, 20, 21, 22, 24, 31, 32, 33, 34, 35, 36, 37, 38, 39, and 40. Matters for examination that involve financial transactions and arrangements of non-party Belle Reve, LLC are: 3, 4, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, and 37.

For purposes of both motions, the court rules as follows regarding records, documents, and matters involving financial transactions and arrangements. Both plaintiffs and defendants have failed to identify and discuss key precedent that is quite relevant to this motion. That precedent is *Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court* (2006) 137 Cal. App. 4th 579 (“*Hecht, Solberg*”).) The court in *Hecht, Solberg* states:

Code of Civil Procedure section 2017.010 et seq. provides the framework allowing a party to “obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action ... if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.” (See *Johnson, supra*, 80 Cal.App.4th 1050, 1062.) In *Ameri-Medical Corp. v. Workers’ Comp. Appeals Bd.* (1996) 42 Cal.App.4th 1260 [50 Cal. Rptr. 2d 366] (*Ameri-Medical Corp.*), the court discussed the scope of allowable financial discovery when privacy issues are raised concerning an artificial entity defendant: “ “[T]he relevance of the subject matter standard must be reasonably applied; in accordance with the liberal policies underlying the discovery procedures, doubts as to relevance should generally be resolved in favor of permitting discovery [citation].” [Citation.]’ The right to privacy in disclosure of financial information affects the scope of discovery.

Disclosure of the private financial affairs of nonparties will not be ordered without justification based on “the real needs of the litigant who seeks discovery.” (*Hecht, Solberg, supra*, at 597 citing *Allen v. Superior Court* (1984) 151 Cal. App. 3d 447, 453.)

Plaintiffs provide the following justification for the records. Belle Reve LLC functions as an alter ego of the Weilert defendants. Lydia Garcia asserts affirmative claims in her cross-complaint. Garcia is a co-conspirator who marketed the subject property with defendant Michael Weilert. Michael Weilert and Garcia knowingly made several material false representations about the property, and based on these representations plaintiffs agreed to purchase the property. Michael Weilert recommended that plaintiffs hire Garcia. They stated her monthly income was \$4000 and that she received health and dental insurance benefits through Belle Reve LLC. Documents that defendants produced show Garcia earned substantially less, and defendants have failed to provide documents in connection with numerous discovery requests that would substantiate the income and benefits Michael Weilert depicted.

Therefore, as to the records, documents, and matters involving financial transactions and arrangements targeted in the subject subpoenas, the court finds plaintiffs provide justification based on “the real needs of the litigant who seeks discovery.” (*Hecht, Solberg, supra*, at 597 citing *Allen v. Superior Court* (1984)

(19)

Tentative Ruling

Re: ***Kalmbach v. Sportsmobile West***
07CECG02071 consol/w 08CECG02981

Hearing Date: September 2, 2010 (**Dept. 97D**)

Motion: by plaintiff to compel further responses to Demand for Inspection, Set No. 3 from defendants Feld and Sportsmobile.

Tentative Ruling:

To grant as to Nos. 3, 16, 21, 26, 27, and 32, ordering a further response which is in full compliance with Code of Civil Procedure sections 2031.210 et seq., and which identifies any document withheld on the basis of privilege by author, date, all recipients, and the specific privilege(s) claimed. All other objections are overruled for No. 3, 26, and 32. Nos. 16 and 27 are limited to the time period in which Kalmbach worked at Sportsmobile West ("SW"). No. 21 is limited to communications regarding Kalmbach's employment. No. 27 is additionally limited to documents stating a value for SW, its stock, or its assets. Both the preliminary statement and the "general objections" must be omitted from the further responses.

The requests for sanctions are denied. The further responses and documents ordered are to be provided by September 16, 2010.

Explanation:

1. Preliminary Statement and General Objections

This states that only one defendant undertook a diligent search and made a reasonable inquiry for the documents at issue. Both defendants must make such a representation, but only for those demands for which they are unable to comply by making full production. Defendants also make blanket objections based on privilege, but identify no documents withheld.

Pursuant to Code of Civil Procedure section 2031.250(b) responding party is required to identify with particularity any document falling within any category of item in the demand to which the objection is made, and to state which specific privilege is being asserted. "Even where a party deems a demand to be objectionable, he still must identify those items which fall into the category of item in the demand to which an objection is being made." *Standon Co. Inc. v. Superior Court* (1990) 225 Cal. App. 3d 898, 901.

The objecting party has the burden to provide evidence of the preliminary facts establishing a privilege exists. *HLC Properties, Limited v. Sup. Ct.* (2005) 35 Cal. 4th 54, 59. *People ex rel. Lockyer v. Superior Court* (2004) 122 Cal. App. 4th 1060, 1074. Identification of privileged documents need be one which “identifies each document for which a privilege is claimed, with its author, date of preparation, all recipients, and the specific privilege claimed.” *Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 291, fnt 6.

