Tentative Rulings for June 28, 2016
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).)

15CECG03589 ***Phillips v. Dang*, Motion to Compel (Dept. 503)**

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

15CECG00475 ***Maciel v. Bar 20 Dairy* is continued to July 28, 2016 at 3:30 p.m. in Department 402.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(20) **Tentative Ruling**

Re: ***Renaud v. William L. Ebbling, Inc.***, Superior Court Case No. 15CECG00256

Hearing Date: **June 28, 2016 (Dept. 402)**

Motion: Demurrer to Complaint

Tentative Ruling:

To sustain the general demurrers to the second and fifth causes of action, with 10 days' leave to amend granted as to the second cause of action only. To overrule the special demurrers and general demurrers to all other causes of action. (Code Civ. Proc. § 430.10(e), (f).) The time in which the complaint may be amended will run from the service of the order by the clerk. All new allegations shall be in **boldface** type.

Explanation:

First, the court will not sustain any of the demurrers on statute of limitations grounds, except for the fifth cause of action, which plaintiff concedes is untimely. Defendant does not argue that the remaining causes of action are barred in their entirety by the statute of limitations. Rather, defendant argues that to the extent claims are based on conduct occurring more than three or four years (as the case may be) prior to the filing of the complaint, plaintiff cannot recover for those claims. If the essential facts of some valid cause of action are alleged, the complaint is good against a general demurrer. (*Quelimane Co., Inc. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 38-39.)

Second, the special demurrers are overruled. 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.) The substance and nature of plaintiff's claims are abundantly clear. Even if plaintiff didn't plead enough detailed facts, as defendant contends, that defect would not render the complaint uncertain.

The first cause of action is for failure to pay overtime compensation.

Defendant points out that to recover unpaid overtime compensation, the plaintiff must prove that (1) plaintiff performed work for defendant, (2) she worked overtime hours, (3) defendant knew or should have known she worked overtime

hours; (4) plaintiff was not paid for some or all of the overtime hours worked, and (5) the amount of overtime pay owed. (Lab. Code § 1194, CACI 2702.)

Plaintiff alleges that deferent suffered plaintiff to work in excess of 8 hours per day and 40 hours per week, and defendant willfully refused to pay plaintiff what she is owed. That is sufficient to meet the general elements of the claim. The only thing missing here is the amount of overtime pay owed. While that is listed in CACI 2702 as an element of the plaintiff's claim, Labor Code section 1194 does not indicate that the dollar amount must be pled in the complaint. In support of the contention that plaintiff must allege the amount and extent of her work, defendant cites to *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727-728. However, *Hernandez* did not involve an attack on the pleadings, or pleading standards. Rather, it addressed whether the plaintiff carried his burden of proof with regards to the number of hours he accrued.

Defendant contends that plaintiff must allege what days and times overtime was worked, but cites to no authority requiring such detail at the pleading stage.

The memorandum in support of the motion raises other extraneous issues that have no impact on whether plaintiff alleges sufficient facts to state a cause of action, such as the availability of punitive damages or liquidated damages where the employer shows that the omission was in good faith under Labor Code section 1194.2.

The second cause of action is for failure to pay wages due and owing. CACI 2700 lists the element that a plaintiff must prove as: (1) plaintiff performed work for defendant, defendant owes wages under the terms of employment, and the amount of wages.

Plaintiff alleges that it was defendant's practice not to allow meal and rest periods as required by California law, and not to compensate plaintiff with pay owing as required by Labor Code section 512 and the applicable Industrial Welfare Commission Orders. (Complaint ¶ 14.) Plaintiff alleges that defendants willfully refused to compensate plaintiff the pay she is owed pursuant to those provisions. (Complaint ¶ 15.)

Here, though, while plaintiff alleges the existence of a policy, and that she was not paid what is owed pursuant to Labor Code § 512 and IWC Orders 11 and 12, she does not allege that she actually worked through a meal period, and that she was not paid one hour for that meal period. Plaintiff fails to clearly allege ultimate facts necessary for the cause of action.

The third cause of action is for retaliation. To establish a prima facie case of retaliation, "a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two." (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Ca1.App.4th 1378, 1384.)

The Complaint alleges that plaintiff called the police to report a co-workers threatening and hostile behavior towards her, because she feared for her safety and well-being. In demurring to the cause of action, defendant basically just wants further detail about the report to the police. Defendant does not contend that the report did not constitute protected activity. Defendant can obtain more detail through discovery.

Defendant contends that no facts are alleged to provide a causal relationship the report and the firing. However, plaintiff alleges that it is believed that Dr. Ebbeling terminated plaintiff because of her report to the police, and that it was a substantial motivating factor in defendant's decision to retaliate against her. (Complaint ¶ 22.) This appears to be a proper pleading on information and belief. Plaintiff is required to plead ultimate facts. "[T]he complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872.) Plaintiff pleads the required ultimate facts.

Defendant also seems to attack the sufficiency of allegations going to the prayer for punitive damages. That is an issue that should have been raised in a motion to strike. Such allegations are not essential to the retaliation claim.

The fourth cause of action is for tortious, wrongful termination in violation of public policy. Plaintiff must allege (1) that she was employed by defendant, (2) that defendant discharged plaintiff, (3) that the alleged violation of public policy was a substantial motivating reason for plaintiff's discharge, and (4) that the discharge caused plaintiff harm. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232.)

Plaintiff alleges that she was terminated for complaining "to defendants" about safety procedures in regards to needles and other CALOSHA violations, as well as for the police report. The court agrees that the allegation regarding needles and OSHA violations is entirely too vague to support the cause of action. However, the cause of action is also based on the police report, which defendant does not address in the context of this cause of action.

