

**Tentative Rulings for May 26, 2016**  
**Departments 402, 403, 501, 502, 503**

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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).)

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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.

- 13CECG03906      *Arteaga v. Fresno Community Regional Medical Center* is continued to Tuesday, June 7, 2016, at 3:30 p.m. in Dept. 402
- 14CECG01472      *Gill v. Fresno Community Regional Medical Center* is continued to Tuesday, June 7, 2016, at 3:30 p.m. in Dept. 402
- 14CECG02305      *Stevenson v. Fresno Community Regional Medical Center* is continued to Tuesday, June 7, 2016, at 3:30 p.m. in Dept. 402
- 14CECG02360      *Riddle v. Community Medical Centers* is continued to Tuesday, June 7, 2016, at 3:30 p.m. in Dept. 402
- 15CECG01565      *Maldonado v. Fresno Community Regional Medical Center* is continued to Tuesday, June 7, 2016, at 3:30 p.m. in Dept. 402
- 16CECG00791      *Riddle v. Community Medical Centers* is continued to Tuesday, June 7, 2016, at 3:30 p.m. in Dept. 402

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(Tentative Rulings begin at the next page)

# **Tentative Rulings for Department 402**

# **Tentative Rulings for Department 403**

(5)

## **Tentative Ruling**

Re: ***Molina v. Community Medical Centers, the Walker Group, Inc. and Dru Walker***  
Superior Court Case No. 16 CECG 00071

Hearing Date: May 26, 2016 (**Dept. 403**)

Motion: Compel Arbitration and stay action pursuant to CCP § 1281 et seq.

### **Tentative Ruling:**

To grant the motion pursuant to CCP § 1281.4 and order Plaintiff and Defendant Community Regional Medical Center to arbitrate the dispute at bench. The action at bench will be stayed.

### **Explanation:**

### **Background**

On January 11, 2016, Plaintiff filed a complaint alleging seven "causes of action":

1. Discrimination on the basis of race;
2. Hostile work environment;
3. Failure to prevent harassment and discrimination;
4. Wrongful termination/constructive termination;
5. Intentional Infliction of emotional distress;
6. Negligent infliction of emotional distress; and
7. Punitive Damages.

The action arose from Plaintiff's employment as a maintenance worker with Defendant Community Medical Centers. His immediate supervisor was Dru Walker. Plaintiff alleges that he was continuously subjected to anti-Mexican slurs by Walker. Despite his seven year employment history, on March 23, 2014, Plaintiff was "demoted" to the night shift and an employee with less seniority took his day shift. In the end, Plaintiff was taken off work by his physician due to stress. When he was unable to return, he was terminated on March 30, 2015. See Declaration of Hitchcock at ¶¶ 2-3.

### **Merits**

On April 7, 2016, Defendants filed a motion seeking to compel arbitration pursuant to CCP § 1281.2 on the grounds that during his employment, the Plaintiff had

signed an agreement to arbitrate “all disputes arising out of the employment relationship...” through final, binding arbitration. See Paragraph 2 of the DISPUTE RESOLUTION AGREEMENT attached as Exhibit A to the Index of Exhibits. See Declaration of Milton, Director of Organizational Development and Education for Defendant CMC. She indicates that the Plaintiff completed his review of the employee handbook online and agreed to its terms including the DISPUTE RESOLUTION AGREEMENT. Although every employee had the right to “opt out”, Plaintiff did not do so. See ¶¶ 6-12.

On April 29, 2016, Plaintiff filed opposition. Plaintiff concedes that under ordinary circumstances, the agreement would be binding. See Declaration of Hitchcock at ¶ 4. However, Plaintiff argues that Dru Walker and The Walker Group, Inc. are also defendants. He submits that these defendants are not bound by arbitration agreement. Plaintiff argues that arbitration should not be ordered when litigation is pending with third parties.

Under state law, courts *may* refuse arbitration where a party to the arbitration agreement is involved in litigation with a third party, if:

- the litigation arises out of the *same transaction* or series of transactions as the arbitration; and
- there is a *possibility of conflicting rulings* on common issues of law or fact. [CCP § 1281.2(c)]

The problem lies in the fact that the Agreement at bench is governed by the Federal Arbitration Act. See ¶ 2 of the DISPUTE RESOLUTION AGREEMENT.

The Federal Arbitration Act (FAA) contains no grounds to stay arbitration as set forth in CCP § 1281.2(c), *supra*. [See *Dean Witter Reynolds, Inc. v. Byrd* (1985) 470 US 213, 216-221, 105 S.Ct. 1238, 1240-1242; *KPMG LLP v. Cocchi* (2011) US , , 132 S.Ct. 23, 26 (per curiam)—under FAA, courts must compel arbitration of pending arbitrable claims even though nonarbitrable claims remain to be tried in court and result is “possibly inefficient maintenance of separate proceedings in different forums”; and *Mastick v. TD Ameritrade, Inc.* (2012) 209 Cal.App.4th 1258, 1263] No *duplicative proceeding exception* exists to the enforcement of arbitration agreements under the FAA. “If there is to be a duplicative proceeding exception, it is for Congress to add it to the FAA ...” [*Reliance Ins. Co. v. Raybestos Products Co.* (7th Cir. 2004) 382 F3d 676, 679-680—necessity of duplicative litigation to resolve identical coverage dispute under policies without arbitration clauses did not render arbitration agreement unenforceable] Nor can a plaintiff in pending federal litigation avoid arbitration with a defendant who is a party to an arbitration agreement by naming an additional defendant who is a *nonparty* to the agreement. [*Encore Productions, Inc. v. Promise Keepers* (D CO 1999) 53 F.Supp.2d 1101, 1113—federal law “requires piecemeal resolution of cases when necessary to give effect to an arbitration agreement”]

Therefore, the argument in opposition has no merit. The motion will be granted pursuant to CCP § 1281.5.



(20)

**Tentative Ruling**

Re: **Coelho v. Coelho**, Superior Court Case No. 13CECG00113

Hearing Date: **May 26, 2016 (Dept. 403)**

Motion: Edward Coelho's Motion for Order in Aid of Arbitration and Stay of Proceedings

**Tentative Ruling:**

To deny.

**Explanation:**

Respondent Edward Coelho ("Edward") filed a motion titled "Motion For Order In Aid of Arbitration and Request for Stay of Proceedings." The motion is procedurally deficient in that it does not clearly state what "order in aid of arbitration" should be made, or identify what proceedings Edward wants stayed. A notice of motion must state in the first paragraph exactly what relief is sought and why (on what grounds). (Code Civ. Proc. § 1010; Cal. Rules of Court, Rule 3.1110(a).) The court cannot grant different relief, or relief on different grounds, than stated in the notice of motion. (See *People v. American Sur. Ins. Co.* (1999) 75 Cal.App.4th 719, 726.) The notice of motion is entirely vague as to what relief is sought.

This defect is not cured by the memorandum either of points and authorities. The memorandum does not clearly set forth what the court is to order the arbitrator to do, other than vaguely "to complete" the arbitration. The memorandum does not identify any other actions, such as by name and case number. The opening memorandum includes no discussion of the other action(s) that Edward wants stayed.

The motion would be denied on the merits as well.

**"Order in aid of arbitration"**

Edward apparently is requesting that the court to order Arbitrator Gilles to complete the arbitration that started in 2009 pursuant to the 1997 Agreement. Edward asserts that since this court's 2/4/14 Order correcting Gilles' 1/3/13 Award, he has issued multiple demands that Gilles complete the arbitration, but Gilles has not addressed the 2/4/14 Order, or made a final arbitration award. Edward says Gilles has refused to complete the pending arbitration, but he must do so consistently with the fact that he has no jurisdiction over Susan, and hence no jurisdiction to compel a transfer of any real property (since Family Code section 1102(a) provides that any attempt to transfer community property requires that both spouses join in executing any such instruments).

The court disagrees with Edward's characterization of the effect of the 2/4/14 Order. Edward argues that the order correcting the 1/3/13 Award "had the effect of eliminating any obligation *on the part of Edward* to transfer the 65.86 acres. It also had

the effect of eliminating any obligation on Susan or Edward's part to sign paperwork necessary to create a 65.86 acre parcel ..." (MPA 7:26-28, emphasis added.) That is incorrect. The Order did not relieve Edward of his obligations. It only excised any order directed at *Susan*. How things are wrapped up from here is a matter for the Arbitrator to address.

