

Tentative Rulings for February 2, 2012
Departments 402, 403, 501, 502, 503

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).)

08CECG03373 *Popps v. Hurado* (Dept. 403)
10CECG04204 *Green v. Reedley Lions Club* (Dept. 403)
11CECG03233 *Baker v. LVN C. Cardens of Pleasant V alle* (Dept. 403)

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

11CECG01016 *Roscoe Moss Manufacturing Co., Inc. v. USA Hydro Washing, Inc. et al.* is continued to Thursday, February 9, 2012 at 3:30 p.m. in Dept 402.

(Tentative Rulings begin at the next page)

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Tentative Ruling

Re: ***Nicole Banks v. Amarjit Sidhu, et al.***
Superior Court Case No.09 CECG 01355

Hearing Date: Thurs., Feb. 2, 2012 (**Dept. 402**)

Motion: Defendant's Motion for Summary Judgment

Tentative Ruling:

To GRANT (CCP 437c.)

Within 5 calendar days of the clerk's service of the minute order, Defendant shall submit a proposed judgment consistent with this minute order.

Explanation:

Defendant makes a prima facie showing that this personal injury action is governed by the 2-year statute of limitations. (**CCP 335.1.**) The accident took place on 4/14/07, but Plaintiff did not file her Original Complaint until 4/17/09, or three days late. So the action is barred unless the statute is tolled.

Defendant admits she spent about 5 weeks in India, but makes a prima facie showing that the statute of limitations was not tolled because Plaintiff Nicole Banks failed to exercise due diligence in attempting to locate her while she was in India. (**Hirsch v. Blish** (1977) 76 Cal.App.3d 163, 166, citing **Dovie v. Hibler** (1967) 254 Cal.App.2d 673.) Plaintiff admits that she did not exercise due diligence to locate Defendant during Defendant's absence. (Plaintiff's Response, Fact 8.) Plaintiff also admits that Defendant was amenable to service outside California under **Vehicle Code 17459** and **17460** because she had accepted a California driver's license and certificate of registration. (Plaintiff's Response, Fact 11.)

So the burden shifts to Plaintiff to show that there are triable issues of material fact as to whether she exercised due diligence to locate Defendant while Defendant in India, or to show that there are triable issues of material fact as to whether the statute of limitations should be tolled.

In Opposition, Plaintiff argues that the statute of limitations was tolled under **CCP 351** and that no showing of due diligence was required to trigger the tolling provision.

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Tentative Ruling

Re: ***DiBuduo et al. v. Bank of the West et al.***
Superior Court Case No. 10 CECG 01055

Hearing Date: February 2, 2012 (**Dept. 402**)

Motion: By Plaintiffs seeking leave to file a Second Amended
Complaint

Tentative Ruling:

To deny the motion with prejudice as to the fourth, eighth, twelfth, thirteenth, seventeenth, eighteenth, nineteenth and twentieth causes of action. The deny the motion **without** prejudice as to the first, second, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, and sixteenth cause of action.

Explanation:

Pre-Requisites

The motion does not comply with CRC Rule 3.1324 (a)(2) and (a)(3). It fails to state what allegations are going to be deleted and what allegations are going to be added. It also does not comply with CRC Rule 3.1324(b)(4). Plaintiffs do not explain why the request for amendment was filed five months after the tolling agreement was terminated.

Effect of Federal Action

Plaintiffs requested judicial notice of various pleadings and orders filed in the U.S. District Court for the Eastern District of California entitled *Kingsburg Apple Packers Inc. dba Kingsburg Orchards v. Ballantine Produce, Inc.* Case No. 1:09-CV-901-AWI-JLT. Judicial notice will be granted pursuant to Evidence Code § 452 (d)(2). The Complaint in Intervention filed by DLM shows that in addition to PACA claims, DLM also filed a cause of action for breach of contract seeking damages in the amount of \$100,498. See pages 5-6 ¶¶ 20-24 of Exhibit C attached to the Supplement Request for Judicial Notice filed on January 5, 2012. Plaintiff contends that the Federal Court dismissed its claims. See Exhibit D. But, this is not accurate. On October 28, 2009 the Federal Court directed DLM to file a motion to determine the validity of its PACA claims. Ultimately, the court held that the claims were untimely. See page 1 lines 18-24 of the Order attached as Exhibit D. But, the Order does not address the third cause of action for breach of contract. According to the Federal Court's Register of Actions, the