Plaintiff agrees that the fifth cause of action is barred by the statute of limitations. Accordingly, this demurrer should be sustained without leave to amend.

With the sixth cause of action plaintiff seeks waiting time penalties pursuant to Labor Code sections 203 and 206.

Section 203 provides for recovery of penalties if an employer willfully fails to pay any wages of an employee who is discharged. The employee's wages continue for up to 30 days from the date of discharge.

Section 206(a) provides that where there is a dispute over wages, the employer shall pay all wages conceded to be due.

Plaintiff alleges that defendant failed to pay her earned wages upon termination on 1/21/13. She did not secret or absent herself from defendant, nor did she refuse to accept the wages from defendant. (Complaint ¶ 43.) This is sufficient at the pleading stage. Further detail can be obtained through discovery.

The seventh cause of action is for unfair business practices under Bus. & Prof. Code § 17200.

"Unfair competition" means and includes "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.) (Bus. & Prof. Code § 17200.) Actions for relief under the Unfair Competition Law ("UCL") may be prosecuted "by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition."

Defendant first asserts that the allegations are conclusory and boilerplate recitation of the elements of a UCL claim. However, defendant never specifically discusses any of the allegations of the complaint, nor how they tie into the preceding causes of action. Defendant ignores the allegation that it engaged in unfair business practices by employing the policy of failing to pay plaintiff's employment compensation as required by California law. (Complaint ¶ 46.) Virtually any law or regulation can serve as predicate for a § 17200 "unlawful" violation. Thus, if a "business practice" violates any law it also violates § 17200 and may be redressed under that section. (*People v. E.W.A.P., Inc.* (1980) 106 Cal.App.3d 315, 319.) Defendant then argues that plaintiff has not alleged what she lost or facts to support that it was a result of defendant's unfair business practice. However, the cause of action incorporates all prior allegations, which include allegations of failure to pay wages due, and seeks restitution of employment compensation wrongfully withheld. (Complaint ¶¶ 45, 48.) This is sufficient to allege that plaintiff suffered financial injury as a result of defendant's alleged statutory violations.

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: JYH on 6/27/16 .
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Harvey v. Winegard Energy, Inc. et al.***

Superior Court Case No. 16 CECG 00256

Hearing Date: June 28, 2016 **(Dept. 402)**

Petition: By Defendants to compel arbitration and stay pending action

Tentative Ruling:

To grant the petition pursuant to CCP § 1281.2. To stay the pending litigation. To order the parties to utilize the services of the American Arbitration Association, 45 River Park Place, West #308, Fresno, CA in the arbitration of this matter. If the parties cannot agree on the selection of an arbitrator with this organization within 45 days, either party may file a motion asking the Court to select an arbitrator from this organization.

Explanation:

Nature of Proceeding

A party to an arbitration agreement may seek a court order compelling the parties to arbitrate a dispute covered by the agreement. See CCP § 1281.2. The petition must allege specific facts (rather than mere conclusions) demonstrating the existence of an arbitrable controversy. See *Graphic Arts Int'l Union v. Oakland Nat'l Engraving Co. (1986) 185 Cal.App.3d 775, 781.* In addition, the petition must allege "that the opposing party refuses to arbitrate the controversy." See *Spear v. California State Auto. Ass'n (1992) 2 Cal.4th 1035, 1041.*

Submission of Evidence

As in motion proceedings generally, factual issues should be submitted by affidavits or declarations. Verified pleadings may not suffice. See *Strauch v. Eyring (1994) 30 Cal.App.4th 181, 186*--error to deny petition on ground of fraud alleged in responsive pleadings. The petition to compel must set forth the provisions of the written agreement and the arbitration clause *verbatim*, or such provisions must be attached and incorporated by reference. See CRC Rule 3.1330.

Burden of Proof

The moving party must prove by **a preponderance of evidence** the **existence** of the arbitration agreement and that the dispute is **covered** by the agreement. The burden then **shifts** to the resisting party to prove by a preponderance of evidence

ground for denial (e.g., fraud, unconscionability, etc.). See *Rosenthal v. Great Western Fin'l Securities Corp.,* (1996) *14 Cal.4th 394 at 413-414.*

MERITS

Petitioner's Burden of Proof Re: Agreement to Arbitrate

The Declaration of Arnold Espinoza is submitted in support of the motion. He states that as part of his employment, Mr. Harvey was presented with a number of documents; i.e., the Employment Agreement. the Employee Handbook Agreement, an Acknowledgment of At-Will Employment, a Notice to Applicants and Employees for Employment With Winegard Energy Inc. (relating to the Drugs and Alcohol Policy), a Uniform Agreement and an Arbitration Agreement. Espinoza states that Harvey voluntarily signed all agreements, including the arbitration agreement. See Declaration at ¶¶ 6-8 and see Exhibit 2 consisting of the Arbitration Agreement. The Defendants have met their burden of proof. See *Rosenthal*, supra.

Respondent's Evidence in Support of Opposition

Mr. Harvey submits his own Declarations in support; one filed on May 12, 2016 and an "amended" Declaration filed-stamped May 13, 2016. Both Declarations state Harvey's version of events. The gravamen of his opposition is that he had no choice but to sign the Arbitration Agreement or he would not have been hired. See original Declaration and amended Declaration at ¶¶6. He also attaches the Arbitration Agreement from his previous employment at Winegard in 2001. That Agreement indicates that Harvey crossed out portions of the Arbitration Agreement. But, that Agreement has no bearing on the matter at bench.