Additionally, Edward's assertion that Gilles has refused to complete the arbitration proceeding is not supported by admissible evidence. Counsel says there were "[s]everal exchanges of emails [that] took place between my office and Gilles in an effort to get him to action the Edward/Vincent Arbitration. To date, he has refused." (Gilmore Dec. ¶ 11.) However, no such emails are provided. This statement is entirely conclusory. It is not clear what, exactly Edward (or his counsel) asked Gilles to do, or what his response was. There is no evidentiary support for the assertion that Gilles has refused to move forward or complete the arbitration.

It appears that the more likely issue is Edward's unwillingness to participate in the arbitration. The opposition papers contend that Edward has ignored the pending arbitration proceeding and has refused to pay the arbitrator's fees. It is telling that Edward does not refute this assertion in his reply. If Edward isn't paying the arbitrator fees he is obligated to pay, the court should not issue an order directing Gilles to work for free.

Regarding the request to stay proceedings, again, the notice of motion does not indicate what actions Edward seeks to have stayed. The memorandum vaguely mentions "separate lawsuits in front of other judges" filed by Vincent, but never actually mentions or identifies any particular action. While the court assumes that Edward is seeking an order staying case numbers 15CECG00074 and maybe 15CECG00543 as well (though the latter is already stayed), the motion is just too vague insofar as it requests that the court stay other actions. The moving papers, especially the notice of motion, needs to be more explicit.

Moreover, if Edward feels the 2015 actions should be stayed, then he should file a motion to stay in those actions to be heard by the department and judge to which those actions are assigned. This motion appears to be an attempt to circumvent Judge Jeffrey Hamilton's order finding that the sublease is an enforceable agreement as to Susan, and Judge Donald Black's orders for injunctive relief, and associated contempt proceedings recently underway to deal with Edward's trespasses in breach of the sublease. The court agrees with Vincent that any motion to stay an action should be brought before the judge to whom the case is assigned. "After a petition has been filed under this title, the court in which such petition was filed retains jurisdiction to determine any subsequent petition involving the same agreement to arbitrate and the same controversy, and any such subsequent petition shall be filed in the same proceeding." (Code Civ. Proc. § 1292.6.)

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 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.



(17)

**Tentative Ruling**

Re: **Henry v. Barss, et al.**  
Court Case No. 12 CECG 02462

Hearing Date: May 26, 2016 (Dept. 403)

Motion: Default Prove Up – Court Judgment

**Tentative Ruling:**

To grant for the interlineated amount of \$296,847.23.

**Explanation:**

The court is required to render default judgment only “for such sum...as appears to be just”, based on the evidence presented. (Code Civ. Proc. § 585, subd. (b).) At the hearing, the plaintiff must prove-up his right to relief, by introducing sufficient evidence to support his claim. (See, *Taliaferro v. Hoogs* (1963) 219 Cal.App.2d 559, 560; and 6 Witkin, Cal. Procedure (5th Ed. 2008) Proceedings Without Trial, § 169, p. 609.)

A defendant who fails to answer admits only the facts that are well pleaded. (See 5 Witkin, supra, §981.) If the complaint fails to state a cause of action or the allegations do not support the demand for relief; the plaintiff is no more entitled to that relief by default judgment than if the defendant expressly admitted all the allegations. (See *Vasey v. California Dance Co.* (1977) 70 Cal.App.3d 742, 749.)

“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.)

Here, the First Amended Complaint alleges the terms of the first note in paragraph 8. Paragraph 9 of the First Amended Complaint alleges the second loan, and paragraph 10 alleges that that the defendants “renewed” the “Note” on or about February 8, 2008, in the principal amount of \$200,000, payable on demand, with interest accruing at the annual rate of eight percent.

The First Amended Complaint now alleges that the Trust and Trustee paid defendants \$200,000 and fully performed under the notes. It is alleged that plaintiff has demanded the notes be paid in full and that defendants have failed to pay the balance due on the note, resulting in damage to plaintiff. (FAC ¶¶ 14-17.) Attorney's fees are alleged to be a term of the renewed note. The Declaration of Alexander Barss proves up the allegations of the First Amended Complaint.

However, plaintiff stopped her interest calculations at February 19, 2016. She is entitled to prejudgment interest to the day of the hearing, which is an additional 96 days of interest at a rate of \$43.84, or \$4,208.64. Thus, the court has changed the



# Tentative Rulings for Department 501

(30)

Re: ***Kristy Hobbs v. Myint Zaw, Medical Doctor***  
Superior Court No. 15CECG02004

Hearing Date: Thursday May 26, 2016 (**Dept. 501**)

Motion: (1) Defendant Lily Holdings, LLC's Demurrer to Plaintiff's Complaint

## **Tentative Ruling:**

To **Overrule** the Demurrer to the Complaint.

Defendant Lily Holdings, LLC is granted 10 days leave to file its answer to the Complaint. The time in which the answer can be filed will run from service by the clerk of the minute order.

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On April 18, 2016, Defendant Oakwood demurred to Plaintiffs' Complaint on the basis of: (1) Statute of Limitations; (2) Prejudice; and (3) California Code of Civil Procedure section 430.10 (f) [The pleading is uncertain].

## **Explanation:**

### Statute of Limitations

Where the dates alleged in the complaint show the action is barred by the statute of limitations, a general demurrer lies. (*Saliter v. Pierce Bros. Mortuaries* (1978) 81 Cal.App.3d 292, 300; *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 995; *Vaca v. Wachovia Mortg. Corp.* (2011) 198 Cal.App.4th 737, 746.) The running of the statute must appear "clearly and affirmatively" from the face of the complaint. It is not enough that the complaint *might* be time-barred. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; *Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 324-325; *Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 321.)

In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. (Code Civ. Proc., § 340.5.) A skilled nursing facility is a "health care provider" for purposes of statute defining the limitations period for an action for injury or death against a health care provider based on alleged professional negligence. (*Guardian North Bay, Inc. v. Sup.Ct.* (2001) 94 Cal.App.4th 963, 974.)

Here, Defendant is a skilled nursing facility (Demurrer, p1 ln11) and the basis for Plaintiffs' cause of action is wrongful death (Complaint, p4). So the statute of limitations is either

one year or three years. (Code Civ. Proc., § 340.5.) Plaintiffs assert that decedent died on July 3, 2014 as a result of Defendant's negligence (Complaint, ¶ 14.). If Plaintiffs were aware of Defendant's negligence at the time of death, then the statute of limitations runs on July 3, 2015 (1 yr.). If Plaintiffs were not aware of Defendant's negligence at the time of death, then the statute of limitations runs on July 3, 2017 (3 yr.). On June 26, 2015, Plaintiffs filed their Complaint, naming Defendant as a 'Doe.' On March 17, 2016, Plaintiffs filed their First Amended Complaint, explicitly naming Defendant. If the one-year statute of limitations applies, Plaintiffs are within the time limit as long as the relation-back doctrine applies. If the three-year statute of limitations applies, Plaintiffs are within the time limit even if the relation-back doctrine does not apply. As such, it does not appear "clearly and affirmatively" from the face of the complaint that the statute of limitations has lapsed. And again, it is not enough that the complaint *might* be time-barred. (*Committee for Green Foothills, supra*, 48 Cal.4th at 42; *Roman, supra*, 85 Cal.App.4th at 324-325; *Stueve Bros. Farms, supra*, 222 Cal.App.4th at 321.) Nonetheless, the relation-back doctrine applies, so Plaintiffs Complaint is timely regardless.

#### *Relation-back doctrine*

Where a complaint is amended after the statute of limitations has run to identify a fictitiously-named defendant, the amended complaint will be given relation back effect, so as to avoid the statute of limitations, provided that plaintiff was "genuinely ignorant" of the defendant's identity or the facts rendering defendant liable when the original complaint was filed. (*Austin v. Massachusetts Bonding & Ins. Co.* (1961) 56 Cal.2d 596, 600-601.) And even though the plaintiff knows of the existence of the defendant sued by a fictitious name or of defendant's actual identity (i.e. his name), the plaintiff is considered "ignorant of the defendant's identity," for limitations purposes, if he lacks knowledge of that person's connection with the case or with his injuries. (*McOwen v. Grossman* (2007) 153 Cal.App.4th 937; *Fuller v. Tucker* (2000) 84 Cal.App.4th 1163.)