Complaint in Intervention has not been dismissed. Plaintiffs have submitted no evidence to the contrary. Accordingly, the Third Cause of Action of the Complaint in Intervention is identical to the first cause of action of the proposed Second Amended Complaint. DLM cannot litigate the same cause of action in two forums. See *Abdallah v. United Savings Bank* (1996) 43 C.A.4th 1101, 1110. Therefore, leave to amend will be denied **without prejudice** as to the first cause of action.

Non-viable Causes of Action

There are a number of causes of action alleged in the proposed Second Amended Complaint that are not viable as a matter of law. The granting of a motion seeking leave to amend lies in the discretion of the court “in furtherance of justice, and on such terms as may be proper . . .” See CCP § 473(a)(1). It is not proper to allow a party to plead nonexistent causes of action. Case law gives the court the right to deny leave to amend under these circumstances. See *Yee v. Mobilehome Park Rental Review Bd.* (1998) 62 CA4th 1409, 1429. In fairness, some of these causes of action were attacked via demurrer and overruled. But, a court has the inherent authority to reconsider its interim rulings sua sponte at any time prior to the entry of judgment. See *Le Francois v. Goel* (2005) 35 C4th 1094, 1107 and *Darling, Hall & Rae v. Kritt* (1999) 75 CA4th 1148, 1156–1157.

The fourth cause of action seeking the imposition of constructive trust is based upon Ballantine’s failure to pay the proceeds of the crop sale to DLM. A constructive trust is not a true trust but an **equitable remedy** available to a plaintiff seeking the recovery of **specific property** in a number of widely differing situations. The cause of action is not based on the establishment of a trust, but consists of the fraud, breach of fiduciary duty, or other act that entitles the plaintiff to some relief. That relief, in a proper case, may be to make the defendant a constructive trustee with a duty to transfer the property to the plaintiff. See *In re Marriage of Buford* (1984) 155 C.A.3d 74, 79 and *Douglas v. Superior Court* (1989) 215 C.A.3d 155.

But, on June 12, 2009 Ballantine was placed under receivership via an order signed by the Honorable Judge Black in Fresno Superior Court Case No. 09 CECG 01818 entitled *Bank of the West v. Ballantine*. On August 16, 2011, an order was entered in that case. The Court determined that “the Receiver gave written notice of the Motion to all of the parties to this action, to interested 3rd parties, and to **any remaining known claimants and /or potential claimants**, either by service of the Notice of Motion directly or via published legal notice . . . The Receiver's Verified First and Final Report of Administration and Accounting (Final Account) is accepted. . . .” Accordingly, the fourth cause of action appears to be moot.

As for the eighth and twelfth causes of action, they do not seek the recovery of specific property. Instead, they both seek the recovery of payment

that was owed. Because a **constructive trust** is a remedy to compel transfer of **specific** property, title to which is in the defendant, the complaint must show the existence of that property. See *Burke v. Maguire* (1908) 154 C. 456, 469, 98 P. 21. Therefore, leave to amend will be denied as to the fourth, eighth and twelfth causes of action.

In addition, the thirteenth cause of action alleges breach of the implied covenant of good faith and fair dealing. But, Plaintiff has already pleaded a cause of action for breach of the employment agreement. See ninth cause of action. "Although breach of the implied covenant often is pleaded as a separate count, a breach of the implied covenant is necessarily a breach of contract." (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885.) Therefore, the thirteenth cause of action is duplicative of the ninth cause of action and leave to amend will be denied.