See also *People ex rel. Lockyer v. Superior Court* (2004) 122 Cal. App. 4th 1060, 1074: “The statute [authorizes] the court to make orders compelling further responses that adequately identify and describe documents for which a party (here, defendant) has raised boilerplate assertions of the attorney-client and work product privileges.” The Court does so here.

The further responses for which an order is recommended herein must omit the preliminary statement and general objections entirely. Any representation of a search and inquiry need be made for the specific demand for which defendants claim an inability to produce the materials sought. Code of Civil Procedure section 2031.230 states:

“A representation of inability to comply with the particular demand for inspection shall affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that demand. This statement shall also specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer in the possession, custody, or control of the responding party. The statement shall set forth the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of item.”

The further responses herein ordered shall also omit the preliminary statement and general objections entirely. The representation of “rights” retained by defendants is not a proper part of a response; the law determines what rights are retained, not boilerplate recitations in discovery responses.

2. Demand No. 2

A claim of overbreadth is a species of relevancy objection, and where documents are demanded, there must be a showing of good cause. Sometimes that can come from the complaint and answer. Other times it would be in the declaration of moving party’s counsel.

But here the declaration of plaintiff's counsel and the meet and confer letters do not discuss this subject. The pleadings also fail to disclose good cause of production of company check registers. Code of Civil Procedure section 2031.310(b)(1) states: "The motion shall set forth specific facts showing good cause justifying the discovery sought by the demand."

The motion is denied as to this demand for lack of the required showing of good cause.

3. Demand No. 3

This sought all documents relating to dividends paid to shareholders of SW from 1/1/1996 to the date of the response. Defendants objected that this demand was vague, overbroad, and burdensome, as well as called for attorney/client communications and work product (which they did not identify). They then said they would produce responsive documents and noted that "discovery is continuing." This last statement must be omitted from all further responses ordered, as the only documents which can be sought are those which defendant possesses, or has custody of, or control over. "Discovery is continuing" in such a context indicates failure to complete the diligent search or make the reasonable inquiry required.

Without any statement as to what is ambiguous, or why the demand is vague, such an objection is a "nuisance" objection, and does not justify a complete failure to produce. *Standon Co., Inc. v. Superior Court* (1990) 225 Cal. App. 3d 898, 901. Generally, such an objection should state the reasons therefore (Weil & Brown, Civil Procedure Before Trial (TRG, 1993) ¶ 8:1476). Defendants did not identify any phrase they were having trouble understanding, and the objection is overruled on that basis alone.

"Whether the description of records is sufficient to inform [responding party] of that which is desired, presents a question merely of whether under the circumstances and situation generally, considered in the light of reason and common sense, he ought to recognize and be able to distinguish the particular thing that is required." *Pacific Automobile Ins. Co. v. Superior Court* (1969) 273 Cal. App. 2d 61, 68. That would seem to be the case with corporate dividend documents. There may be minutes of the corporation, cancelled checks, etc. But whatever there is, defendants should be able to find the materials readily.

The claim that the demand is overbroad is not well taken either. One of the issues in this case is what is due to Kalmbach should his claims that he is or should have been a shareholder are found true. What was paid to other shareholders is excellent evidence of what Kalmbach, as a co-shareholder, would also be entitled to.

As to burden, there is no declaration from anyone but counsel. Lawyers cannot testify for their clients or authenticate purported documents of the client. Brown & Weil, Civil Procedure Before Trial, § 10:115 - 10:116; *Norcal Mutual Ins. Co. v. Newton* (2000) 84 Cal. App. 4th 64, 72, fnt. 6; *Cullincini v. Deming* (1975) 53 Cal. App. 3d 908, 914; *Maltby v. Shook* (1955) 131 Cal. App. 2d 349, 351-352; *Rodriguez v. County of LA* (1985) 171 Cal. App. 3d 171, 175.

To show objectionable burden requires a declaration from the responding party specifying the tasks required to be completed to answer, and the number of hours required to do those tasks. Generalization does not suffice. "Many hundreds of man-hours" and "approximately nine months" "is conclusionary and not factual in character," and insufficient to show burden. *Coriell v. Superior Court* (1974) 39 Cal. App. 3d 487, 493. See also *Perkins v. Superior Court* (1981) 118 Cal. App. 3d 761, 764. As defendants did not provide evidence of burden, this objection is also overruled.

4. Demand No. 8

This demand seeks various tax documents showing payments to defendant Feld as reported to tax authorities. Defendants objected that this demand was vague, overbroad, and burdensome, as well as violating the privacy rights of Feld, and contend it failed to comply with the requirements for seeking employee records found in section 1985.6. They say some documents have already been produced, and refuse to produce any others. They did not say the documents produced were responsive.