Doctrine of Unconscionability

The same analysis is applied to commercial, consumer and employment contracts. [*Walnut Producers of Calif. v. Diamond Foods, Inc*. (2010) 187 CA4th 634, 642–644] Arbitration clauses are often found in adhesion contracts (standardized contracts drafted by a party of superior bargaining power and presented to the weaker party on a take-it-or-leave-it basis). "Unconscionable" provisions in such contracts may be unenforceable, at least under state law. See *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 C4th 83, 113–115; *Ontiveros v. DHL Express (USA), Inc.* (2008) 164 CA4th 494, 503–505]

But, **the mere fact** an adhesion contract is involved does *not* per se render the arbitration clauses unenforceable. Such contracts are "an inevitable fact of life for all citizens—businessman and consumer alike." See *Graham v. Scissor–Tail, Inc.* (1981) 28 C3d 807, 817 and *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 C4th 83 at 113. Thus, a seller's standard form contract does not ipso facto prevent the buyer from negotiating for other terms. Ultimately, a form contract used by a party for many transactions is not necessarily a contract of adhesion and procedurally unconscionable. Rather, the particular circumstances under which the contract was executed must be considered. See *Crippen v. Central Valley RV Outlet, Inc.* (2004) 124 CA4th 1159, 1165–1167—absence of

procedural unconscionability in used motor home purchase agreement prevented buyer from blocking arbitration of dispute]

An arbitration agreement must be **both** procedurally and substantively unconscionable in order to render it unenforceable. See *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 133-134. An arbitration agreement is procedurally unconscionable when it is oppressive and surprising due to unequal bargaining power between the parties. See *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071. An agreement is substantively unconscionable when it is overly harsh and one-sided. Id. The procedural and substantive elements need not be present in the same degree, and a sliding scale is used to evaluate the presence of procedural and substantive unconscionability. As a result, the more one type of unconscionability is present, the less the other type of unconscionability needs to exist. See *Armendariz, supra* at 114.

Here, Mr. Harvey has met his initial burden. His claim that he had to sign the Arbitration Agreement in order to gain employment renders the Agreement a contract of adhesion and as such, procedurally unconscionable. See *Sanchez v. Carmax Auto Superstores Calif., LLC* (2014) 224 Cal.App.4th 398 at 402, *review denied (June 11, 2014)*.

But, in order to invalidate the arbitration agreement, it must be **BOTH** procedurally and substantively unconscionable. Id. To be substantively unconscionable, a contract term must be "unduly harsh, oppressive, or one-sided." [*Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771 at p. 797.] Here, Mr. Harvey did not address the requirement of substantive unconscionability as applied to the facts of his case. Instead, he cites to "black letter law." See Memorandum of Points and Authorities at page 7 and page 8 lines 1-6.

It is not the Court's responsibility to "comb through" the Arbitration Agreement and/or Mr. Harvey's Declaration and ascertain whether he has presented facts that would constitute substantive unconscionability. However, as a matter of fairness, an examination of the Arbitration Agreement indicates that it is not substantively unconscionable. It applies equally to both Winegard Energy and any employee. It provides for discovery and Winegard agrees to pay for the cost of arbitration. See Arbitration Agreement attached as Exhibit 2 to the Declaration of Espinoza. Therefore, the motion to compel arbitration and stay the pending litigation will be granted pursuant to CCP § 1281.2.

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

Tentative Ruling
Issued By: JYH on 6/27/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 403

Tentative Rulings for Department 501

03

Tentative Ruling

Re: ***Pena v. Manco Abbott, Inc.***
Case No. 15 CE CG 03954

Hearing Date: June 28th, 2016 (Dept. 501)

Motion: Defendants' Demurrer and Motion to Strike Complaint

Tentative Ruling:

The matter is off calendar. Plaintiff has filed a first amended complaint, so the demurrer and motion to strike are moot.

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

Tentative Ruling
Issued By: MWS on 6/24/16.
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Crop Production Services, Inc. v. EarthRenew, Inc.***
Court Case No. 09 CECG 02733

Hearing Date: June 28, 2016 (Dept. 501)

Motions: CPS' Motion for Summary Judgment or, in the Alternative, for Summary Adjudication
CPS' Motion for Leave to Submit Excerpts from the Deposition of Murray Hasinoff in Support of its Motion for Summary Judgment

Tentative Ruling:

To deny CPS' Motion for Summary Judgment/Adjudication.

To deny CPS' Motion to Submit Additional Evidence in Support of its Motion for Summary Judgment.

Explanation:

Motion for Summary Judgment/Adjudication

Burden on Summary Judgment

In ruling on a motion for summary judgment or summary adjudication, the court must "consider all of the evidence' and all of the 'inferences' reasonably drawn there from and must view such evidence and such inferences 'in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843.) In making this determination, courts usually follow a three-prong analysis: identifying the issues as framed by the pleadings; determining whether the moving party has established facts negating the opposing party's claims and justifying judgment in the movant's favor; and determining whether the opposition demonstrates the existence of a triable issue of material fact. (*Lease & Rental Management Corp. v. Arrowhead Central Credit Union* (2005) 126 Cal.App.4th 1052, 1057-1058.)

As the moving party, Crop Production "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact[.]" (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 850.) If Crop Production meets this burden, then the burden of production shifts to EarthRenew "to make a prima facie showing of the existence of a triable issue of material fact." (*Ibid*.)

A defendant or cross-defendant who seeks a summary judgment must define *all* of the theories of liability alleged in the complaint and challenge *each* factually; if the defendant or cross-defendant fails to do so, he or she does not carry the initial

burden of showing the nonexistence of a triable issue of material fact. (*Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1165; *Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 714.)