The fourteenth and fifteenth causes of action are defective as well. Ballantine et al. filed opposition on the grounds that inter alia, the causes of action were not properly pleaded. The Court will exercise its discretion and consider the late filed opposition. See in *Mann v. Cracchiolo* (1985) 38 C3d 18, 30.

Misrepresentation is a type of fraud. It must be pleaded with the requisite degree of particularity. See *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216. Every element of the cause of action for fraud must be alleged in full, factually and specifically. The policy of liberal construction of pleading will *not* be invoked to sustain a pleading defective in any material respect. See *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1332. The particularity requirement necessitates pleading facts that "show *how, when, where, to whom, and by what means* the representations were tendered." See *Lazar v. Sup.Ct. (Rykoff-Sexton, Inc.)* (1996) 12 Cal.4th 631, 645 and *Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73.

Also, with the exception of the proposed Defendant, David Albertson, the other Defendants are corporations. In order to state a cause of action for fraud against a corporation, a plaintiff must allege:

- the *names of the persons* who made the misrepresentations;
- their authority* to speak for the corporation;
- to whom they spoke;
- what they said or wrote; and
- when it was said or written. See *Lazar v. Sup.Ct. (Rykoff-Sexton, Inc.)* (1996) 12 C4th 631, 645 and *Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 CA4th 153, 157.

Therefore, leave to amend will be denied **without prejudice** as to the fourteenth and fifteenth causes of action.

The seventeenth cause of action is also defective. It seeks to set aside or annual fraudulent transfers of the crop proceeds. But, this cause of action is not well thought out. It alleges that Ballantine made payments to Pelton in the amount of at least \$250,00 and to BOW in the amount of \$931,864. But, the Pelton Defendants have been dismissed. As for Defendant BOW, as stated supra, on June 12, 2009 Ballantine was placed under receivership in Case No. 09 CECG 01818 entitled *Bank of the West v. Ballantine*. On August 16, 2011, an order was entered in that case accepting the Receiver's Verified First and Final Report of Administration. Accordingly, the seventeenth cause of action appears to be moot.

The eighteenth cause of action alleges conspiracy. But, there is no independent cause of action for civil conspiracy in California. See *Kidron v. Movie Acquisition Corp.* (1995) 40 C.A.4th 1571, 1581 and *Kesmodel v. Rand* (2004) 119 C.A.4th 1128, 1140. Therefore, leave to amend will be denied as to the eighteenth cause of action.

The nineteenth cause of action seeks a declaration that the loans made by BOW to Ballantine should be equitably subordinated to the claims of the Plaintiffs. But a search of *13 Witkin Summary of California Law* (10th Ed. 2010) "Equity" §§ 180, 183-189 reveal no basis for the application of the doctrine of equitable subrogation outside the insurance or surety context. The few exceptions are not applicable to the scenario at bench. *Id.* at § 185. Therefore, leave to amend will be denied as to the nineteenth cause of action.

The twentieth cause of action is barred by the doctrine of judicial estoppel. This doctrine, sometimes referred to as the doctrine of preclusion of inconsistent positions, prevents a party from "asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process." (*Jackson v. Los Angeles* (1997) 60 C.A.4th 171, 181).

As BOW submitted in its supplemental brief, Jerry DiBuduo was sued as a co-Defendant in federal court along with Ballantine. In DiBuduo's Answer to the Complaint in Intervention filed by Sufuco Alimentos LTDA, he admits that Ballantine was a commission merchant, dealer or broker operating subject to the provisions of PACA. See Answer of DiBuduo at ¶1 attached as Exhibit 1 to the Request for Judicial Notice. The request for judicial notice will be granted pursuant to Evidence Code § 452 (d)(2). As BOW argues, the admission is diametrically opposed to the position taken in the twentieth cause of action—Ballantine was a "processor".

Food & Agr. Code § **55407** "Processor" states:

"Processor" means any person that is engaged in the business of **processing or manufacturing** any farm product, that solicits, buys, contracts to buy, or otherwise takes title to, or possession or control of, any farm product from the producer of the farm product for the purpose of processing or manufacturing it and selling, reselling, or redelivering it in any dried, canned, extracted, fermented, distilled, frozen, eviscerated, or other preserved or processed form. **It does not, however, include any retail merchant** that has a fixed or established place of business in this state and does not sell at wholesale any farm product which is processed or manufactured by him.