Defendants did not make any objection on the basis of the tax privilege discussed in *Webb v. Standard Oil Co.* (1957) 49 Cal.2d 509, *Brown v. Superior Court* (1977) 71 Cal. App. 3d, and *Schnabel v. Superior Court* (1993) 5 Cal. 4th 704. It is therefore waived.

Defendant Feld does have a privacy interest in these documents, even if he has waived his tax information privilege. That requires a showing of direct relevancy to an issue in controversy. The proponent of discovery of constitutionally protected material has the burden of making a threshold showing that the evidence sought is directly relevant to the claim or defense. *Harris v. Superior Court* (1992) 3 Cal. App.4th 661, 666; *Britt v. Superior Court* (1987) 20 Cal.3d 859, 862; *Davis v. Superior Court* (1992) 7 Cal. App.4th 1008, 1018.

Plaintiff has not provided any facts showing direct relevancy of this information to any issue in this case, and the declaration of counsel has no discussion of good cause for these materials. Under such circumstances, the privacy objection is sustained, and the lack of information as to good cause also requires denial of the motion as to this demand.

5. Demand No. 16

This demand asks for all cell phone records for any phone used by defendant Feld in part or completely for business purposes. Defendants objected that this demand was vague, overbroad, and burdensome, as well as violating the privacy rights of Feld, and failed to comply with the requirements for seeking employee records found in section 1985.6. They state that the cell phone records are not reasonably calculated to lead to the discovery of admissible evidence, but then say they will produce some for 2004 and 2005, with the private phone call info redacted.

Defendants contended that termination of Kalmbach was permitted because he used his company cell phone for personal reasons, against SW policy. This demand is designed to solicit documents showing if there really was such a policy, and if Mr. Feld followed it. Plaintiff has offered to withdraw this demand if defendants will stipulate they will not offer plaintiff's cell phone records into evidence. The Court has not seen any such stipulation. There is no subpoena involved, so Code of Civil Procedure section 1985.6's discussion of discovery of non-parties is not relevant here.

The overbreadth objection is well taken; the time period for which documents must be produced is limited to the time that Kalmbach was employed by defendant SW. The request is not vague. If desired, the records can be produced under the protective order to protect privacy, but this was an issue injected into the case by defendants, and that renders their privacy objection waived.

6. Demand No. 20

This seeks documents constituting or relating to communications with preparers of, or contributors to, any of the documents described in Request No. 21. Defendants objected that the demand was vague due to confusion over repeated numbers given by plaintiff to demands, so much so that it was not possible to respond. In his separate statement, plaintiff changed the demand to reference No. 19. However, defendants never had the opportunity to object to that quite different demand for documents.

Because the confusion hindered defendants' ability to make objections, as they could not tell what it was that was sought, they would be prejudiced if a further response were ordered to the new demand. The vagueness objection is sustained, without prejudice to service of a demand which clearly seeks what plaintiff now states he desired.

7. Demand No. 21

Here plaintiff demands all electronically stored information constituting or relating in any way to communications with anyone or entity “or relating to the terms, conditions, or performance of John Kalmbach’s employment at SWI.”

The demand is vague in that it appears to asks for any communication of any kind, and also for communications about Kalmbach’s employment. But the meet and confer letter limited it to communications about Kalmbach’s employment, which is not vague, and also avoids the overbreadth problem. No evidence of burden has been provided by defendants; that objection should therefore be overruled. The offer of two documents is without much value. A further response, with no objections but for those on the basis of attorney/client communication or work product doctrine, is ordered. If defendants assert either of those two permitted objections, they also need to specifically identify the documents as discussed above.

8. Demand No. 26

This one asks for documents reflecting communications of any kind with actual or potential investors or lenders to SW from 1/1/2009 to the date of the response, to include electronically stored information Defendants objected that this demand was vague, overbroad, and burdensome, and say it is not possible for them to provide documents reflecting all communications with potential investors. They state they gave some documents about an offer from Mighty Oak, and that is all they are parting with. No basis for the claim of impossibility s given.

The demand is not vague, nor overbroad, due to the very narrow time period at issue. If it is not possible for defendants to produce those documents, they must say why, such as that they were lost, destroyed, or who else might have them, as required by Code of Civil Procedure section 2031.230.

9. Demand No. 27

Sought here are documents relating, reflecting, evidencing or referring to the valuation by any person entity, persons, or group of entities, of SW or its stock, or any part of its stock, assets, intangibles, goodwill, going concern value, “or any other consideration that may be considered [sic] in making such an evaluation.” Defendants made three burden objections, none of which are supported by any evidence, and all of which are therefore overruled.