Purchase Agreement – First Cause of Action

"In order for acceptance of a proposal to result in the formation of a contract, the proposal 'must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain.' (Citation.) ... The terms of a contract are reasonably certain if they provide a basis for determining ... the existence of a breach and for giving an appropriate remedy." (Citation.)" (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811.) "If, by contrast, a supposed 'contract' does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract. (See, e.g., 1 Williston on Contracts (4th ed.1990) § 4:18, p. 414 ['It is a necessary requirement that an agreement, in order to be binding, must be sufficiently definite to enable the courts to give it an exact meaning.']; see also Civ. Code, § 3390, subd. 5 [a contract is not specifically enforceable unless the terms are 'sufficiently certain to make the precise act which is to be done clearly ascertainable'].)" (*Id*. at pp. 811–812.)

"[T]he specificity required for an enforceable contract depends upon the circumstances." (*S. Jon Kreedman & Co. v. Meyers Bros. Parking–Western Corp*. (1976) 58 Cal.App.3d 173, 182.) "The objective intent as evidenced by the words of the instrument, not the parties' subjective intent, governs our interpretation." (*Beck v. American Health Group Internat., Inc*. (1989) 211 Cal.App.3d 1555, 1562.) If the written instrument's language is clear and explicit, it governs. (*La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co*. (1994) 9 Cal.4th 27, 37.)

Under ordinary rules of contractual interpretation, the Purchase Agreement would be too uncertain to be enforced. EarthRenew sold fertilizer in multiple forms, including, "prill, meal, granule, or pellet form." (See Marroso Decl. Ex. 50 at p. 7; Ex. 23 p. 4; Ex. 30 at ¶ A.) Here, the Purchase Agreement leaves the product type blank.

However, this contract is governed by the UCC as it involves the sale of goods. (Com. Code, §§ 2102, 2105(1).) Commercial Code section 2204(3) provides that "[e]ven though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." Pursuant to Commercial Code section 2202, terms of any writing expressing the entire agreement of the parties may be explained or supplemented by evidence of course of dealing, usage of trade, and course of performance. Further, trade usage may be put in evidence as an instrument of interpretation without the requirement of proof of ambiguity. (*Balfour, Guthrie & Company, Ltd. v. Gourmet Farms* (1980) 108 Cal.App.3d 181, 190.) Accordingly, as the party which bore the burden of proving the contract was unenforceable, Crop Production also bore the burden of

producing evidence as to the course of dealing, usage of trade, and course of performance to prove that the contract was nonetheless indefinite in light of this extrinsic evidence. Because Crop Production failed to introduce any such evidence (see UMF Nos. 46-50), it failed to carry its burden on summary judgment. As such, the Court denies Crop Production's motion for summary judgment. Furthermore, summary adjudication of this cause of action is also inappropriate.

Offtake Agreement – Second and Third Causes of Action

The second cause of action is for breach of the Offtake Agreement. The third cause of action is for anticipatory breach of the Offtake Agreement. The elements of a cause of action for breach of contract are: the existence of the contract, the plaintiff's performance or excuse for nonperformance, the defendant's breach, and the resulting damages to the plaintiff. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) "Repudiation of a contract, also known as "anticipatory breach," occurs when a party announces an intention not to perform prior to the time due for performance." (*Stephens & Stephens XII, LLC v. Fireman's Fund Ins. Co*. (2014) 231 Cal.App.4th 1131, 1150.) An essential element of a breach of contract claim is an enforceable contract. (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 515, p. 648.)

Crop Production's Motion for Summary Judgment/Summary Adjudication seeks to prove that the Offtake Agreement is simply not enforceable under any theory proposed by EarthRenew. For its part, EarthRenew has proposed three theories as to why the Offtake agreement is valid: Mullins had actual authority to enter into the Agreement; Mullins had ostensible authority to enter into the Agreement; and barring either actual or ostensible authority on the part of Mullins to enter into the Agreement, Crop Production ratified Mullins' execution of the Agreement and is bound thereby. Because each theory is independent of the others, i.e., establishing any one theory would be sufficient for EarthRenew to prevail, Crop Production must establish that there is no triable issue of material fact relevant as to any theory, and that each theory fails as a matter of law.

Because the Court concludes that there are triable issues of material fact as to whether Duckworth and/or Mullins had ostensible authority to enter into the Offtake Agreement, the issues of actual authority and ratification need not be addressed herein.

Since the Offtake Agreement was for five years duration, it fell within the statute of frauds. Civil Code section 1624 provides that an agreement "that by its terms is not to be performed within a year from the making thereof" is invalid unless it or some note or memorandum is "in writing and subscribed by the party to be charged or by the party's agent." (Civ. Code, § 1624(a)(1).)

"Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." (Civ. Code, § 2317.) """It is settled [in California] that ostensible authority arises as a result of conduct of the principal which causes the third party reasonably to believe that the

agent possesses the authority to act on the principal's behalf.'" [Citation.] Significantly, 'ostensible authority must be based upon acts or declarations of the principal and not the conduct or representations of the alleged agent.' [Citations.]" (*Petersen v. Securities Settlement Corp*. (1991) 226 Cal.App.3d 1445, 1452, emphasis in original.) Liability of the principal for the ostensible agent requires not only the principal's conduct that creates the authority, but also "justifiable reliance by a third party, and a change of position from such reliance resulting in injury." (*Preis v. American Indemnity Co*. (1990) 220 Cal.App.3d 752, 761; Civ. Code, § 2334.)

