

Tentative Rulings for July 20, 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).)

15CECG03594 *Benitez v. Fresno County Private Security* (Dept. 501)

15CECG02507 *Kasandra Clemente v. Good Cents Pest Control, Inc.* (Dept. 502)

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

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(2)

Tentative Ruling

Re: ***Aguilar v. Marquez et al.***
Superior Court Case No. 16CECG00596

Hearing Date: July 20, 2016 (Dept. 402)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. Order signed. Hearing off calendar.

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

Tentative Ruling

Issued By: JYH on 7/19/2016.
(Judge's initials) (Date)

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Tentative Ruling

Re: **Gomez v. Gomez**
Court Case No. 07 CECG 04166

Hearing Date: July 20, 2016 (Dept. 402)

Motion: Defendant Maria Gomez-Bonk's Motion for Distribution and Attorney's Fees

Tentative Ruling:

To grant the motion to distribute funds and award attorney's fees in the amount of \$1,500.

The Clerk of the Court shall pay the funds deposited in this action with the Clerk of the Court of April 17, 2014, together with any accrued interest as directed: \$1,500 shall be paid to the Law Offices of Randolph Krbechek; and the remaining funds shall be apportioned and paid as follows: 28.572% to Joe Gil Gomez and Helen M. Gomez as Trustees of the Joe Gil Gomez and Helen M. Gomez Trust u/d/t dated October 14, 1988; 14.283% to Joe Gil Gomez, as Personal Representative for the Estate of Enedina Gomez Avila; 2.860% to Rosemary Gomez Wagner; 2.86% to Mary Romana Gomez Bonk; 2.86% to Stephen Michael Gomez; 2.86% to Joe Louis Gomez; 1.428% to Paul Gomez; 1.428% to Valerie Gomez; 14.283% to David R. Gomez and Stella H. Gomez, Co-Trustees of the David G. Gomez and Teresa R. Gomez 2009 Family Trust; 14.283% to Mary M. Gomez, Trustee of the Ruben and Mary Gomez Family Trust u/d/t dated October 12, 1994; and 14.283% to Natalia Gomez, Trustee of the Natalia Gomez Gallardo Living Trust.

Explanation:

Proceeds of the sale must be applied in the following order: (1) expenses of the sale; (2) other costs of partition; and (3) liens on the property in order of priority, except liens that by the terms of the sale are to remain on the property. Any remaining funds are to be distributed among the parties in proportion to their interest in the property as determined by the court. (Code Civ. Proc., § 873.820.) When property is partitioned by sale in California, sale proceeds are first used to pay general costs of the action; costs reimbursed before any distribution to either cotenant include fees for any attorney engaged for the common benefit of the parties, as well as costs and expenses of any referee and third parties hired by the referee, the costs of title reports, and interest on any of these expenditures. (*In re Flynn* (B.A.P. 9th Cir. 2003) 297 B.R. 599, rev'd and remanded on other grounds, (9th Cir. 2005) 418 F.3d 1005 [applying California law].) Here, there are no liens on the property and the referee's costs and costs of sale were paid out of escrow and are no longer at issue. The fund is ready to distribute.

Attorney Krbechek requests his attorney's fees incurred in bringing this motion for distribution. This is not unreasonable. Code of Civil Procedure 874.010 provides that the costs of partition "include:" "(1) reasonable attorney's fees incurred or paid by a party

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Tentative Ruling

Re: ***Karima K. Ali v. Asurea Insurance Services***
Superior Court Case No. 12CECG01068

Hearing Date: Wednesday, July 20, 2016 (**Dept. 402**)

Motions: (1) Plaintiff Karima K. Ali's Motion to Stay the Action

(2) Defendant Asurea Insurance Services' Request to Initiate Contempt Proceedings and Request for Additional Sanctions Pursuant to Code of Civil Procedure Section 177.6

Tentative Ruling:

To deny Plaintiff Karima K. Ali's motion to stay the action.

To deny Defendant Asurea Insurance Services' request to initiate contempt proceedings and request for additional sanctions pursuant to Code of Civil Procedure section 177.6.

Explanation:

Plaintiff's Motion to Stay Action

Plaintiff Karima K. Ali ("Plaintiff") moves pursuant to Code of Civil Procedure section 410.30, subdivision (a), for an order staying this action while a virtually identical action between Plaintiff and Defendant Asurea Insurance Services ("Defendant") regarding the same facts and injuries as this action is decided in federal court. Plaintiff asserts that she filed a complaint in the U.S. District Court for the Eastern District of California because, after four years of litigation in this court, this action does not have a trial date.