To defeat the amendment, the burden is on defendant to prove-- via an evidence based motion, plaintiff's earlier awareness of defendant's identity and facts creating its liability. (*Optical Surplus, Inc. v. Superior Court* (1991) 228 Cal.App.3d 776, 779-782; *Fuller v. Tucker, supra*, 84 Cal.App.4th at 1173; *Dover v. Sadowinski* (1983) 147 Cal.App.3d 113, 115-116; *Breceda v. Gamsby* (1968) 267 Cal.App.2d 167, 179; *A.N. v. County of Los Angeles* (2009) 171 Cal.App.4th 1058, 1067.)

Here, Defendant's motion is a demurrer, in which This Court can consider defects on the face of the Complaint *only*. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) A demurrer cannot consider extrinsic evidence, which is required (here) to prove that relation-back does not apply. (*A.N., supra*, 171 Cal.App.4th at 1067; see also *Ion Equip. Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881 and *Colm v. Francis* (1916) 30 Cal.App. 742.) Nonetheless, Defendant attempts to argue that the relation-back doctrine is not applicable based on the face of the Complaint. Defendant argues that Plaintiffs were not "truly ignorant of the identity of Oakwood Gardens at the time of filing of the Complaint" (Demurrer, p1 lns 21-22). Defendant points to Plaintiffs' *multiple* references to Oakwood in the Complaint to support this argument (Demurrer, p1 lns 22-27 - p2 ln 1; p3 lns 7-10).

However, simply acknowledging Oakwood by name does not prove that Plaintiffs were aware *earlier* of facts not pleaded or disclosed implicating Oakwood. (see *McOwen, supra*, 153 Cal.App.4th at 937; *Fuller, supra*, 84 Cal.App.4th at 1163.) Since Defendants do not meet their burden, the First Amended Complaint relates back. Therefore, Plaintiffs are within the statute of limitations. Demurrer is denied on the basis of Statute of Limitations.

#### Prejudice

The Court has discretion to deny a motion for leave to substitute a named person or entity for a "Doe" defendant where there is evidence of laches—i.e., *unreasonable* delay by plaintiff in seeking leave to amend after acquiring knowledge of the defendant's identity and culpability, that has prejudiced the defendant. (*A.N., supra*, 171 Cal.App.4th at 1068; *Smeltzley v. Nicholson Mfg. Co.* (1977) 18 Cal.3d 932, 939; *Barrows v. American Motors Corp.* (1983) 144 Cal.App.3d 1, 8; *Okoro v. City of Oakland* (2006) 142 Cal.App.4th 306, 313.) But, even if plaintiff has been dilatory in identifying a "Doe" defendant, defendant must show *specific prejudice* resulting from the delay; i.e., *delay alone will not bar the amendment*. (*Barrows, supra*, 144 Cal.App.3d at 9; *Sobeck & Assocs., Inc. v. B & R Investments No. 24* (1989) 215 Cal.App.3d 861, 870; *Winding Creek v. McGlashan* (1996) 44 Cal.App.4th 933, 942-943.)

Here again, Defendant's motion is a demurrer, in which This Court can consider defects on the face of the Complaint *only*. (*Blank, supra*, 39 Cal.3d at 318; *Donabedian, supra*, 116 Cal.App.4th at 994.) Nonetheless, Defendants have not shown any *actual* prejudice resulting from Plaintiffs' "delay" in substituting them into this case. Everything Defendant submits is speculative (Demurrer, p 9 Ins 12-20). Demurrer is denied on the basis of Prejudice.

#### Code of Civil Procedure section 430.10 (f)

A demurrer for uncertainty will be sustained only where the complaint is so bad that defendant *cannot reasonably* respond—i.e., he or she cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him or her. (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.) Thus, demurrers for uncertainty will almost certainly be overruled where the facts alleged in the complaint are *ascertainable* by invoking discovery procedures. (*Khoury, supra*, 14 Cal.App.4th at 710.)

Here, Defendant argues that it cannot ascertain "what, if any, allegations are being asserted against it" (Demurrer, p10 Ins 14-15), due to Defendant being incorrectly substituted in as 'Does 1-50' (FAC, p1 In 23). This is because Defendant is a company which operates a "skilled nursing facility" (Demurrer, p10 In 12). It does not fit the definition of 'Does 1-50' as described in the Complaint, which reads: "Does 1 through 150 were practicing physicians and or medical doctors and/or medical specialist, and/or certified technicians, which being limited thereto, in the Cities of Fresno And Clovis, County of Fresno, State of California, duly licensed to practice medicine under the law of the State of California" (Complaint, p3 Ins 5-8). However, there is only one cause of action (wrongful death), and it is alleged uniformly against *all* defendants. Defendant being incorrectly named is a simple misnomer. Arguments to the contrary



(20)

**Tentative Ruling**

Re: ***Martinez-Luna v. Vallarta Food Enterprises, Inc.***, Superior Court Case No. 15CECG00633

Hearing Date: **May 26, 2016 (Dept. 501)**

Motion: Motion to Enforce Subpoena Duces Tecum

**Tentative Ruling:**

To deny.

**Explanation:**

Defendant moves for an order compelling Dr. William DiFiore to produce plaintiff's medical records pursuant to a subpoena. The motion is denied because defendant has not clearly established that it complied with all statutory requirements in the service of the subpoena.

The notice to consumer must be served at least five days before service on the records custodian. (Code Civ. Proc. § 1985.3(b)(2), (3).) Counsel's declaration in support of the motion states that on October 13, 2015, his office directed Compex to serve the deposition subpoena on Dr. DiFiore. It does not state when the subpoena was served, and the copy of the subpoena does not include a completed proof of service. (Benton Dec. Exh. A.) If the subpoena was served immediately, the notice to consumer was not served early enough, as it was served by mail on October 14, 2015. The subpoena was issued on October 13, 2015. If that is also when the subpoena was served, then the timing was off. Failure to comply with any of the foregoing requirements by itself invalidates the service, so that the custodian is under no duty to produce the records sought by the subpoena. (Code Civ. Proc. § 1985.3(k).) Defendant has not clearly established that Dr. DiFiore had a duty to produce the documents, because timeliness of service of the notice to consumer depends on when the deposition subpoena was served, and that information is not provided.

Additionally, the moving papers do not indicate Dr. DiFiore's reason (if any) for not producing the specified records, such as whether he asserted an objection.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 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:**     MWS     **on 5/25/16.**  
(Judge's initials) (Date)



(17)

**Tentative Ruling**

Re: ***Weidenbach v. Scott et al.***  
Court Case No. 16 CECG 00394

Hearing Date: May 26, 2016 (Dept. 501)

Motion: Guarantee Real Estate's & Melissa Schroder's Motion for  
Determination of Good Faith Settlement

**Tentative Ruling:**

To deny.

**Explanation:**

Under Code of Civil Procedure section 877.6, a settlement entered by one or more of several joint tortfeasors may be determined by the court to be in "good faith." If the court does so, this bars any other joint tortfeasor from any further claims against the settling defendant for equitable comparative contribution, equitable indemnity or comparative fault.

In considering a motion under Section 877.6, courts are called upon to balance the statute's twin goals of (1) encouragement of settlements, and (2) equitable sharing of costs among the parties at fault. (*Tech-Bilt v. Woodward-Clyde & Assoc.* (1985) 38 Cal.3d 488, 494 (*Tech-Bilt*)). The standard is whether the amount of the settlement is within the "reasonable range" or "ballpark" of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries. (*Id.* at p. 499.) "In order to encourage settlement, it is quite proper for a settling defendant to pay less than his proportionate share of the anticipated damages...What is required is simply that the settlement not be grossly disproportionate to the settlor's fair share". (*Abbott Ford, Inc. v. Superior Court* (1987) 43 Cal.3d 858, 874.) "And even where the claimant's damages are obviously great, and the liability therefor certain, a disproportionately low settlement figure is often reasonable in the case of a relatively insolvent, and uninsured, or underinsured joint tortfeasor." (*Tech-Bilt, supra*, 38 Cal.3d at p. 499.)