Although the existence of an agency relationship is usually a question of fact, it "becomes a question of law when the facts can be viewed in only one way." (*Metropolitan Life Ins. Co. v. State Bd. of Equalization* (1982) 32 Cal.3d 649, 658.) Here, they cannot.

Crop Production argues that EarthRenew admitted that it never believed that Mullins had the authority to bind Crop Production to the Offtake Agreement. Crop Production asserts that, in her deposition, Carin stated that, prior to May 20, 2009, she "never considered" whether Mullins had authority to commit Crop Production to the obligations that were in the Offtake Agreement. (UMF Nos. 27-28; Marroso Decl. Ex. 5 at 67:16-68:13; 56:3-6.)

This is not what the evidence shows. The cited portions of the deposition testimony indicate that EarthRenew's CEO did not personally: 1) ask Mullins what his contract authority limit was; 2) ask him to prove his authority limit; and 3) ask Mullins to show her any contracts to prove his authority.

However, the CEO of a corporation is not the whole of the corporation. The knowledge of all EarthRenew's officers and directors will be imputed to EarthRenew. A corporation can acquire knowledge only through its officers and agents. The knowledge of a corporate officer within the scope of his employment is the knowledge of the corporation. (*Meyer v. Glenmoor Homes, Inc*. (1966) 246 Cal.App.2d 242, 264; *Uecker v. Zentil* (2016) 244 Cal.App.4th 789, 797.) Here, Duckworth told EarthRenew Director of Business Alliances, Hasinoff, that Miller, Crop Production's West Region Manager and an Agrium officer, put Mullins in Coburn's position as region marketing manager for new products. (Hasinoff Decl. ¶ 9.) Hasinoff heard Duckworth tell Mullins that Mullins had authority to sign the Offtake Agreement because Mullins was responsible for new products. (Hasinoff ¶ 15.) Finally, Carin testified in deposition that she believed that Duckworth could authorize Mullins to sign the Agreement in his stead and she had no concerns about his doing so. (Sinek Decl. Ex. 1 at 82:5-83:22 and Ex. 2 at 290:5-290:7.) This evidence disputes the deposition testimony that Carin "never considered" whether Mullins had authority to commit Crop Production to the Offtake Agreement.

Evidence that Crop Production Lead EarthRenew to Believe that Mullins Had Signing Authority

Furthermore, EarthRenew has evidence that Crop Production led EarthRenew to believe that Mullins had authority to enter into the Offtake Agreement.

Duckworth was "General Manager, Purchasing" for the West Region. (Sinek Decl. Ex. 9 at 14:14-21.) Specifically, Duckworth was responsible for purchasing fertilizer for the West Region. (Sinek Decl. at 4 24:22-25:2; Ex. 7 at 33:4-12, 55:6, 57:13-17; Ex. 11 at 29:15-19.) When Duckworth told EarthRenew that Mullins would be signing the Offtake Agreement Crop Production personnel Rinkenburger and Mullins were both present and neither questioned Mullins' authority to do so. (Sinek Decl. Ex. 1 at 82:5-83:22, 84:6-11; Ex. 2 290:5-291:7; Ex. 8 at 247:19-25.) Rinkenburger's presence – and silence – is important. Ostensible agency may arise from the silence of the principal, provided the principal knows that the ostensible agent is holding himself out as having agency authority. (*Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 426–427.) At one of the meetings with EarthRenew, Duckworth said Mullins had authority to sign the Agreement because Mullins was responsible for new products and EarthRenew's fertilizer was a new product. (Hasinoff Decl. ¶ 9, 15.)

The issue as to whether EarthRenew could have reasonably relied on Duckworth's representations as to Mullin's authority, because it knew that Duckworth's own authority to approve contracts was limited to $5 million dollar agreements and the Offtake Agreement was for $200 million, is a triable issue of fact. Carin testified that Duckworth told her that he could make multiple $5 million purchases on an on-going basis. (Sinek Decl. Ex. 2 at 278:16-279:8.) Duckworth testified that he signed agreements that provided he would make a series of purchases instead of a one-time purchase, though he did not recall the dollar amount of those contracts. (Sinek Decl. Ex. 9 at 177:19-178:15.) Duckworth signed contracts for fertilizer purchases in excess of $5 million. (Sinek Decl. Ex. 29.) Moreover, in response to Requests for Admission, Crop Production admitted that Duckworth had the authority to sign the letter of intent. (Sinek Decl. Ex. 20, No. 15.) Finally, with respect to Crop Production's argument that EarthRenew could not rationally have thought that breaking up a $200 million contract into many $5 million parts would have evaded Duckworth's contractual limitations, this presents a triable issue of material fact. First, it is there is evidence that EarthRenew had no knowledge of Crop Production's written policies on contract approval which forbid this practice. (Hasinoff Decl. ¶ 18; Sinek Decl. Ex. 4 at 69:24-70:4; Ex. 8 at 143:11-14.) Second, Crop Production's only authority on this point, *Perpetual Building, Ltd Partnership v. District of Columbia* (1985) 618 F.Supp. 603, is not a California authority, does not discuss California law, and is not binding on either this court or EarthRenew.