Code of Civil Procedure section 410.30, subdivision (a) provides that: "When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just." "Section 410.30 is a codification of the doctrine of forum non conveniens[.]" (*Trident Labs, Inc. v. Merrill Lynch Commercial Finance Corp.* (2011) 200 Cal.App.4th 147, 153.) "A trial court considering a forum non conveniens issue engages in a two-step process, the first of which is to determine whether a suitable alternative forum exists. [Citations.] Where there is a suitable alternative forum, the court proceeds to the next step, consideration of the private interests of the parties and the public interest in keeping the case in California." (*National Football League v. Fireman's Fund Insurance Company* (2013) 216 Cal.App.4th 902, 917.)

Plaintiff contends that the U.S. District Court for the Eastern District of California is a suitable alternative forum for this action. However, after considering the complaint that Plaintiff filed in the federal court and attached to her motion, the Court determines that, first, since Plaintiff asserts that she and Defendant are both citizens of California, the federal court cannot exercise diversity jurisdiction. Second, since the complaint that Plaintiff asserts she filed in federal court only alleges state-law causes of action, the federal court cannot exercise subject matter jurisdiction over Plaintiff and Defendant. Therefore, the Court finds that the U.S. District Court for the Eastern District of California is not a suitable alternative forum because the federal court has no jurisdiction over the parties and claims asserted in this action.

Accordingly, the Court denies Plaintiff's motion to stay the action.

Defendant's Request to Initiate Contempt Proceedings and Request for Additional Sanctions Pursuant to Code of Civil Procedure Section 177.6

Defendant Asurea Insurance Services ("Defendant") requests that this Court initiate contempt proceedings, find Plaintiff Karima K. Ali ("Plaintiff") in contempt of court, order Plaintiff to pay \$3,193.00 in attorney's fees, and order Plaintiff to pay an additional monetary sanction of \$1,500.00 pursuant to Code of Civil Procedure section 177.6. Specifically, Defendant argues that Plaintiff is in contempt of the Court's March 3, 2016 order because Plaintiff failed to pay the \$1,140.00 in monetary sanctions within the allotted time.

Code of Civil Procedure section 1209, subdivision (a)(5) provides that "[d]isobedience of any lawful judgment, order, or process of the court[]" is a "contempt[]" of the authority of the court[.]" There are two types of contempt: direct contempt and indirect contempt. "Direct contempt is that committed in the immediate view and presence of the court or of the judge at chambers; all other contempts are indirect which by definition occur outside the presence of the court." (*Nierenberg v. Superior Court* (1976) 59 Cal.App.3d 611, 616.) "A proceeding for an adjudication for constructive [or indirect] contempt is initiated by the filing of an affidavit or declaration. Such affidavit or declaration must set forth the facts constituting the alleged contempt in order to confer jurisdiction upon the court to exercise its contempt powers [citation]. [¶] The facts essential to jurisdiction for a contempt proceeding are (1) the making of the order; (2) knowledge of the order; (3) ability of the respondent to render compliance; [and] (4) willful disobedience of the order." (*In re Liu* (1969) 273 Cal.App.2d 135, 140; see also *Anderson v. Superior Court* (1998) 68 Cal.App.4th 1240, 1245.)

In order to initiate indirect contempt proceedings against Plaintiff, Defendant has submitted the declaration of its counsel, Josh H. Escovedo. However, while Mr. Escovedo asserts in his declaration that Plaintiff had the ability to comply with the Court's order, the statement is a conclusion unsupported by any specific facts. Therefore, Mr. Escovedo's declaration fails to contain sufficient evidence establishing that Plaintiff actually had the ability to comply with the Court's March 3, 2016 order and pay Defendant \$1,140.00 in monetary sanctions within 30 days after the order was made. Accordingly, Defendant has failed to establish all of the facts essential to

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Tentative Ruling

Re: **Delicious Foods, LLC v. Sunsweet Fresh Stone Fruit, LLC**

Case No. 15CECG03406

Hearing Date: July 20, 2016 (Dept. 402)

Motion: By Defendants Wildwood Packing and Cooling, Inc. and Luke Woods, demurring to Complaint brought by Plaintiff Delicious Foods LLC.

Tentative Ruling:

To sustain the demurer with leave to amend as set forth below.

Plaintiff shall have ten court days in which to file an amended complaint. Any new or amended allegations shall be set out in **boldface** typeset.