During meet and confer, plaintiff limited this demand to “appraisals or other documents where any person formally or informally expresses a value for SWI or its stock or assets.” The information is pertinent to the issue of the probable cost to Kalmbach to exercise his option to purchase stock and such.

A limitation to the period of time from Kalmbach's date of hire to the present, in addition to the limitation proposed by plaintiff, is imposed.

10. Demand No. 32

This seeks documents given to SW or Feld from 1/1/1999 to the response date relating to the terms, conditions, or performance of John Kalmbach's employment with SW. Defendants objected that this demand was vague, overbroad, and burdensome. The vagueness is ascribed to the phrase "relating to the terms, conditions, performance of John Kalmbach's employment at SWI." Defendants then state they produced a 1999 employment agreement and a 2005 letter of intent.

The demand is not vague, nor is it overbroad given the very narrow time limitation. There is no evidence of burden.

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 9-1-10.
(Judge's initials) (Date)

(23)

Tentative Ruling

Re: ***John Fermanian v. Synagro Technologies, Inc., et al.***
Superior Court No. 10 CECG 01527

Hearing Date: Thursday, September 2, 2010 (**Dept. 97B**)

Motion: Defendants Synagro Technologies, Inc.'s and Earthwise Organics, Inc.'s Demurrer to Plaintiff's First Amended Complaint

Tentative Ruling:

To OVERRULE Defendants' demurrer to all of Plaintiff's causes of action pursuant to Code of Civil Procedure § 430.10(f).

To SUSTAIN with leave to amend Defendant Synagro Technologies, Inc.'s demurrer to Plaintiff's third cause of action pursuant to Code of Civil Procedure § 430.10(e).

To SUSTAIN with leave to amend Defendant Earthwise Organics, Inc.'s demurrer to Plaintiff's first, second, and third causes of action pursuant to Code of Civil Procedure § 430.10(e).

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

Explanation:

1. Generally

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, California Practice Guide: Civil Procedure Before Trial (Rutter Group 2007) "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.)

2. Defendants' Demurrer to all of Plaintiffs' Causes of Action Pursuant to Code of Civil Procedure § 430.10(f)

Defendants Synagro Technologies, Inc. and Earthwise Organics, Inc. contend that the Plaintiff's first, second, and third causes of action are uncertain. Specifically, the Defendants argue that the first, second, and third causes of action are uncertain because the Plaintiff has failed to state which Defendants each cause of action is asserted against. However, the Defendants can reasonably determine what issues should be admitted or denied and what claims are directed against them. Therefore, the Plaintiff has sufficiently pleaded the first, second and third causes of action in certain and unambiguous terms.

For this reason, the Court overrules the Defendants' demurrer to the all of the Plaintiff's causes of action pursuant to Code of Civil Procedure § 430.10(f).

3. Defendant Synagro Technologies, Inc.'s Demurrer to Plaintiff's Third Cause of Action Pursuant to Code of Civil Procedure § 430.10(e)

Defendant Synagro Technologies, Inc. contends that the Plaintiff's third cause of action for fraud fails to state facts sufficient to constitute a viable cause of action. "To establish a claim for deceit based on intentional misrepresentation, the plaintiff must prove seven essential elements: (1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant made it, or the defendant made the representation recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff reasonably relied on the representation; (6) the plaintiff was harmed; and (7) the plaintiff's reliance on the defendant's representation was a substantial factor in causing that harm to the plaintiff." (*Manderville v. PCG&S Group, Inc.* (2007) 146 Cal. App. 4th 1486, 1498.) "In California, fraud must be pled specifically; general and conclusory allegations do not suffice. Thus the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect. This particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.'" (*Small v. Fritz Companies, Inc.* (2003) 30 Cal. 4th 167, 184.) With respect to a corporate defendant, plaintiff must allege facts to establish the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke and what was said or written and when. (*Tarmann v. State Farm Mutual Auto. Ins. Co.* (1991) 2 Cal. App. 4th 153, 157.)

The Plaintiff has failed to allege all of the necessary elements for a viable cause of action for intentional misrepresentation against Defendant Synagro Technologies, Inc. First, the Plaintiff has sufficiently alleged that the representations made by Defendants were false. Second, the Plaintiff has sufficiently alleged that, when Defendants made the representations to Plaintiff, the Defendants knew that the representations were false. Third, the Plaintiff has pled that the Defendants made the representations with the intent and purpose to induce Plaintiff's reliance on the representations and to persuade Plaintiff to

accept employment with Synagro. Fourth, Plaintiff has alleged that he justifiably relied on the representations and accepted employment with Synagro. Fifth, the Plaintiff has pled that he was harmed.