Finally, aside from Duckworth's representations, Bruce Waterman, the CFO of Agrium and a Crop Production Director had a discussion with Carin, wherein she said EarthRenew was negotiating an Offtake agreement with Duckworth and his team in California. Waterman replied that he would leave EarthRenew in the hands of Duckworth and his team and they were quite capable of handling this type of agreement. (Sinek Decl. Ex. 2 at 282:10-283:25.) While, Crop Production introduces evidence that Carin never told Waterman about the scope of the Offtake Agreement, i.e., that it was for $200 million dollars over 5 years for 550,000 tons of fertilizer and never showed him the contract, this evidence goes to evaluating the weight of Waterman's statements. In resolving a summary adjudication motion, the trial court does not weigh evidence, or evaluate the credibility or plausibility of a plaintiff's claims. (*Binder v. Aetna Life Ins. Co*. (1999) 75 Cal.App.4th 832, 840.)

EarthRenew Justifiably Relied on Mullins' Apparent Authority to Execute the Offtake Agreement

Crop Production's arguments that EarthRenew could not have reasonably relied on Mullins' ostensible authority to execute the Offtake Agreement are based primarily on two theories. First, that the equal dignities rule required Mullins' (and Duckworth's) agency authority to be in writing, and, second, that EarthRenew was required to, but never did, consult a Crop Production senior manager, director, officer, etc. to confirm Duckworth's or Mullins' authority.

The equal dignities rule provides that, when a contract must be in writing to be effective, an agency relationship with respect to that contract must also be in writing. (Civ. Code., § 2309 ["An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing"].) The rule is subject to an exception: estoppel. "A principal is estopped to raise the equal dignities rule against a contracting third party if the principal, by its own conduct, lulls the third party into believing that its agent has written authority to enter the contract or has no need of written authority. [Citations.]" (*Kerner v. Hughes Tool Co*. (1976) 56 Cal.App.3d 924, 934.)

The facts of *Kerner* as particularly close to this instant case. In *Kerner*, the defendant assigned the agent the title of Entertainment Director and placed his name on defendant's hotel marquee as the presenter of entertainment. The agent regularly booked entertainment for the hotel. The agent signed the contract for plaintiff's first production. When plaintiff tried to speak to the managing director of the hotel, he was told to speak with the agent. The appellate court found, "[f]rom defendant's conduct plaintiff could reasonably conclude either that [the agent] had written authority to enter all contracts for entertainment, including those required to be in writing, or that defendant would not object to [the agent's] lack of written authority." (*Id* at pp. 934-935.) Here, Duckworth signed the first contract, the Purchase Agreement. When Carin spoke to Waterman about the Offtake Agreement, she was referred to Duckworth and "his team" in California. Both Duckworth's and Mullins' titles suggested they could purchase fertilizer for their region. Therefore, the Court finds a triable issue of material fact regarding estoppel – whether Crop Production lulled EarthRenew into believing that Duckworth and/or Mullins had either written authority to enter the contract or had no need of written authority.

Crop Production's second contention, that EarthRenew was required to speak with Crop Production management to confirm Mullins' or Duckworth's authority is based on *South Sacramento Drayage Co. v. Campbell Soup Co*. (1963) 220 Cal.App.2d 851. In *South Sacramento Drayage Co.*, plaintiff sued to enforce a 15-year trucking contract made with McReynolds, defendant's "traffic manager" in the local territory. McReynolds had previously negotiated two one-year contracts with plaintiff, which were executed by the general traffic manager in New Jersey. From this case, Crop Production takes the following principal: "[i]t is therefore

declared to be a fundamental rule … that persons dealing with an assumed agent, whether the assumed agency be a general or special one, are bound at their peril, if they would hold the principal, to ascertain not only the fact of the agency but the nature and extent of the authority, and in case either is controverted, the burden of proof is upon them to establish it.'" (*Id*. at pp. 857-858.) However, *South Sacramento Drayage Co*. is distinguishable. In that case, there had been a prior course of conduct between the alleged agent and the third party such that it should have been clear that the agent had no authority to enter into the kind of long range contract he purported to enter into; in preceding long range contracts, the agreement was always consummated by the agent's supervisor.

In the instant case, there was no course of conduct to suggest either Duckworth or Mullins could not execute the Offtake Agreement. Indeed, Crop Production had no qualms about Duckworth executing the Letter of Intent and, when Carin did speak with Waterman, she was referred back to Duckworth. Moreover, "[I]t has been consistently held '[w]ith regard to ostensible authority ... that, if the principal clothes his agent with such authority, a person dealing with the agent, in the absence of any conduct on the part of either principal or agent warranting inquiry, is entitled to rely upon that apparent authority....' [Citation.]" (*United States Credit Bureau, Inc. v. Cheney* (1965) 235 Cal.App.2d 357, 360.)

EarthRenew Changed its Position in Reliance on Mullins' Apparent Authority to Execute the Offtake Agreement

EarthRenew has introduced evidence that, after the Offtake Agreement was signed, it incurred over $20,000 in expenses to ship product to Crop Production. (Hasinoff Dec. at ¶ 26.) It also spent millions of dollars to purchase equipment for the subsequent facilities to be built in California. (Sinek Decl. Ex. 2 at 296:6-24; Ex. 3 at 123:19-124:18.) Finally, on June 9, 2009, EarthRenew entered into a lease agreement to build a second production facility, which obligated EarthRenew to pay rent. (Sinek Decl. ¶ Ex. 2 at 299:8-300:10; Ex. 27.)

Accordingly, there is, at a minimum, triable issues of material fact as to the existence of ostensible authority of both Duckworth and Mullins to execute the Offtake Agreement and as to the applicability of the equal dignities rule. As such, summary adjudication of the second and third causes of action is improper.

Evidentiary Objections

Crop Production's evidentiary objection to the Deposition of Phil Mullins at pages 144 through 145 are overruled.