*Factors:*

*Tech-Bilt* provided the following non-exclusive list of factors for the court to consider in determining the "good faith" of a settlement: "A rough approximation of plaintiff's total recovery and the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial." (*Tech-Bilt, supra*, 38 Cal.3d at p. 499.) "Other relevant considerations include the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants". (*Ibid.*). "Finally, practical considerations obviously require

that the evaluation be made on the basis of information available at the time of settlement." (*Ibid.*)

#### *Moving Party's Burden:*

The moving-party's initial evidentiary burden depends on whether the 'good faith' of the settlement is being contested. If the nonsettling defendants do not oppose the motion on the good faith issue, a 'barebones' motion which sets forth the grounds of good faith, accompanied by a declaration which sets forth a brief background of the case, is sufficient. (*City of Grand Terrace v. Superior Court* (1987) 192 Cal.App.3d 1251, 1261; Rylaarsdam & Edmon, *Cal. Practice Guide: Civil Procedure Before Trial*, (The Rutter Group 2014) § 12:871-12:872.) But, as here, where the nonsettling defendants contest 'good faith', the moving party must make a more specific showing under the *Tech-Bilt* factors. Such showing may be made either in the original moving papers or in counter-declarations filed after the nonsettling defendants have filed an opposition challenging good faith of the settlement. (*City of Grand Terrace v. Superior Court*, *supra*, 192 Cal.App.3d at p. 1262; Rylaarsdam & Edmon, *supra*, § 12:872). Where good faith is contested, the showing requires competent evidence in support of "good faith." (*Greshko v. County of Los Angeles* (1987) 194 Cal.App.3d 822, 834.)

Code of Civil Procedure section 877.6, subdivision (d) states that "the party asserting the lack of good faith shall have the burden of proof on that issue."

#### *The Showing*

##### *1. Plaintiff's Total Recovery*

Plaintiffs claimed a recovery of "not less than \$100,000" for both out of pocket and loss of use damages in their complaint. At paragraph 11 in his declaration, Guarantee's counsel states that he has two bids that plaintiffs' counsel gave him in connection with the pre-litigation mediation that total \$80,649.77. This is some evidence, that at the time of the mediation conducted with Guarantee, plaintiffs claimed cost-of-repair damages in the neighborhood of \$80,000. However, there is no evidence at all of plaintiffs' alleged loss of use damages. It is unknown if plaintiffs are waiving their claimed loss-of-use damages or chose not to present them at the mediation. Accordingly, plaintiffs' total recovery is unknown at this time.

##### *2. Proportionate Liability*

"The ultimate determination of good faith is whether the settlement is grossly disproportionate to what a reasonable person at the time of settlement would estimate the settlor's liability to be." (*City of Grand Terrace v. Superior Court*, *supra*, 192 Cal.App.3d at p. 1262.) The court must consider not only the settling parties' liability to the plaintiff but also their proportionate share of culpability as among all parties alleged to be liable for the same injury. (*TSI Seismic Tenant Space, Inc. v. Superior Court* (2007) 149 Cal.App.4th 159, 166-167.) This is because a good faith determination bars indemnity claims by non-settling parties, thus the true value of the settlement to the

settler may not be the amount paid plaintiff but the value of the shield against such indemnity claims. (*Ibid.*)

Factual declarations and admissible evidence showing the nature and extent of the settling defendant's liability are required. Without such evidence, a "good faith" determination is an abuse of discretion. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1995) 38 Cal.App.4th 1337, 1348.)

The memorandum of Points and Authorities submitted by Guarantee and Schroder is 21 pages long, which is 6 pages longer than the 15 allowed. No leave of court was obtained for this oversize brief. The legal analysis does not begin until page 14. As such there is excellent cause for not considering any of settling parties' legal arguments at all.

The causes of action directed at Schroder and Guarantee are the second cause of action for negligent misrepresentation and the Third cause of action or Violation of Civil Code section 1102 et seq. The cause of action for negligent misrepresentation will depend on evidence that Schroder was the one who had a duty to disclose the mold or water intrusion as opposed to the Scotts. Guarantee and Scott contend that the law and the contract put the duty squarely on the Scotts, however, the fact remains the Schroder changed sides during escrow and as an agent for the plaintiffs' agency, had a duty to reveal the water intrusion. As for the claim under Civil Code section 1102 et seq., Guarantee and Schroder argue that this statutory scheme only requires a diligent visual inspection of areas reasonably and normally accessible. Here arguably the mold and water damage was hidden, and the grading was disclosed in the report made available to plaintiffs by their own inspection, thus liability to plaintiffs is uncertain.

However, liability to plaintiffs is not the only consideration. Schroder changed sides during the transaction without obtaining the Scotts' consent or a dual agency disclosure. She also initially advised the Scotts to not disclose the water damage and mold. She owed a fiduciary duty to the Scotts. (*Michel v. Palos Verdes Network Group, Inc.* (2007) 156 Cal.App.4th 756, 762–763.) Moreover JMS has claims against Schroder for not disclosing what she knew about the water damage and mold once she came to work for that company.

These claims against Schroder and Guarantee could potential include the value of the attorney's fees incurred in defending against the plaintiffs' lawsuit under the "tort of another theory" or indemnity.

Accordingly, the claims by JMS and the Scotts against Guarantee and Schroder are greater than plaintiffs' against Guarantee and Schroder.

### 3. *Amount Paid in Settlement*

The settlement totals \$25,000.

4. *Recognition that Settlor Should Pay Less*

While the settling defendants will pay less, and here the settlement with plaintiffs may be a fair share of plaintiffs' liability, it does not appear to be a fair allocation of the liability between the non-settling defendants.

5. *Settlor's Financial Condition and Insurance Policy Limits*

There is no evidence of Guarantee's insurance or general financial condition, or of Schroder's insurance or financial condition. Nor is there any indication as to whether Guarantee will be defending Schroder.

6. *Evidence of Collusion, Fraud, or Tortious Conduct*

This is a significant factor. First, plaintiffs and settling parties Guarantee and Schroder chose to mediate this matter before the case had even been filed, and to do so in the absence of the other parties. This is all the worse given that the duties owed to plaintiffs by Guarantee and Schroder are more limited compared to those owed by the parties not invited to the mediation, but the duties owed by Guarantee and Schroder to the parties not present at the mediation (and the ones going to be eliminated by this settlement, if it is found to be in good faith) are much larger. Second, judging from the date on the MLS report, counsel for Guarantee knew of the claim in late June of 2015, or within two months of its occurrence. By that time, Schroder had contracted the Scotts to ask about documentation concerning the mold remediation, which looks very much like she was gathering documentation for the "pre-litigation" mediation, while trying not to alert the Scotts to the impending lawsuit. Third, the language in the complaint at paragraph 33 and 34 is virtually identical to the language in Melissa Schroder's Declaration at paragraphs 22 and 23, suggesting the complaint was drafted after the mediation. And although the settlement bears a pre-printed an "effective date" of March 28, 2016, it very interestingly has no dates indicating when any of the parties signed it.

The Motion for Good Faith Determination was brought before the other defendants have even appeared, effectively preventing them from having any basis from contesting the factual support of the motion save for their own declarations.

In short, the settlement appears particularly collusive. The court in *Long Beach Memorial Medical Center v. Superior Court* (2009) 172 Cal.App.4th 865, had the following to say about collusion in settlements: "As explained, '[s]ection 877.6 is grounded in the equitable policies of the "encouragement of settlements and the equitable allocation of costs among multiple tortfeasors." [Citation.]' [citation.] 'The good faith provision of section 877 "mandates that the courts review agreements purportedly made under its aegis to insure that such settlements appropriately balance the contribution statute's dual objectives.... 'Lack of good faith encompasses many kinds of behavior. It may characterize one or both sides to a settlement. When profit is involved, the ingenuity of man spawns limitless varieties of unfairness....' " [Citation.]' [Citation.] Here, the conclusion is inescapable that the physicians' offer was tactical and did not reflect the cooperative decision-making among all interested parties that is





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### **Tentative Ruling**

Re: ***Sarita Duncan, et al. v. Antonio Tauro, et al.***  
Superior Court Case No. 15CECG01734

Hearing Date: May 26, 2016 (Dept. 501)

Motion: Defendant Hertz Corporation's motion to compel further responses, and for sanctions

#### **Tentative Ruling:**

To grant the motion to compel further responses to Form Interrogatories, set one, nos. 10.1 and 20.2 (Plaintiff Sarita Duncan); and nos. 8.3-8.8 (Plaintiff Brett Duncan). (Code Civ. Proc. §2030.300.) Plaintiffs shall serve further verified responses without objections within 10 days of the date of service of this order.

To grant Defendant's motion for sanctions. Plaintiffs Sarita Duncan and Brett Duncan, and Plaintiffs' attorney, Rodney Haron, jointly and severally, are ordered to pay monetary sanctions in the amount of \$685 to the law office of Jacobsen, Hansen & McQuillan within 30 days of service of this order. (Code Civ. Proc. §§ 2030.290(d).)