Explanation:

A general demurrer admits the truth of all material allegations and a Court will “give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context.” (*People ex re. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300.) The standard of pleading is very liberal and a plaintiff need only plead “ultimate facts.” (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.) However, a plaintiff must still plead facts giving some indication of the nature, source, and extent of the cause of action. (*Semole v. Sansoucie* (1972) 28 Cal.App.3d 714, 719.)

Defendants demur solely on the grounds that Plaintiff lacks standing to bring either the “derivative claims,” or the “individual claims.” Thus, to the extent that the demurrer is based on a failure to plead facts showing a cause of action, the Court will not consider those arguments. (See Defendant's Memorandum of Points and Authorities at pp. 11-12 (arguing that Wildwood does not owe a fiduciary duty to Sunsweet as a matter of law).)

Further, Defendant Giumarra Brothers Fruit Co., Inc. has filed a “joinder in the demurrer.” Although joinders are allowed for motions, in a court's discretion, they are generally not allowed in pleadings such as a demurrer. (See also Code of Civ.Proc. sec. 430.60.) Therefore, the Court will not consider the joinder of Defendant Giumarra Brothers Fruit Co., Inc.

Defendants Wildwood Packing and Cooling, Inc. and Luke Woods (together, "Defendants") claim that Plaintiff lacks standing for two reasons. First, as to the derivative claims, they argue that Plaintiff has not complied with Corporations Code sec. 17709.02, subdivision (a)(2), insofar as Plaintiff has not alleged that it urged action on the part of the company whose rights Plaintiff is seeking to vindicate and that the corporation refused to act, or that such presentment would be "futile." Second, as to Plaintiff's "individual claims," Defendants assert that the "individual" claims, as alleged, are purely incidental to Sunsweet's claims and, therefore, cannot be claimed in this derivative action.

1) *Derivative Claims*

Defendants contend that Plaintiff lacks standing to pursue the derivative claims because: (1) Plaintiff did not present the claim *before* filing the initial complaint; (2) the company did not refuse to act, instead actually ratifying Plaintiff's conduct; and, (3) the ratification was not by disinterested parties and is therefore defective.

Corporations code section 17709.02, subdivision (a)(2) states (in pertinent part) that in order to bring a derivative claim:

(2) The plaintiff alleges in the complaint with particularity the plaintiff's efforts to secure from the managers the action the plaintiff desires or the reasons for not making that effort, and alleges further that the plaintiff has either informed the limited liability company or the managers in writing of the ultimate facts of each cause of action against each defendant or delivered to the limited liability company or the managers a true copy of the complaint that the plaintiff proposes to file.
(Cal. Corp. Code § 17709.02.)

Here, Plaintiff has alleged that, after the demurrer was sustained with leave to amend, it offered the action to Sunsweet, and that Sunsweet ratified the present lawsuit.

First, as to timing, while the statute mandates that the action cannot be "instituted" absent allegations of presentment compliance, there is nothing that prevents a party from rehabilitating its derivative claims after the fact, such as here.

Second, Defendants are correct in stating that Plaintiff has not alleged that Sunsweet refused to act. Instead, it is alleged to have ratified Plaintiff's lawsuit. However similar such actions might be in practice, Section 17709.02 requires the allegations to be pleaded "with particularity." The purpose of the presentment requirement is to allow the company to pursue claims on its own behalf, not necessarily to allow its members to continue a lawsuit.

Third, Defendants' contention that the members of the board who "ratified" the lawsuit are not independent and that therefore the board action is invalid is probably not proper to be decided at this juncture- that would seem to require a weighing of evidence, which would be beyond the scope of a demurrer.

Tentative Ruling

Re: ***Ron Miller Enterprises, Inc. v. Lobel Financial Corp.***
Case No. 15 CE CG 02661

Hearing Date: July 20th, 2016 (Dept. 403)

Motion: Plaintiff's Motion for Summary Judgment and/or Summary
Adjudication, and Request for Monetary Sanctions

Tentative Ruling:

To deny plaintiff's motion for summary judgment, and the alternative motion for summary adjudication. (Code Civ. Proc. § 437c.) To deny plaintiff's request for monetary sanctions against defendant. (Code Civ. Proc. § 128.5.)

Explanation:

Motion for Sanctions: Under section 128.5, subdivision (a), "A trial court may order a party, the party's attorney, or both to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Code Civ. Proc. § 128.5, subd. (a).) "'Actions or tactics' include, but are not limited to, the making or opposing of motions or the filing and service of a complaint, cross-complaint, answer, or other responsive pleading." (Code Civ. Proc., § 128.5, subd. (b)(1).) Also, "Any sanctions imposed pursuant to this section shall be imposed consistently with the standards, conditions, and procedures set forth in subdivisions (c), (d), and (h) of Section 128.7." (Code Civ. Proc., § 128.5, subd. (f).)