However, first, while the Plaintiff has alleged that alleged that Sam Monaco, then Plaintiff's manager and at the direction of Thomas Bintz and/or other high management officials of Defendant Synagro Technologies, Inc., represented orally, in a February 5, 2009 offer letter to Plaintiff, and in a February 13, 2009 document that if Plaintiff accepted employment and entered into an employment agreement with Synagro that Plaintiff would receive an annual management incentive bonus if Plaintiff and Synagro each met certain performance objectives, the Plaintiff has failed to allege Sam Monaco's authority to speak on behalf of Defendant Synagro Technologies, Inc. and when Monaco made any oral representations to Plaintiff. Consequently, the Plaintiff has failed to specifically plead that Defendant Synagro Technologies, Inc. represented to Plaintiff that an important fact was true. Second, while the Plaintiff alleges that his harm was a direct and proximate result of his reliance on Synagro's misrepresentations, the Plaintiff has failed to allege that the Plaintiff's reliance on Defendant's representations was a substantial factor in causing Plaintiff's harm.

For these reasons, the Court sustains with leave to amend Defendant Synagro Technologies, Inc.'s demurrer to Plaintiff's third cause of action for fraud pursuant to Code of Civil Procedure § 430.10(e).

4. Defendant Earthwise Organics, Inc.'s Demurrer to Plaintiff's First Cause of Action Pursuant to Code of Civil Procedure § 430.10(e)

Defendant Earthwise Organics, Inc. contends that the Plaintiff's first cause of action for wrongful termination in violation of public policy fails to state facts sufficient to constitute a viable cause of action. A cause of action for wrongful discharge/demotion in violation of public policy is comprised of the following elements: (1) that plaintiff was employed by defendant; (2) that defendant discharged or demoted plaintiff; (3) that [an allegation violation of public policy] was a motivating reason for plaintiff's discharge or demotion; and (4) that the discharge or demotion caused plaintiff harm. (CACI 2430.)

Plaintiff has failed to allege all of the elements necessary for a viable cause of action for wrongful termination in violation of public policy against Defendant Earthwise Organics, Inc. Specifically, the Plaintiff has failed to plead that he was employed by Defendant Earthwise Organics, Inc.

For this reason, the Court sustains with leave to amend Defendant Earthwise Organics, Inc.'s demurrer to Plaintiff's first cause of action for wrongful termination in violation of public policy pursuant to Code of Civil Procedure § 430.10(e).

5. Defendant Earthwise Organics, Inc.'s Demurrer to Plaintiff's Second Cause of Action Pursuant to Code of Civil Procedure § 430.10(e)

Defendant Earthwise Organics, Inc. contends that the Plaintiff's second cause of action for breach of contract fails to state facts sufficient to constitute a viable cause of action. "A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.)

The Plaintiff has failed to allege any of the elements necessary for a viable cause of action for breach of contract against Defendant Earthwise Organics, Inc. First, the Plaintiff has failed to allege that Plaintiff and Defendant Earthwise Organics, Inc. entered into a contract. Second, the Plaintiff has failed to allege that he performed, or had a valid excuse for nonperformance, his duties under a contract with Defendant Earthwise Organics, Inc. Third, the Plaintiff has failed to allege that Defendant Earthwise Organics, Inc. breached any contract. Fourth, the Plaintiff has failed to allege that Defendant Earthwise Organics, Inc.'s breach caused Plaintiff's damages.

For these reasons, the Court sustains with leave to amend Defendant Earthwise Organics, Inc.'s demurrer to Plaintiff's second cause of action for breach of contract pursuant to Code of Civil Procedure § 430.10(e).

6. Defendant Earthwise Organics, Inc.'s Demurrer to Plaintiff's Third Cause of Action Pursuant to Code of Civil Procedure § 430.10(e)

Defendant Earthwise Organics, Inc. contends that the Plaintiff's third cause of action for fraud fails to state facts sufficient to constitute a viable cause of action. "To establish a claim for deceit based on intentional misrepresentation, the plaintiff must prove seven essential elements: (1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant made it, or the defendant made the representation recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff reasonably relied on the representation; (6) the plaintiff was harmed; and (7) the plaintiff's reliance on the defendant's representation was a substantial factor in causing that harm to the plaintiff." (*Manderville v. PCG&S Group, Inc.* (2007) 146 Cal. App. 4th 1486, 1498.) "In California, fraud must be pled specifically; general and conclusory allegations do not suffice. Thus the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect. This particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.'" (*Small v. Fritz Companies, Inc.* (2003) 30 Cal. 4th 167, 184.) With respect to a corporate

(19)

Tentative Ruling

Re: ***R&S Farms v. Valhalla Sales***
Superior Court Case No. 09CECG04365

Hearing Date: September 2, 2010 (**Dept. 97A**)

Motion: by plaintiff to compel responses to form interrogatories, Set No. One from defendant Rios.