#### **Explanation:**

The scope of pretrial discovery is broad and its purpose is to obtain all of the facts relative to a claim or defense. (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 782.) The rules are applied liberally in favor of discovery. (*Colonial Life & Accident Ins. Co. v. Superior Court* (1982) 31 Cal.3d 785, 790.) When responding to interrogatories, the answering party owes a duty to respond in good faith as best it can. (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 783.) Each answer in the response must be "as complete and straightforward as the information reasonably available to the responding party permits. If an interrogatory cannot be answered completely, it shall be answered to the extent possible." (Cal.Civ.Proc. §2030.220, subd. (a) & (b).)

Defendant Hertz Corporation ("Hertz") moves to compel further responses to Form Interrogatory Numbers 10.1 and 20.2 propounded on Plaintiff Sarita Duncan, and Numbers 8.3 - 8.5 propounded on Plaintiff Brett Duncan.

The parties have satisfied their pretrial discovery conference obligation under Local Rule 2.17. (See MPA i/s/o motion, 2:6-20; Decl. of Garabedian, Exhs. E, F, I).

#### *Form Interrogatory Nos. 10.1 and 20.2 – Plaintiff Sarita Duncan*

Conditions related to an injury in controversy are discoverable. (Evid. Code §§ 996, 1016.) When a plaintiff files a personal injury action, that plaintiff has placed in issue his or her past and present physical and/or mental conditions related to the injury sued upon; thus plaintiff's medical and/or psychological records relating to the claimed

injuries are discoverable. (Evid. Code §§ 996, 1016; *Palay v. Superior Court* (1993) 18 Cal.App.4th 919, 927; see also *City & County of S.F. v. Superior Court* (1951) 37 Cal.2d 227, 232 ["The whole purpose of the [physician-patient] privilege is to preclude the humiliation of the patient that might follow disclosure of [his] ailments. When the patient [himself] discloses those ailments by bringing an action in which they are in issue, there is no longer any reason for the privilege."].)

Here, Form Interrogatory no. 10.1 seeks information regarding "the same part of [Plaintiff's] body claimed to have been injured in the INCIDENT[.]" (Decl. of Garabedian, Exh. D.) Plaintiff Sarita Duncan's amended response objects on the grounds that the question seeks information that is unrelated to the litigation, is in violation of Plaintiff's privacy rights, and requires Plaintiff to provide her entire medical history. This is inaccurate. No. 10.1 seeks information about the specific body part Plaintiff claims was injured in the accident at issue. This is clearly related to the litigation. As Plaintiff is seeking damages based on physical injury, she has put her physical state at issue in the litigation. Nothing in the request seeks Plaintiff's entire medical history. Where a physical injury is claimed, the other party is entitled to discovery regarding the injury; this is neither unrelated nor in violation of Plaintiff's privacy rights. The motion is granted as to Form Interrogatory No. 10.1.

A party may not deliberately misconstrue a question for the purpose of supplying an evasive answer. (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 783).

No. 20.2 seeks information regarding the vehicles involved in the accident that gave rise to Plaintiff's injuries. Plaintiff's initial response left the answer area blank. In Plaintiff's first amended response, Plaintiff objects on the ground that the information sought is equally available to Defendant Hertz in that Hertz already has Plaintiff's medical records, making the request unduly burdensome and oppressive. Plaintiff's response is nonsensical in light of the fact that Defendant Hertz is seeking information on the vehicles involved in the accident, not Plaintiff's medical records. The motion is granted as to Form Interrogatory 20.2.

#### Form Interrogatories Nos. 8.3 – 8.8 – Plaintiff Brett Duncan

Responses to discovery must be "as complete and straightforward as the information reasonably available to the responding party permits." (Code Civ. Proc. § 2030.220(a).) False or evasive answers are improper; parties must state the "truth, the whole truth, and nothing but the truth" in answering written interrogatories. (*Guzman v. General Motors Corp.* (1984) 154 Cal.App.3d 438, 442.) Evasive answers such as, "I don't recall" are improper. (*Deyo*, supra, 84 Cal.App.3d at p. 783.) A party to an action may not plead ignorance of information which he or she can obtain from sources under his or her control. (*Id.* at p. 782.)

Here, Form Interrogatory no. 8.3 seeks the last date prior to the incident that Plaintiff Brett Duncan worked for compensation. Plaintiff states that he cannot fully respond due to a lack of independent recollection or documents to refresh his recollection. Plaintiff does provide an answer on information and belief. Because this information is ascertainable from Plaintiff's current employer, Plaintiff must obtain it and

provide same to Defendant Hertz. The motion is granted as to Form Interrogatory No. 8.3.

No. 8.4 asks Plaintiff to provide his monthly income at the time of the accident, and how he calculated the amount. Plaintiff again states that he cannot fully respond due to a lack of independent recollection and documents to refresh his recollection. Plaintiff does provide a dollar amount, but fails to state how he calculated it. Plaintiff's response is incomplete. The motion is granted as to Form Interrogatory No. 8.4.

No. 8.5 seeks the date Plaintiff returned to work after the accident. Once more, Plaintiff states that he cannot fully respond due to a lack of independent recollection and documents to refresh his recollection, states that the date is unknown and that investigation and discovery on the matter continues. This information is available to Plaintiff. The answer is both evasive and incomplete. The motion is granted as to No. 8.5.

No. 8.6 asks Plaintiff to state the dates that he missed work and for which he lost income. Plaintiff again states that he is unable to fully respond because he lacks independent recollection and documents to refresh his recollection, then states that he responds to the extent he is able "as follows" but leaves the following space blank. (Decl. of Garabedian, Exh. C.) The response is evasive and incomplete. The information is ascertainable from Plaintiff's employer if Plaintiff is unable to recall the dates himself. The motion is granted as to Form Interrogatory No. 8.6.

No. 8.7 seeks the total income lost to date resulting from the accident, and asks how the amount was calculated. Plaintiff yet again states that he cannot fully respond because he lacks independent recollection and documents to refresh his recollection, then states that he responds to the extent he is able "as follows" but leaves the following space blank. (Ibid.) The answer is evasive and incomplete. The motion is granted as to Form Interrogatory No.8.7.

No. 8.8 asks Plaintiff whether he will lose income in the future as a result of the accident, and if so, to provide the facts upon which the contention is based, an estimate of the amount, an estimate of the amount of time Plaintiff will lose income, and how the claim for future lost income was calculated. Plaintiff objects on the ground that the interrogatory is seeking information protected by the attorney work product doctrine. Plaintiff does provide a response contending that his injuries will likely result in a diminution of his earning capacity, but that the value of such is currently unknown. This response is in conflict with Plaintiff's amended response to Interrogatory 8.1, in which Plaintiff states, "At the present [sic] time no future wage loss is known." (Decl. of Garabedian, Exh. G.) Plaintiff to provide consistent supplemental answers. The motion as to Form Interrogatory 8.8 is granted.

### Sanctions

Defendant moves for sanctions in the amount of \$685. The motion is granted.



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**Tentative Ruling**

Re: ***Gilbert v. Herrera and related Cross-action***  
Superior Court Case No. 14 CECG 03034

Hearing Date: May 26, 2016 (**Dept. 501**)

Motion: Determine Good Faith of Settlement pursuant to  
CCP § 877.6

**Tentative Ruling:**

To deny on the grounds that the moving party has not made a sufficient showing of the factors set forth in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates (1985)* 38 Cal.3d 488, 499-500.

**Explanation:**

On October 22, 2012, a traffic collision occurred at the northbound interchange between Hwy 180 and Hwy 41. Plaintiff Danielle Gilbert was a passenger in the vehicle of the moving party, Cross-Defendant Spain. That vehicle was struck from behind by a vehicle driven by Defendant/Cross-Complainant Bonnie Herrera. Gilbert filed a complaint on October 9, 2014. Herrera filed an Answer on November 26, 2014 and a Cross-Complaint seeking indemnity and contribution against Spain on December 16, 2014.

On May 2, 2016, Cross-Defendant Brandon Lee Spain filed a motion seeking a determination that his settlement with Plaintiff Danielle Gilbert is in good faith. On May 5, 2016, Plaintiff filed a statement of non-opposition. On May 13, 2016, Defendant and Cross-Complainant Herrera filed opposition, including objections. Spain filed a reply.