Thus, a party moving for sanctions under section 128.5 must also comply with the procedural requirements of section 128.7, including bringing a separately noticed motion for sanctions describing the specific conduct said to violate the statute, and serving the motion for sanctions on the other party 21 days before the motion is filed with the court to give the opposing party an opportunity to withdraw the offending pleading. (Code Civ. Proc. § 128.7, subd. (c)(1).)

Here, plaintiff's caption to the notice of motion mentions that plaintiff is seeking sanctions, but the request for sanctions is not mentioned in the body of the notice of motion. Nor does plaintiff cite the statutory authority for the request for sanctions in the notice of motion, or the specific conduct alleged to violate the statute. The plaintiff does not explain the statutory and factual basis for the request for sanctions until pages 13 and 14 of its points and authorities brief. Therefore, the notice of motion fails to give proper notice of the legal and factual basis for the requested sanctions.

In addition, the motion for sanctions was not brought separately from the motion for summary judgment. Furthermore, there is no evidence that plaintiff served the motion for sanctions on defendant at least 21 days before filing it with the court.

Indeed, the proof of service indicates that the motion was served only one day before it was filed. The body of the notice of motion also lists the incorrect date for the hearing, since it states the hearing will be held on May 25th, 2016, not July 20th, 2016. Therefore, plaintiff has failed to comply with the procedural requirements of sections 128.5 and 128.7, and the court intends to deny the request for monetary sanctions against defendant.

Motion for Summary Judgment: When a plaintiff moves for summary judgment, the burden is on the plaintiff to show, by admissible evidence, that there is no defense to its claims. “[E]ven if no opposition is presented, the moving party still has the burden of eliminating all triable issues of fact.” (*Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218, 1228, internal citation omitted.) If the moving party fails to meet its burden of production, the burden never shifts to the opposing party to present any evidence to raise a triable issue of material fact, and the motion must be denied. (*Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1442.)

Here, plaintiff contends that it is entitled to summary judgment against defendant Lobel because (1) Elizabeth Chavez, dba King of Kars, borrowed money from plaintiff using the title to the subject vehicles as security, (2) Kars then sold the subject autos to consumers pursuant to conditional purchase contracts, (3) Kars sold the purchase contracts to Lobel Financial, and (4) Kars then defaulted on the loans from plaintiff and went out of business without paying off the loans. Plaintiff contends that Lobel is now liable for the amounts that plaintiff loaned to Kars, even though Lobel was not a party to the loan contract or a third party beneficiary of the loans, and even though it never agreed to be held liable for Kars' debt.

Plaintiff relies on *Quartz of Southern California, Inc. v. Mullen Bros. Inc.* (2007) 151 Cal.App.4th 901 in support of its position that Lobel should be held liable for Kars' debt. However, there are some obvious factual differences between the facts of *Quartz* and the present case, since in *Quartz* the plaintiff was an auto auction house, not a commercial lender, and the plaintiff there actually owned legal title to the cars in question. (*Id.* at 903.) The Court of Appeal held that, since the plaintiff was the legal owner of title to the autos, the financial company that purchased the sales contracts from the defunct dealer should be responsible for repaying the amounts the dealer owed to the auction company to purchase the cars, and that the financial company was in the best position to prevent the loss caused by the defaulting dealer. (*Id.* at 910-911.) Also, as the financial company was the assignee of the dealer, it stepped into the dealer's shoes, and thus could be held liable for the dealer's unpaid debt to the auction house. (*Id.* at 911.)

In the current case, on the other hand, the plaintiff is a financial company that loaned money to the dealer, Kars, in exchange for Kars giving plaintiff physical custody of the title documents as security for the loans. There is no evidence that plaintiff ever actually obtained legal title to the subject cars, as opposed to holding the physical title documents as security for the loans. It is not clear whether, under these circumstances, plaintiff has the right to demand payment from Lobel when the dealer defaults on the loans, since, unlike the situation in *Quartz*, here plaintiff has not shown that it is the legal owner of title to the cars. It appears that plaintiff was, at most, the holder of the title

Tentative Ruling

Re: **Bank of Stockton v. Garcia**
Case No. 12 CE CG 03902

Hearing Date: July 20th, 2016 (Dept. 403)

Motion: Defendants John and Janie Garcia's Demurrer to Third Amended Complaint

Tentative Ruling:

To sustain the demurrer to the entire third amended complaint (TAC) without leave to amend, for failure to state facts sufficient to constitute causes of action. (Code Civ. Proc. § 430.10, subd. (e).)