By plaintiff to compel responses to special interrogatories, Set No. One, from defendant Rios.

By plaintiff to compel responses to demand for inspection, Set No. One.

By plaintiff for order deeming request for admissions, Set No. One, admitted.

Tentative Ruling:

To deny without prejudice.

To set a hearing on a motion for reconsideration of the Court's order permitting counsel for defendant Rios to withdraw, pursuant to *Le Francois v. Goel* (2005) 35 Cal. 4th 1094. That hearing shall be held on September 29, 2010 at 3:30 p.m. in this Department. Mr. Phillips must appear personally at that hearing, and the Clerk is directed to retain him on the service list for the time being.

Explanation:

The instant papers contain four motions seeking orders with regard to four separate discovery devices, for which only one motion fee was paid. The declaration of moving party's counsel fails to comply with California Rules of Court, Rule 3.110(f). Moving party did not inform the Court of the pending discovery when the motion by Rios' counsel to withdraw was made although Rios's counsel failed to do so, nor did it discuss those circumstances in the papers. The papers were not served on Rios, who also was not advised of pending discovery in the motion to withdraw.

These defects call for the motions to be denied. As there is no time limit on simple motions to compel, that denial will be without prejudice.

(18)

Tentative Ruling

Re: *Anezinos v. Thomas J. Gearing, et al.*
Case no. 09CECG03427

Hearing Date: September 2, 2010 (Dept. 97B)

Motion: By defendant Thomas J. Gearing, to compel further production of documents and for monetary sanctions

Tentative Ruling:

To continue the hearing on the motion to October 7, 2010. The parties are ordered to further meet and confer, *either in person or at a minimum by telephone*, and to file with the court no later than September 30, 2010 a joint separate statement that sets for the substance of any remaining disputed discovery.

Explanation:

California Code of Civil Procedure (CCP) section 2031.310(b)(2) requires that motions to compel further production of documents show a “reasonable and good faith attempt” at informal resolution of each issue presented by the motion. In *Stewart v. Colonial W. Agency* (2001) 87 Cal. App. 4th 1006, 1016, the California appellate court stated:

A determination of whether an attempt at informal resolution is adequate . . . involves the exercise of discretion. The level of effort at informal resolution which satisfies the 'reasonable and good faith attempt' standard depends upon the circumstances. In a larger, more complex discovery context, a greater effort at informal resolution may be warranted. In a simpler, or more narrowly focused case, a more modest effort may suffice. The history of the litigation, the nature of the interaction between counsel, the nature of the issues, the type and scope of discovery requested, the prospects for success and other similar factors can be relevant. Judges have broad powers and responsibility to determine what measure and procedures are appropriate in varying circumstances.” (*Obregon v. Superior Court* (1998) 67 Cal. App. 4th 424, 431 [79 Cal. Rptr. 2d 62].) “A trial judge’s perceptions on such matters, inherently factual in nature at least in part, must not be lightly disturbed.” (*Ibid.*)

This standard mandates a “serious effort” at negotiation and informal resolution of the discovery dispute prior to filing the motion to compel. (*Townsend v. Superior Court* (1998) 61 Cal.App.4th 1431, 1435-1437.)

Tentative Ruling

(RA#24)

Re: **Debra Rogers v. Saint Agnes Medical Center, et al.**
Court Case No. 09CECG02897

Hearing Date: **September 2, 2010 (Dept. 97C)**

Motion: Defendant Kaiser Foundation Hospital's Motion to Stay
Action Pending Arbitration, or, in the alternative, a Petition to
Compel Arbitration

Tentative Ruling:

To grant the Kaiser Defendants the motion to stay the entire action pending arbitration. [CCP §1281.2; CCP §§ 1281.4 and 1292.8] Since arbitration is already in progress, the petition to compel arbitration is moot, and thus is ordered off calendar.

Explanation:

Plaintiff appears to concede the validity of the arbitration agreement, since she indicates that she filed her demand for arbitration because this was a "required process under its member agreement." Defendants Kaiser Foundation Hospitals, Kaiser Foundation health Plan, Inc., and The Permanent medical Group, Inc. ("Kaiser defendants") have established that at the time of the conduct alleged, plaintiff was enrolled as a Health Plan member through her husband's employment under a group agreement between Health Plan and Northern California General Teamsters and through her own employment under an agreement between Health Plan and the United States Office of Personnel Management ("OPM") through the Federal Employees Health Benefits Program ("FEHBP").

There is no argument made by plaintiff as to there being any grounds to revoke the agreement or find it unconscionable or otherwise invalid. The claims appear to fall within the scope of the arbitration agreement (and there is no argument that they do not).