When a motion for determination of good faith settlement is **contested**, the moving party **must** provide the court with declarations or other evidence demonstrating **the facts necessary to evaluate the settlement in terms of the Tech-Bilt factors**. (*City of Grand Terrace v. Superior Court (1987)* 192 Cal.App.3d 1251, 1261.) After an initial showing by the moving party, the burden of proof then shifts to the **nonsettling** defendant to demonstrate the settlement lacks good faith. (CCP § 877.6(d); *Abbott Ford, Inc. v. Superior Court (1987)* 43 Cal.3d 858, 895.

The **party seeking a good faith settlement determination** has the burden of explaining to the court and to all other parties the **evidentiary basis** for any allocations and valuations made sufficient to demonstrate that a reasonable allocation has been made. (*L. C. Rudd & Son, Inc. v. Superior Court (1997)* 52 Cal.App.4th 742, 750; *Abbott Ford, Inc. v. Superior Court (1987)* 43 Cal.3d 858, 879) This rule applies even when the payment is contingent and difficult to value. (*Arbutnot v. Relocation Realty Service Corp. (1991)* 227 Cal.App.3d 682, 689–690; see also *Brehm Communities v. Superior Court (2001)* 88 Cal.App.4th 730, 736)

Expert declarations may be used to address valuation or allocation issues. (*Erreca's v. Superior Court* (1993) 19 Cal.App.4th 1475, 1497; *United Services Auto. Ass'n v. Superior Court* (2001) 93 Cal.App.4th 633, 644) All declarations relied upon must show facts and circumstances from which the ultimate fact sought to be proved may be deduced by the court. Declarations setting forth only conclusions, opinions, or ultimate facts are insufficient. Even an expert's opinion cannot rise to the dignity of substantial evidence if it is unsubstantiated by facts. (*Greshko v. County of Los Angeles* (1987) 194 Cal.App.3d 822, 834)

Here, Spain bears the initial burden of showing that its settlement was in "good faith." Whether the settlement was within the "good faith ballpark" is to be evaluated on the basis of information available at the time of settlement, including:

A rough approximation of plaintiffs' total recovery and the settlor's proportionate liability;

1. The amount paid in settlement;
2. A recognition that a settlor should pay less in settlement than if found liable after a trial;
3. The allocation of the settlement proceeds among plaintiffs;
4. The settlor's financial condition and insurance policy limits, if any, and;
5. Evidence of any collusion, fraud, or tortious conduct between the settlor and the plaintiffs aimed at making the nonsettling parties pay more than their fair share.

See *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499-500.

In support of the motion, the Declaration of Steve Clark, counsel for Cross-Defendant Spain is submitted. He attaches to his Declaration:

- The traffic collision report dated October 22, 2012 as Exhibit A;
- Excerpts from the deposition of Defendant/Cross-Complainant Herrera as Exhibit B;
- Excerpts from the deposition of Cross-Defendant Spain as Exhibit C;
- Excerpts from the deposition of Plaintiff Gilbert as Exhibit D;
- Plaintiff's verified responses to Form Interrogatories as Exhibit E;
- Herrera's Cross-Complaint for indemnity and contribution as Exhibit F;
- A summary of the Plaintiff's medical bills as Exhibit G.

However, the objection to the Declaration of Clark regarding the Traffic Collision Report will be sustained. Clark has no personal knowledge regarding the accident. Second, the report itself is hearsay. See *People v. Flaxman* (Super. 1977) 74 Cal.App.3d Supp. 16.

Importantly, the motion is largely directed toward Spain's assertion that he was not "at fault" for the accident. But, this is an issue of fact which a jury must decide. See Evidence Code § 312. The Declaration of Clark attempts to address the circumstances under which the settlement was made, but no facts are submitted. See ¶¶ 8 and 11 of the Declaration of Clark. Instead, only conclusions are offered. *Id.* In addition, no



# **Tentative Rulings for Department 502**

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## **Tentative Ruling**

Re: **Summit Almonds, LLC v. RB International Import-Export, LLC**  
Superior Court No. 15CECG00948

Hearing Date: Thursday, May 26, 2016 (**Dept. 502**)

Motion: Petitioner Summit Almonds, LLC's Motion for Order Fixing Attorney's Fees

### **Tentative Ruling:**

To grant Petitioner Summit Almonds, LLC's motion for order fixing attorney's fees. (Code Civ. Proc., § 1293.2.)

To award Petitioner Summit Almonds, LLC \$4,500.00 in attorney's fees.

### **Explanation:**

On January 5, 2016, the Court granted Petitioner Summit Almonds, LLC's ("Petitioner") petition to confirm a contractual arbitration award of \$110,693.20 plus 10% interest per annum against Respondent RB International Import-Export, LLC ("Respondent"). The Court awarded costs, but stated that attorney's fees would only be assessed pursuant to a noticed motion for attorney's fees. On April 15, 2016, Petitioner filed the instant motion for order fixing attorney's fees, seeking an award of attorney's fees in the amount of \$7,200.00.

Code of Civil Procedure section 1293.2 states that: "The court shall award costs upon any judicial proceeding under this title as provided in Chapter 6 (commencing with Section 1021) of Title 14 of Part 2 of this code." A petition to confirm a contractual arbitration award is a judicial proceeding covered by Code of Civil Procedure section 1293.2. "The award of costs pursuant to section 1293.2, including attorney fees when authorized by contract, is mandatory." (*Marcus & Millichap Real Estate Investment Brokerage Co. v. Woodman Investment Group* (2005) 129 Cal.App.508, 513.) However, in an award of costs pursuant to Code of Civil Procedure section 1293.2, a prevailing party can only recover the costs that the party incurred in the judicial proceedings and cannot recover any costs incurred in the arbitration proceedings. (*Corona v. Amherst Partners* (2003) 107 Cal.App.4th 701, 706-707.)

A court assessing attorney's fees begins with a touchstone or lodestar figure, based on the 'careful compilation of the time spent and reasonable hourly

compensation of each attorney . . . involved in the presentation of the case." (*Serrano v. Priest* (1977) 20 Cal.3d 25, 48 ("Serrano III").) Here, Petitioner seeks a lodestar of \$7,200.00. As the California Supreme Court has repeatedly made clear, the lodestar consists of "the number of hours *reasonably expended* multiplied by the *reasonable* hourly rate. . . ." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095, italics added; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1134.) The California Supreme Court has noted that anchoring the calculation of attorney fees to the lodestar adjustment method "is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.'" (*Serrano III, supra*, 20 Cal.3d at p. 48, fn. 23.)

#### **A. Reasonable Hourly Compensation**

Reasonable hourly compensation is the "hourly prevailing rate for private attorneys in the community conducting noncontingent litigation of the same type." (*Ketchum v. Moses, supra*, 24 Cal.4th at p. 1133.) Ordinarily, "the value of an attorney's time . . . is reflected in his normal billing rate." (*Mandel v. Lackner* (1979) 92 Cal.App.3d 747, 761.)

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

The Court finds that the rate of James T. Freeman at \$300.00 per hour is reasonable.

#### **B. Number of Hours Reasonably Expended**

While the fee award should be fully compensatory, the trial court's role is not to simply rubber stamp Petitioner's request. (*Ketchum v. Moses, supra*, 24 Cal.4th at p. 1133; *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 361.) Rather, the court must ascertain whether the amount sought is reasonable. (*Robertson v. Rodriguez, supra*, 36 Cal.App.4th at p. 361.) However, while an attorney fee award should ordinarily include compensation for all hours reasonably spent, inefficient or duplicative efforts will not be compensated. (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1321.) The constitutional requirement of just compensation, "cannot be interpreted as giving the [prevailing party] carte blanche authority to 'run up the bill.'" (*Aetna Life & Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865, 880.) The person seeking an award of attorney's fees "is not necessarily entitled to compensation for the value of attorney services according to [his] own notion or to the full extent claimed by [him]. [Citations.]" (*Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 950.)

The prevailing party must make a "good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary." (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 434.) A district court should approach this reasonableness inquiry "much as a senior partner in a private law firm would review the reports of subordinate attorneys when billing clients . . . ." (*Ramos v. Lamm* (10th Cir. 1983) 713 F.2d 546, 555.)