A "producer's" lien is created only when a farm product is sold to a processor not a commission merchant. See Food & Agr. Code § 55631:

Every producer of any farm product that sells any product which is grown by him **to any processor** under contract, express or implied, in addition to all other rights and remedies which are provided for by law, has a lien upon such product and upon all processed or manufactured forms of such farm product for his labor, care, and expense in growing and harvesting such product. The lien shall be to the extent of the agreed price, if any, for such product so sold. If there is no agreed price or a method for determining it which is agreed upon, the extent of the lien is the value of the farm product as of the date of the delivery. Any portion of such product or the processed or manufactured forms of such product, in excess of the amount necessary to satisfy the total amount owed to producers under contract, shall be free and clear of such lien.

Accordingly, leave to amend will be denied as to the twentieth cause of action.

Finally, the proposed Second Amended Complaint is too detailed. The first 25 pages are devoted to the "background facts and the material facts". See ¶¶ 1-72. Then, like a "chain letter", the first 72 paragraphs are incorporated into the first cause of action. The second cause of action incorporates the previous paragraphs and so on. These reincorporations are continued through the twentieth cause of action. This is **NOT** an effective way to plead. In fact, this type of "chain letter" pleading has been criticized for creating ambiguity and redundancy. See *International Billing Services, Inc. v. Emigh* (2000) 84 CA4th 1175, 1179 and *Uhrich v. State Farm Fire & Cas. Co.* (2003) 109 CA4th 598, 605. Basically, there are few FACTS set forth in **any** of the causes of action. Instead, legal conclusions are alleged in large part.

As stated long ago by the Supreme Court in *Green v. Palmer* (1860) 15 C. 411: "Facts only must be stated. This means . . . the facts, as contra-

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Tentative Ruling

Re: ***Hernandez v. Sanchez***
Superior Court Case No. 11CECG00210

Hearing Date: February 2, 2012 (Dept. 501)

Motion: by guardian ad litem for approval of compromise of claim for minor
Juan Daniel Hernandez

By guardian ad litem for approval of compromise of claim for minor
Maria Hernandez

Tentative Ruling:

To deny without prejudice.

Explanation:

A report from the childrens' physician attesting to their complete recovery is necessary. So too is an explanation of why the medical bills for each child are so different, when the injuries discussed appear to be lesser for the child with nearly \$9,000 in bills than for the child with a \$234.54 bill. Actual billings need be submitted with any amended petition.

There is no discussion of why the father is entitled to twice as much of the overall settlement fund than each child. Such a division of the fund may well be justified, but the absence of any explanation leaves the question open. There is also no evidence of the financial position of the defendant which supports a decision to limit recovery to insurance proceeds. The loss at issue is more than substantial, and could support recovery of more than \$100,000. There is no discussion of any liability problems, and it appears that liability is not really contested.

The proposal to place the childrens' settlement proceeds into an annuity is not supported. Annuities are not guaranteed by the U.S. Government, as certificates of deposit are. The return on the investment to be made does not seem to be much higher than the return would be on a long term certificate of deposit, without the safety. The proposed insurer is not one of those listed as the strongest by Weiss Ratings, a company which does not collect fees for its ratings from the companies rated and which was cited as more reliable by the U.S. General Accounting Office in a 1994 report to Congress. See [Insurance Ratings: Comparison of Private Agency Ratings for Life/Health Insurers](http://archive.gao.gov/t2pbat2/152669.pdf) (1994, U.S. GAO), which can be found at <http://archive.gao.gov/t2pbat2/152669.pdf>. The Court believes that the parties should explore the option of a certificate of deposit or annuity with a higher rated insurer.

Tentative Ruling

(17)

Re: ***Lucas v. KTDA Group Homes, Inc. et al.***
Superior Court Case No. 11 CECG 02159

Hearing Date: February 2, 2012 (Dept. 501)

Motion: Motion to Strike

Tentative Ruling:

To deny.