EarthRenew's evidentiary objections will not be ruled on given that EarthRenew is the prevailing party and, in light of that finding, the evidentiary objections are moot.

Motion to Submit Additional Evidence in Support of Motion for Summary Judgement

Consideration of late-filed evidence over objection may violate the opposing party's due process right to be fully informed of the issues it must meet to defeat the summary judgment motion. (*Jimenez v. County of Los Angeles* (2005) 130 Cal.App.4th 133, 140.) Notwithstanding the above, the court has discretion to consider new evidence in reply papers in ruling on a summary judgment motion, provided the other party had notice and an opportunity to respond. (*Plenger v. Alza Corp*. (1992) 11 Cal.App.4th 349, 362, fn. 8.)

Here, Crop Production seeks to submit excerpts of the deposition transcript of Murray Hasinoff, whose deposition was taken May 24, and 25, 2016, after the motion for summary judgment had been filed. Crop Production asserts that the excerpts of testimony would establish that, as of June 7, 2009, Hasinoff knew that certain executives at Crop Production believed that the Offtake Agreement was not valid.

First, EarthRenew objects to the consideration of this evidence and the Court is not inclined to continue the summary judgment hearing to allow it to produce counter-evidence.

Second, the evidence is really irrelevant, as it goes to the ratification argument which is not considered in the analysis of the motion for summary judgment/adjudication. While Crop Production also claims that this evidence "destroy[s]" EarthRenew's estoppel argument; it does not. While the lease for the feedlot was signed after June 7, 2009, there is no evidence that the equipment purchases were accomplished after June 7, 2009. (Sinek Decl. Ex. 2 at 296:6-24.)

Accordingly, the motion is denied due to EarthRenew's objection, the closeness of the trial date, and the lack of relevance of the evidence given the court's resolution of the summary judgment/adjudication motion.

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: MWS on 6/27/16.
(Judge's initials) (Date)

Tentative Rulings for Department 502

Tentative Rulings for Department 503

(6)

Tentative Ruling

Re: ***Rice v. Hall***
Superior Court Case No.: 14CECG03790

Hearing Date: June 28, 2016 (**Dept. 503**)

Motion: Default prove-up

Tentative Ruling:

The Court is prepared today to grant a $15,000.00 judgment against Defendant FindFAST Real Estate, LLC, only; otherwise, Plaintiff will need to file a first amended complaint that alleges any valid cause of action she may have against Defendant(s) for recovery of the entire $198,600.00 Defendant(s) are alleged to owe Plaintiff, re-served, and start the process again.

The case management conference set for July 18, 2016, is vacated. The Court sets an OSC: Re Default Judgment Review hearing on October 14, 2016, at 10:05 a.m. in Dept. 401.

Explanation:

The Request for Court Default Judgment

As the complaint now stands for the purpose of obtaining a default judgment, Plaintiff Sandra Rice ("Plaintiff") has alleged a cause of action for and proved up damages for breach of contract against Defendant FindFast Real Estate, LLC ("FindFAST") only, in the amount of $15,000.00.

Here, the first cause of action for breach of contract alleges that Plaintiff and "Defendants" [plural, presumably Defendant Steve Hall, individually and dba FindFast Real Estate, and FindFast Real Estate, LLC] entered into written agreements whereby they promised to repay Plaintiff the loans. Plaintiff has performed everything she was required to do, and Defendants have failed to repay the loans. According to the terms of the loans, penalties accrue on each loan at the rate of $50.00 per day until paid in full. The loans each provide that the prevailing party is entitled to attorney's fees and costs in connection with any action filed over the loans. Damages of not less than $198,600.00, which does not include interest, attorney's fees/costs, and the penalties of $50.00 per day, is alleged. (Complaint, ¶¶14-19.)

Exhibit B to the complaint shows the November loan is between FindFAST Real Estate, LLC, and some other known party, and most importantly, is unsigned.

FindFAST is alleged to be the obligor, and is obligated to pay the total amount due of $183,600.00 on December 23, 2011, and provides that payment may be made prior to December 23, 2011, or at the preferred time of closing of sale of 1446 Tavel Court Sparks NV 89436 property. "It is essential to the validity of a contract, not only that the parties should exist, but that it should be possible to identify them." (Civ. Code, § 1558.) In order for there to be a valid contract, there must be: (1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration. [Emphasis added.] (Civ. Code, §1550.) Without a signature by the obligor, here, FindFAST, there is no consent.

The December loan is between FindFAST Real Estate, LLC, and Plaintiff Sandra Rice. It is signed by Steve Hall, but clearly only in his capacity as agent or member of FindFAST; he is not a party to the note. In the place for social security number, is an IRS employer identification number, apparently for FindFAST.

Consequently, the cause of action states a valid cause of action against FindFast only, in the amount of $15,000.00 for the December loan.

Concerning the second cause of action for fraud and intentional misrepresentation, Mr. Hall is alleged to have represented to Plaintiff that monies being loaned to "Defendants" were short term loans and were to be used in connection with Defendants' purchase of a residential property. Further, Mr. Hall represented he would record liens to secure the loans against real property that Mr. Hall and/or FindFAST had an interest in. At the time "Defendants" made these representations to Plaintiff, "Defendants" knew the representations were not true and intended to deceive Plaintiff by making the representations. At the time the misrepresentations were made by "Defendants" to Plaintiff, Plaintiff did not know, and could not have known, the representations were in fact false. Plaintiff relied upon the representations made by Defendants in providing the funds for the loans. Although Defendants have had use of Plaintiff's monies from the loans for the last few years, Defendants have refused to repay Plaintiff despite repeated demand. As a direct result of Defendants' fraudulent representations, Plaintiff has been damaged in an amount according to proof but not less than $198,600.00. (Complaint, ¶¶20-26.)