Ultimately, the Court awards a lodestar of \$4,500.00. This number is based on the following reductions:

1. Clerical Tasks

"[P]urely clerical or secretarial tasks should not be billed . . . , regardless of who performs them." (*Missouri v. Jenkins* (1989) 491 U.S. 274, 288, fn. 10.) Since "attention to filing action[.]" "[a]ttention to service of process[.]" "[a]ttention to filing proof of service with court[.]" and "serve memorandum of costs" are clerical tasks, the Court deducts 0.30 hours of Mr. Freeman's time at \$300.00 per hour on 03/18/2015 or \$90.00, 0.40 hours of Mr. Freeman's time at \$300.00 per hour on 06/19/2015 or \$120.00, 0.20 hours of Mr. Freeman's time at \$300.00 per hour on 11/16/2015 or \$60.00, and 0.50 hours of Mr. Freeman's time at \$300.00 per hour on 01/25/2016 or \$150.00. Accordingly, the total deduction for clerical work is \$420.00.

2. Correspondence and Telephone Conversations With L. Irgens

While Petitioners' attorney fails to identify who L. Irgens is, the Court presumes that L. Irgens is a representative of Petitioner Summit Almonds, LLC. In total, Mr. Freeman requests 3.2 hours of fees at \$300.00 per hour, or \$960.00, for communicating by correspondence and over the telephone with L. Irgens. Given the limited nature of these proceedings, the Court believes that this is an excessive amount of time. Therefore, the Court only allows 2.5 hours of fees at \$300.00 per hour, or \$750.00, for communicating with L. Irgens. Accordingly, the total deduction for excessive time communicating with L. Irgens is \$210.00.

3. Correspondence and Telephone Conversations with "Counsel"

While Petitioner's counsel fails to identify who "counsel" is, the Court presumes that "counsel" is James D. Burnside III, the individual identified as the attorney for Respondent in the proof of service of the instant motion. In total, Mr. Freeman requests 2.7 hours of fees at \$300.00 per hour, or \$810.00, for communicating by correspondence and over the telephone with Respondent's counsel throughout these proceedings. However, since Respondent never appeared in these proceedings, the Court determines that these conversations were unnecessary and, hence, disallows all of the time incurred. Accordingly, the total deduction for time communicating with "counsel" is \$810.00.

4. Pleadings and Other Papers



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**Tentative Ruling**

Re: ***Ozuna v. GGC Enterprises, Inc., et al.***

Case No. 15CECG02157

Hearing Date: May 26, 2016 (Dept. 502)

Motion: Defendants OGC Enterprises, Inc. dba Gold Digger's Gentleman's Club motion to strike portions of the Fifth Amended Complaint; Demurrer.

**Tentative Ruling:**

To grant the motion to strike without leave to amend.

To take the demurrer off calendar, as no pleadings were filed by defendant.

**Explanation:**

A motion to strike can be used to: "(a) Strike out any irrelevant, false, or improper matter inserted in any pleading"; or "(b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (Code Civ. Proc. §§ 431.10, subd.(b); 436, subd.(a).) A court will "read allegations of a pleading subject to a motion to strike as a whole, all parts in their context, and assume their truth." (*Clauson v. Sup.Ct. (Pedus Services, Inc.)* (1998) 67 CA4th 1253, 1255.)

A motion to strike may lie where the facts alleged do not rise to the level of "malice, fraud or oppression" required to support a punitive damages award. (*Turman v. Turning Point of Central Calif.* (2010) 191 Cal.App.4th 53, 63.) Mere conclusory allegations will simply not suffice. (*Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872.)

Punitive damages are governed by Civil Code §3294:

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified

the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

Here, the Fifth Amended Complaint contains the following allegations:

- Plaintiff attended a "gentleman's club" known as "Golddiggers" in Fresno to celebrate his step-son's 21<sup>st</sup> birthday. (5AC ¶9.)
- Plaintiff was eating sunflower seeds in the back of the club. (5AC ¶9.)
- "Doe One" (dressed in a great uniform with a black vest) asked Plaintiff and his step-son to leave. (5AC ¶9.)
- Once outside, Doe One threatened to strike and struck Plaintiff on the left side of his face. (5AC ¶9.)
- Plaintiff alleges that Doe One was an employee of GGC and was acting within the scope of his employment. He also alleges that GGC knew or should have known that Doe One was unfit for employment and employed Doe One "with a knowing disregard for the rights or safety of others." (5AC ¶10.)
- Plaintiff alleges that Doe One struck him on the side of the face outside of the club without warning. (5AC ¶17.)

Plaintiff has pleaded the language of section 3294, subdivision (b) with respect to whether punitive damages can be pleaded against an employer for the actions of the employee. Plaintiff has pleaded no facts, however, that support this contention: there are no factual allegations that Defendant knew or should have known about Doe One's unfitness to serve as a "bouncer" or security guard for Defendant.

Therefore, the Motion to Strike punitive damages is granted. Leave to amend is denied. This is plaintiff's sixth unsuccessful attempt to adequately plead a claim for punitive damages against the moving defendants. Plaintiff has not suggested how the pleading could be amended in good faith to properly allege such a claim.



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**Tentative Ruling**

Re: ***N.P. v. First Student, Inc.***  
Court Case No. 14CECG02937

Hearing Date: May 26, 2016 **(Dept. 502)**

Motion: 1) Motion to Seal Records  
2) Petition to Approve Compromise of Minor's Claim in Pending Action **(trailing Motion to Seal, with hearing conditioned upon Petitioner filing the Redacted Petition at the hearing, in accordance with the court's intended ruling herein)**

**Tentative Ruling:**

To deny the motion to seal in part, and to grant it in part: the court denies the request to seal the amount of the settlement and related dollar amounts in the Petition to Approve Compromise of Minor's Claim in Pending Action ("Petition"), but grants the request to seal all references to the names of the minor and Guardian ad Litem in the Petition.

Provided that, after the court's ruling on the motion to seal is entered, Petitioner files the redacted version of the Petition in accordance with the above order, the court intends to grant the Petition.

**Explanation:**

Petitioner/Plaintiff incorrectly concludes that Rule 2.550 of the California Rules of Court ("Rule 2.550") does not apply (i.e., that the parties can seal what they wish to) simply because the records (i.e., the Petition and its attachments, and the Order) are not being used at trial. That is not the case. Subdivision (a)(3) of Rule 2.550 merely indicates that the Rule applies to discovery materials, but does not state that it only applies to such materials. Rule 2.550 applies generally to "records," as defined at subdivision (b)(1) of the Rule. (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178 ("NBC"), *fn* 25—Courts have found public right of access to "civil litigation documents filed in court as a basis for adjudication.") Further, it does not apply only to materials *used at trial*; subdivision (a)(3) indicates that the Rule applies to records used at trial or when "submitted as a basis for adjudication of matters other than discovery motions or proceedings." (See also *NBC, supra.*) That means it applies to any documents or records presented in any judicial proceeding (e.g., motions, petitions, applications) where the court is called upon to make an adjudication. Thus, it certainly applies to the Petition here that has been lodged conditionally under seal with the court: it has been submitted in order for the court to adjudicate whether to accept and approve the compromise of this minor's claim.

There is an overriding interest in sealing any mention of the names of the minor and Guardian *ad litem* which overcomes the right of public access to the record, which supports sealing the record by redacting their names from the Petition. They have



# **Tentative Rulings for Department 503**

(19)

## **Tentative Ruling**

Re: ***Thornton Law Group v. Clifford Tutelian***  
Court Case No. 14CECG03560

Hearing Date: May 26, 2016 (Department 503)

Motion: by defendants for summary judgment or summary adjudication as to plaintiff's First Amended Complaint

### **Tentative Ruling:**

To deny.

### **Explanation:**

#### **1. Objections to Evidence**

The Court deems the objections by opposing party immaterial given the Courts' ruling. As for the objections by moving parties, the Court overrules Objections Nos. 1-12 and 14 – 19, deems No. 13 immaterial, sustains the hearsay objection contained in Nos. 20 and 21, and sustains the conclusion objection contained in Nos. 22 – 27.

#### **2. Adjudication of Issues 3, 4, 5, and 6 Impermissible**

Issue No. 3 seeks adjudication of "amounts billed to Mr. Tutelian and Non-Parties" for the "Corporate Entities." Issue No. 4 seeks adjudication of "amounts billed by MMW as barred by the four year statute of limitations." Issue No. 5 seeks adjudication of "amounts billed that are barred by the four year statute of limitations." Issue No. 6 seeks same as to the two year statute of limitations. The actual bills are not identified in the issues themselves.

In *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal. App. 4th 1848, the plaintiffs brought legal malpractice actions for representation in two different matters. One was a matter involving a tenant. The other was a matter involving a real estate purchase. The defendants filed a summary adjudication motion as to the tenant matter, contending all claims for malpractice with regard to that matter were barred by the statute of limitations. The claims were combined into causes of action in the complaint.