Explanation:

A motion to strike can be used to cut out any 'irrelevant, false or improper' matters or "a demand for judgment requesting relief not supported by the allegations of the complaint." (Code Civ. Proc. § 431.10(b).) A motion to strike is the proper procedure to challenge an improper request for relief, or improper remedy, within a complaint. (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166-167.)

Defendants claim that there are insufficient facts to support a claim for punitive damages. With respect to punitive damage allegations, mere legal conclusions of oppression, fraud or malice are insufficient (and hence improper) and therefore may be stricken. However, if looking to the complaint as a whole, sufficient facts are alleged to support the allegations, then a motion to strike should be denied. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.) Sufficient allegations supply the circumstances which make the malicious or despicable conduct apparent. (*Grieves v. Superior Court, supra*, 157 Cal.App.3d at pp. 166-167.)

There must be clear and convincing evidence that the defendant is guilty of oppression, fraud or malice. (Civ. Code, § 3294, subd. (a); *Neal v. Farmers Ins. Exchange* (1978) 21 Cal. 3d 910, 922.) Of course, at the pleading stage, we concern ourselves merely with whether the plaintiff had pled facts sufficient to state oppression, fraud or malice. "'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code, § 3294, subd. (c)(2).) Malice is "conduct which is [1] intended by the defendant to cause injury to the plaintiff or [2] despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code § 3294, subd. (c)(1).)

"Despicable" conduct is defined as "conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down

upon and despised by ordinary decent people.” Such conduct has been described as “having the character of outrage frequently associated with crime.” (*Tomaselli v. Transamerica Ins .Co.* (1994) 25 Cal.App.4th 1269, 1287.) “[A]bsent an intent to injure the plaintiff, ‘malice’ requires more than a willful and conscious disregard of the plaintiff’s interests. The additional component of ‘despicable conduct’ must be found.” (*College Hosp. v. Superior Court* (1994) 8 Cal.4th 704, 725.)

Defendants contend the allegations of the complaint are conclusionary and not factual, and therefore do not support a claim for punitive damages. (See *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1041-1042.) This is correct, but it is also true that a complaint is sufficient if it contains “[a] statement of the facts constituting the cause of action, in ordinary and concise language.” (See Code Civ. Proc., § 425.10, subd. (a).) The rules of pleading require only general allegations of ultimate fact. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47; *Lim v. The TV Corp. Internat.* (2002) 99 Cal.App.4th 684, 690.) A plaintiff need not plead evidentiary facts supporting the allegation of ultimate fact. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 212.)

Here, plaintiff pleads that he was fired “in retaliation” for his complaints. This allegation can be sufficient to support a claim for punitive damages. Punitive damages based on retaliation were permitted in *Monge v. Superior Court* (1986) 176 Cal.App.3d 503, in which the Court of Appeal concluded that sexual harassment in itself pleads the evil motive necessary to support punitive damages or emotional distress. (*Id.* at p. 511.) *Monge* relied on *Perkins v. Superior Court, supra*, 117 Cal.App.3d 1 which held that the alleged conclusions of fact or law considered in the context of alleged wrongful conduct “in retaliation” pleaded an evil injurious motive sufficient to establish malice and sustain a plea for punitive damages. However, in *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, the appellate court examined both *Monge* and *Perkins* and concluded that a properly pled cause of action for retaliation in violation of FEHA does not, support a claim for punitive damages. (*Id.* at p. 620.)

The allegations that plaintiff was deliberately fired for an unlawful purpose are adequate to support a claim for punitive damages. Such conduct would be “oppressive” in that it subjected plaintiff to the loss of his job which is a “cruel and unjust hardship” in conscious disregard of his rights. The conduct was also allegedly intended to harm plaintiff and thus made been seen as malicious within the meaning of Civil Code section 3294.

The failure to comply with California Rule of Court 3.1322 is consequently irrelevant.

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.