There is no logical connection with the alleged misrepresentations and the damages sought. In other words, just because the loans were unsecured, and supposed to be used for purchase of a residential property, doesn't lead to a conclusion that that Plaintiff was damaged $198,600.00 because no residential property was purchased and the loan was unsecured; the failure to pay is why Plaintiff was damaged $198,600.00. (Complaint, ¶21.) It must appear that the fraud and the damage sustained bear to each other the relation of cause and effect. (*Lesperance v. North American Aviation, Inc.* (1963) 217 Cal.App.2d 336, 345.) "A 'complete causal relationship' between the fraud or deceit and the plaintiff's damages is required. ... Causation requires proof that the defendant's conduct was a '"substantial factor" ' in bringing about the harm to the plaintiff." [Internal citations omitted.] (*Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 132.) Again, it is unclear how the misrepresentations Mr. Hall allegedly made caused the injury.

The third cause of action for breach of fiduciary duty alleges that by "engaging in and knowingly benefiting from the various actions, conduct, self-dealing, and concealments, Defendant HALL breached his fiduciary duty(s) owed to Plaintiff including, without limitation, the obligations of full disclosure, duty of loyalty, duty to avoid conflict of interests [sic] and the duty to act with utmost good faith and fair dealing with Plaintiff." This cause of action seeks damages in an amount according to proof at trial. The $198,600.00 in damages sought does not naturally flow from a failure to place liens on the property and to use the loan proceeds to purchase a residential property. There are no factual allegations indicating that Mr. Hall didn't fully disclose something, breached his duty of loyalty [further, as a member of FindFAST, by law, he owed a fiduciary duty of loyalty and of care to FindFAST, see Corporations Code section 17704.09)], what conflict of interest alleged existed, and because there is no contract with Mr. Hall alleged as discussed above, how he could have owed a "duty to act with utmost good faith and fair dealing" with Plaintiff. There is no implied covenant of good faith and fair dealing without an underlying contractual obligation. (*Racing & Laramie, Ltd. V. Department of Parks and Recreation* (1992) 11 Cal.App.4th 1026, 1031.)

The fourth cause of action for unfair business practices (Bus. & Prof. Code, § 17200 et seq.) fails to state facts sufficient against either Mr. Hall or FindFAST because it fails to allege facts showing that the practice violates another law. If the business practice alleged to violate Business and Professions Code section 17200 is of the "unlawful" variety, the complaint must allege facts showing that the practice violates another law. If the complaint does not allege a violation of law, it fails to state a cause of action. (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 610.) Further, the cause of action as alleged here seeks damages, not restitution. (Bus. & Prof. Code, § 17204; *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 337.)

False advertising is also mentioned in ¶32, but if Plaintiff is relying on the statements found on the website for FindFAST, there are no allegations in the complaint that anything stated on that website is false, i.e., that Mr. Hall is not a successful business person for more than four decades, has the degrees he says he has, has coached hundreds of real estate professionals and worked with several Fortune 500 companies, etc. To state a claim under either the unfair competition law or the false advertising law, based on false advertising or promotional practices, it is necessary to show that members of the public are likely to be deceived. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 951.)

Although it does appear that the common law alter ego theory applies to a member of a limited liability company (Corp. Code, §17703.04, subd. (b)), except that the failure to hold formalities concerning meetings is not considered a factor in determining alter ego liability where the articles or organization or operating agreement do not expressly require them, the complaint here only alleges at ¶3 that "…Defendant HALL is the sole owner of Defendant HALL and that at all time [sic] herein Defendant HALL failed to follow corporate formalities." Alter ego liability requires that: (1) there be such unity of interest and ownership that the separate

personalities of the corporation and the individual no longer exist; and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow. (*Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal.App.2d 825, 837.) The complaint does not allege any of the traditional nonexclusive factors to determine if the alter ego doctrine should apply in this case. (*Id.* at pp. 839-840.) The alter ego allegations here are insufficient for liability against Mr. Hall.

The complaint also attempts to tie Mr. Hall to the other Defendants through the concept of ratification (complaint, ¶6), but it's clear the charging allegations (i.e., the conduct) of the other two causes of action for fraud—intentional misrepresentation, and breach of fiduciary duty, are directed against Mr. Hall only. Consequently, the allegation that Mr. Hall "personally participated in and ratified the tortuous [sic] conduct of all other Defendants" adds nothing because the other Defendants are not alleged to have done anything. If the only allegations in a complaint against a particular defendant are generic agency allegations, and where the defendant is not mentioned anywhere in the body of the complaint, the complaint fails to state facts sufficient to constitute a cause of action. (*Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 829.)

Concerning the allegation that Mr. Hall was doing business as FindFast Real Estate, it is well-settled that doing business under another name does not create an entity distinct from the person operating the business. (*Pinkerton's Inc. v. Superior Court* (1996) 49 Cal.App.4th 1342, 1348.) In the case of a limited liability company, it is an entity distinct from its members. (Corp. Code, §17701.04, subd. (a).)

Plaintiff's Options

Plaintiff may either obtain a default judgment today against Defendant FindFAST Real Estate, LLC, in the amount of $15,000.00 or, if Plaintiff wants a judgment against Defendant(s) for the entire $198,600.00 alleged in the complaint, Plaintiff must file a first amended complaint containing any valid cause of action against Defendant(s) under California law that she can, re-served, and start the process again.

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 6/23/16.
(Judge's initials) (Date)