The question was whether the two matters involved separate primary rights so as to permit separate adjudication even though combined into one

claim in the lawsuit. The defendants (petitioners in the writ proceeding) sought to determine if the statute of limitations barred suit on one of the legal matters.

“[W]e hold that under subdivision (f) of section 437c, a party may present a motion for summary adjudication challenging a separate and distinct wrongful act even though combined with other wrongful acts alleged in the same cause of action.” (*Id.* at 1854-1855.)

In *Catalano v. Superior Court* (5<sup>th</sup> Dist. 2000) 82 Cal. App. 4<sup>th</sup> 91, the Fifth District Court of Appeal reversed a summary adjudication of punitive damages for four claims, which was combined (at the trial court level) with denial of a claim for punitive damages on a fifth count. See same at page 92:

“Is a motion for summary adjudication regarding punitive damages properly granted when the resulting determination adjudicates only some of the asserted facts relating to the claim but does not dispose of the entire claim for punitive damages? We conclude summary adjudication is not properly granted as a piecemeal disposition of some of the asserted facts within a claim for punitive damages, but may only be granted when an entire claim for punitive damages is eliminated.”

Here, the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> issues presented for summary adjudication are directed to part of the claims for damages. No entire cause of action or primary right is raised, only certain amounts of the overall damages sought are targeted. Under *Catalano*, that is a request for a prohibited partial summary adjudication.

## **2. Issue No. 1 – Existence of Fee Agreement with Defendant Tutelian**

The defendant must show that the plaintiff **does not possess** needed evidence, because otherwise the plaintiff might be able to establish the elements of the cause of action; the defendant must also show that the plaintiff **cannot reasonably obtain** needed evidence, because the plaintiff must be allowed a reasonable opportunity to oppose the motion.”

*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal. 4<sup>th</sup> 826, 854, emphasis in original. The evidence adduced by defendant for this motion fails to establish that plaintiff lacks evidence of a fee agreement at present and that plaintiff cannot obtain evidence of one. Mr. Tutelian does not state in his declaration that no fee agreement exists. The discovery found at Exhibit B to defendants' evidence establishes a lack of a fee agreement with the assignee, which is not material. It also states that Mr. Tutelian has the document (No. 13), which serves to defeat moving parties' claim that no evidence of such agreement may be obtained by opposing party. Finally, the facts set forth for this issue in moving parties' separate statement do not serve to establish the issue, as those facts discuss only whether the assignee has a direct contract with defendants, but omits whether a contract existed with Mr. Thornton's prior firms.

### 3. Issue No. 2 – Identity of Paying Party

Moving parties' Facts Nos. 7 through 36 are disputed by the Thornton Declaration at paragraphs 4, 6, 7, 8, 9, 10, 11, and 12, as well as the Exhibit thereto. Exhibit D to the moving parties' evidence show the "client number" as discussed by the Thornton Declaration. Fact No. 38 is also disputed by the evidence cited in support thereof.

Mr. Tutelian states that he is an owner, officer, or partner in the entity defendants, and does not state he derived no benefit from counsel's representation. *Michael Distributing Co. v. Tobin* (1964) 225 Cal. App. 2d 655. "Whenever the leading and main object of the promisor is not to become surety or guarantor of another, but to subserve some purpose or interest of his own, his promise is not within the statute [of frauds], although the effect of the promise may be to pay the debt or discharge the obligation of another." *Seneca Communications Inc. v. International Bank of California* (1980) 103 Cal. App. 3d 541, 551, relying on *Schumm v. Berg* (1951) 37 Cal. 2d 174, 187. See also *Crocca*, 84 A.L.R.4th 994 at section 3, cited in 1 Witkin, Summary of California Law, Contracts, section 372.

There is also the exhibit to Mr. Thornton's Declaration, which demonstrates a written agreement to pay by Mr. Tutelian existed. Such evidence is admissible pursuant to Evidence Code section 1523(a), with loss of the document explained by the response to No. 10 of Exhibit B to moving parties' evidence.

Pursuant to 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:** A.M. Simpson **on** 5/24/16 .  
(Judge's initials) (Date)

(23)

**Tentative Ruling**

Re: **David B. Kaye, M.D. Inc. v. Ryan, Christie, Quinn, Provost & Horn**  
Superior Court No. 14CECG00190

Hearing Date: Thursday, May 26, 2016 (**Dept. 503**)

Motion: Defendants Ryan, Christie, Quinn, Provost & Horn's and J. Patrick Horn's Motion to Trifurcate Trial and Empanel Separate Juries

**Tentative Ruling:**

To grant in part and to deny in part Defendants Ryan, Christie, Quinn, Provost & Horn's and J. Patrick Horn's motion to trifurcate trial and empanel separate juries.

The Court grants bifurcation of Defendants' statute of limitations defense and orders that trial of the statute of limitations defense will be conducted first. (Code Civ. Proc., § 597.) The Court denies Defendants' request to bifurcate the punitive damages issues as moot. (Civ. Code, § 3295, subd. (d).) The Court denies Defendants' request to empanel two separate juries. (Code Civ. Proc., § 598.)

**Explanation:**

Defendants Ryan, Christie, Quinn, Provost & Horn and J. Patrick Horn ("Defendants") request that the Court issue an order trifurcating the trial of this action into three phases and directing that one jury will hear and decide the first phase of the trial while a second, separate jury will decide the second and third phases of the trial if the case continues past the first phase.

First, Defendants request that the Court exercise its discretion to trifurcate the trial of this action into three phases – (1) a statute of limitations phase; (2) a liability phase; and (3) a punitive damages phase. While Plaintiffs David B. Kaye, M.D. Inc. dba Natural Vision, David B. Kaye, and Loan K. Nguyen ("Plaintiffs") do not object to bifurcation of the punitive damages phase, Plaintiffs argue that the Court should not order a separate trial on Defendants' statute of limitations defense because it is not significantly likely that Defendants will prevail on their statute of limitations defense and the separate trial will not promote judicial economy because the statute of limitations and liability issues are so intertwined that the evidence cannot be divided into the proposed separate phases.

Initially, the Court notes that Defendants' motion to strike the punitive damages allegations from Plaintiffs' third amended complaint was granted with leave to amend on May 17, 2016 and that, as of this date, Plaintiffs have not filed a fourth amended complaint that includes punitive damages allegations. Therefore, the Court finds that Defendants' request to bifurcate the issue of punitive damages is moot.

When it comes to bifurcating the statute of limitations issue, Code of Civil Procedure section 597 states that: "When the answer pleads that the action is barred by the statute of limitations ..., the court may, either upon its own motion or upon the motion of any party, proceed to the trial of the special defense ... before the trial of any other issue in the case[.]" Plaintiffs contend that the Court should deny Defendants' request to bifurcate the statute of limitations defense and conduct the trial of the special defense first because, since the evidence regarding the statute of limitations defense is the same evidence that will be presented to establish Defendants' liability, no time or expense will be saved by trying the statute of limitations defense separately. However, while some of the evidence regarding both the statute of limitations issue and the liability issues may indeed be the same, the issues regarding the statute of limitations defense will be limited to determining what Plaintiffs knew about their injury and when Plaintiffs began to suspect that the embezzlement was Defendants' fault. Therefore, Plaintiffs will not need to present their entire case, or even most of their case, regarding Defendants' liability in order for a jury to decide the statute of limitations issue. Consequently, the Court grants Defendants' request to bifurcate the statute of limitations defense and orders that the special defense be tried first pursuant to Code of Civil Procedure section 597.

However, the Court denies Defendants' request to empanel one jury to decide the statute of limitations defense and a second, separate jury for the trial of the liability issues if a trial on liability issues is necessary. A trial court "has discretion whether or not to order different juries for separate trials in an action." (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 911.) Defendants argue that two separate juries are needed because both Plaintiffs and Defendants would be presenting different and potentially confusing arguments in the two phases of trial. However, Defendants have failed to establish that any potential confusion caused by allegedly contradictory positions taken by Defendants and/or Plaintiffs during the two phases of the trial could not be cured by reasonable jury instructions. Therefore, given the extra expense and time that having two separate juries would cause, the Court finds that two separate juries does not promote the economy and efficiency of handling this action and is not in the ends of justice.

Accordingly, the Court grants in part and denies in part Defendants' motion to trifurcate trial and empanel separate juries.

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:** A.M. Simpson **on** 5/25/16 .  
(Judge's initials) (Date)