Under California law, once a valid agreement to arbitrate a controversy is found to exist, a petition to compel arbitration must be granted, unless the right to compel arbitration has been waived or grounds exist to revoke the agreement, or arbitration should be stayed for very narrow reasons not present here. [CCP §1281.2] A petition to compel arbitration may be coupled with a motion to stay the court action between the parties. [CCP §§ 1281.4 and 1292.8]

Likewise, the Federal Arbitration Act ("FAA") compels this result. [9 U.S.C. § 1 et seq.] The U.S. Supreme Court has vigorously enforced the FAA, since

agreements to arbitrate under that Act “evidences a transaction involving” interstate commerce within the meaning of Section 2, 9 U.S.C. [See *Allied-Bruce Terminix Cos., Inc. v. Dobson* (1995) 513 U.S. 265, 282; see also *Toledo v. Kaiser Permanente Med. Group* (1997) 987 F.Supp. 1174, 1180—Health Plan agreement providing for medical and hospital services “evidences a number of links to interstate commerce sufficient to invoke the application of the FAA.”] The FAA’s pro-arbitration policy and standards preempt any contrary state law rules, even if the petition to compel arbitration is brought in state court. [See, e.g., *Doctor’s Assocs. Inc. v. Casarotto* (1996) 517 U.S. 681, 686-88]

The validity and applicability of the arbitration provision is also supported by the Federal Employee Health Benefits Act (“FEHBA”), 5 U.S.C. §8901 et seq., under which OPM contracted with Health Plan to furnish health benefits to plaintiff. As courts have found, 5 U.S.C. §8902(m)(1) of FEHBA expressly preempts any state law that is inconsistent with the provisions of the OPM-Health Plan contract.

The Kaiser defendants argue that CCP §1295 also applies to the OPM and Teamster’s arbitration agreements in question. Courts have held that the Kaiser arbitration provision is an agreement to arbitrate professional negligence claims within the scope of CCP §1295. [Citing to *Herbert v. Superior Court* (1985) 169 Cal.App.3d 718, 726-727, n.4; *Moore v. Conliffe* (1994) 7 Cal.4th 634, 657, n.9]

This statute regulates what a medical provider must put in its agreements with patients to ensure that a court will find that the patient has given up his/her right to a jury trial of a medical malpractice action. Subsections (a) through (c) set forth the mandatory language any such agreement must have, and also mandates the font size and color of the warnings about arbitration. If the proper language is contained in the medical services agreement, then such a contract will not be found to be a contract of adhesion, or unconscionable, or otherwise improper. Furthermore, the notice provisions of subsections (a) through c) do not apply to any recognized health care service plan contract which “has a procedure for notifying prospective subscribers of the fact that the plan has an arbitration provision, and the plan contracts conform to [H&S §1373(i)].”

Defendants’ supporting declarations from its Director of Health Plan Licensing, Maria Borje-Bonkowski and its Director of FEHB Contract Administration and Development establish that these arbitration provisions indeed comply with CCP §1295(f), and thus defendants argue that they are arbitration provisions for medical services that should be found valid under this statute, without having the exact language required under subsections (a) through (c).

However, the case law cited by defendants indicates that CCP §1295 may not *directly* apply to the arbitration agreement here, even though its contract is

the type mentioned in subsection (f) of that statute. In *Madden v. Kaiser Foundation Hospitals*, the California Supreme Court found that a contract for a group medical plan (similar to the one here, and also involving Kaiser) did not come under CCP §1295. [See *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 709] In fact, the Court stated that §1295 governed “an arbitration provision inserted into an individual medical services contract.”

Even the court’s language in the *Herbert* ruling (*supra*) underscores this point. In discussing CCP §1295 (among other statutes evidencing broad Legislative support for arbitration), the court clearly stated that this statute is “inapplicable” to plans such as Kaiser’s (and referenced Kaiser specifically) because of subdivision (f). However, the court in *Herbert* found that “this is only because such plans must contain alternative means for notifying plan members of arbitration provisions in the plan agreements.” [*Herbert v. Superior Court* (1985) 169 Cal.App.3d 718, 727] Thus, the court concluded that “it logically follows that arbitration provisions may be enforced where, as here, proper notice of the arbitration provision is given.” In other words, even if the arbitration agreement did not directly come under the ambit of §1295 (because it had other analogous statutes that controlled its language), the court in *Herbert* found that it should receive similar treatment as to the validity and enforceability of the arbitration provisions that an individual contract under CCP §1295 would receive, since the only difference is the method of notifying the patient about the arbitration provisions.

On this logic, the rest of defendants’ argument makes sense: if the principals of §1295 apply to this arbitration agreement concerning medical services, then the “healthcare exemption” under CCP §1281.2(c) should apply, and the court has no discretion to deny arbitration, even though there are unrelated parties and there is a risk of conflicting rulings on common issues of law or fact. Clearly, this result was contemplated by the Legislature in multi-defendant medical malpractice cases where plaintiff had an arbitration agreement with only one defendant, since §1281.2(c) operates to mandate that very result (if the contract contains the language mandated by §1295).

Furthermore, this is the same result if the arbitration agreements in question are controlled by the Federal arbitration provisions. Defendants have clearly presented sufficient evidence to show that this contract “involves interstate commerce,” and thus it should be governed by the Federal Arbitration Act (“FAA”). The FAA contains no such provision for exercise of the court’s discretion to deny arbitration, where there is a valid, enforceable agreement, and would require the arbitration to proceed [see 9 USC §§ 3, 4; See *Dean Witter Reynolds, Inc. v. Byrd* (1985) 470 U.S. 213, 216–221] Defendant has supplied ample evidence that this agreement is governed by the FAA, and plaintiff has not countered this evidence. On this basis alone, arbitration must be compelled.

Tentative Ruling

(17)

Re: ***Fulbright v. Mohammed et al.***
Superior Court Case No. 09 CECG 02034

Hearing Date: September 2, 2010 (Dept. 97D)

Motion: Plaintiff's Motion to Compel Responses to Form Interrogatories – General, Set One
Plaintiff's Motion to Compel Responses to Form Interrogatories – Employment, Set One
Plaintiff's Motion to Compel Responses to Special Interrogatories, Set One
Plaintiff's Motion to Compel Responses to Requests for Production, Set One
Plaintiff's Motion to Deem Admissions Admitted

Tentative Ruling:

To grant the Motion to Compel Responses to Form Interrogatories -- General, Set One; Form Interrogatories – Employment, Set One; Special Interrogatories, Set One; and the Motion to Compel Responses to Requests for Production, Set One. Defendants Raj Mohammed aka Sam Malone; Johid Mohammed, and Johid Mohammed dba JFM Management Company will provide verified responses to the Form Interrogatories -- General, Set One; Form Interrogatories – Employment, Set One; Special Interrogatories, Set One; and the Motion to Compel Responses to Requests for Production, Set One served by Plaintiff without objection within 20 days after service of this order. To grant Plaintiff's Motion to Deem Admissions Admitted. The truth of the matters specified in the Requests for Admission, Set One, is to be deemed admitted, unless defendants serve, before the hearing, a proposed response to the requests for admission that is in substantial compliance with Code of Civil Procedure sections 2033.210, 2033.220 and 2033.230. To grant plaintiff's request for monetary sanctions against defendants Raj Mohammed aka Sam Malone; Johid Mohammed, and Johid Mohammed dba JFM Management Company in the amount of \$650.00, payable to David C. Hollingsworth within 30 days after service of this order.

To order plaintiff to pay additional filing fees of \$160.00 to be due and payable to the court clerk within 30 days of service of this order. (Gov. Code § 70617, subd. (a).) (Although plaintiff claims to have paid \$200 in filing fees, the notation on the notice of motion and our filing system indicate the amount paid was \$40.)

Explanation:

Form & Special Interrogatories:

Form and Special Interrogatories were served by mail April 16, 2010. (Hollingsworth Decl. ¶¶ 2-4; Exhibits "A," "B," & "C".) Responses were due May 21, 2010. No responses have been received. (Hollingsworth Decl. ¶ 9.)

The motion to compel the initial responses to the form and special interrogatories is granted. (Code Civ. Proc. §§2030.260, subd. (a), 2030.290, subd. (b).)

Request for Production of Documents

Requests for Production of Documents were likewise served by mail October 6, 2009. (Hollingsworth Decl. ¶ 6; Exhibit "E.") Responses were due May 21, 2010. No responses have been received. (Hollingsworth Decl. ¶ 9.)

The motion to compel the production of documents is granted. (Code Civ. Proc. §2031.300, subd. (b).)

Motion to Deem Requests for Admission Admitted:

Code of Civil Procedure section 2033.280, subdivision (b) provides that if a party fails to timely respond to requests for admission, "[t]he requesting party may move for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted, as well as for a monetary sanction." This section leaves no room for discretion. (*Tobin v. Oris* (1992) 3 Cal.App.4th 814, 828.)

A set of request for admissions was served on defendant by mail on April 16, 2010. (Hollingsworth Decl. ¶ 5; Exhibit "D.") While defendants claim they have responded, the responses submitted to the court are not verified. Unverified responses are "tantamount to no responses at all." (*Appleton v. Superior Court* (1988) 206 Cal.App.3d 632.) Accordingly, the court must grant the motion for order deeming the matters admitted unless plaintiffs serve a proposed response that is in substantial compliance with Code of Civil Procedure §2033.280 subdivision (a)(1), i.e., verified responses, prior to the hearing.

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

Issued By: DRF on 9-1-10.
(Judge's initials) (Date)