Explanation:

First, while plaintiffs argue that the demurrer is untimely because it was not filed within 30 days of the effective date of service of the TAC based on the parties' stipulation, plaintiffs have waived any objections regarding the untimeliness of the demurrer by also arguing its merits. Plaintiffs cannot claim that they were prejudiced by the delay in bringing the demurrer when they have filed a lengthy opposition brief that addresses the merits of the defendants' arguments. Also, even though the demurrer was technically untimely, the trial court has discretion to consider an untimely demurrer. (*Jackson v. Doe* (2011) 192 Cal.App.4th 742, 749.) Here, since it does not appear that the delay was excessive or that it resulted in any prejudice to the plaintiffs, the court declines plaintiff's request to strike the demurrer.

Plaintiffs have also objected that the defendants did not meet and confer on the issues raised by the demurrer five days before the deadline for filing a responsive pleading, in violation of Code of Civil Procedure section 430.41, subdivision (a)(2). Again, however, plaintiffs have shown no prejudice from the delay, and there has clearly been none, since they were able to file a full opposition brief on the merits of the demurrer. In any event, failure to meet and confer adequately is not a ground for overruling or sustaining a demurrer. (Code Civ. Proc. § 430.41, subd. (a)(4).) Thus, the court will not overrule or strike the demurrer based on the delay in the meet and confer process.

Plaintiffs have also argued that the demurrer is improper because defendants are seeking to raise grounds to the TAC that could have been raised in their demurrer to the original complaint. They rely on Code of Civil procedure section 430.41, subdivision (b), which states that, "A party demurring to a pleading that has been amended *after a demurrer to an earlier version of the pleading was sustained* shall not demur to any portion of the amended complaint, cross-complaint, or answer on grounds that could have been raised by demurrer to the earlier version of the complaint, cross-complaint, or answer." (Code Civ. Proc., § 430.41, subd. (b), emphasis added.)

Here, defendants demurred to the original complaint, and the court *overruled* the demurrer in its entirety on August 19th, 2015. (Plaintiffs' Request for Judicial Notice, Exhibit B.) Therefore, since the prior demurrer was not sustained, the language of section 430.41, subdivision (b) does not apply to defendants' new demurrer to the TAC. As a result, the court will not disregard the demurrer simply because it raises arguments that might have been raised to the earlier complaint.

Next, with regard to the merits of the demurrer itself, the court intends to sustain the demurrer to all of the causes of action without leave to amend, as they fail to state facts sufficient to constitute valid causes of action. The court has previously ruled with regard to the Bank's demurrer to the TAC that plaintiffs cannot state valid claims for money had and received, unjust enrichment/restitution, and imposition of a constructive trust against the Bank because plaintiffs have failed to show that they suffered any damage as a result of the allegedly wrongful conduct. (See court's minute order of June 14th, 2016 adopting court's tentative ruling on Bank's Demurrer to Third Amended Complaint.) The court rejected plaintiffs' theory that they were entitled to a refund of their capital contributions to the LLCs after the sale of the LLCs' assets since they admitted that they lost their economic interest in the LLCs when the Bank foreclosed on their interests.

In sum, Morris and Sharon acknowledge they do not have an economic interest in the LLCs. (TAC, ¶ 52.) Under the operating agreements, the capital accounts are only maintained for those persons holding economic interests. Without holding an economic interest, Morris and Sharon were not entitled to the capital accounts. (Tentative ruling of June 14th, 2016, p. 3.)

The same reasoning applies to the plaintiffs' claims against John and Janie Garcia. Since plaintiffs have conceded that they lost their economic interest in the LLCs after the Bank foreclosed on those interests, they cannot show that they were damaged by the defendants' actions in selling the LLCs' assets and distributing the money afterward. Any money that was held in capital accounts would only go to the holder of the economic interests of the members, which was the Bank or John and Janie Garcia, not Morris and Sharon. Therefore, the claims for conversion, money had and received, unjust enrichment, imposition and constructive trust, and declaratory relief all fail to state a claim for lack of any allegation that supports the existence of money damages as to Morris and Sharon.

The breach of fiduciary duty claim alleged as a direct claim on behalf of Morris and Sharon also fails to state a cause of action, since even assuming that plaintiffs prevail on their claim, any misappropriated money would have to be returned to the LLCs. Since Morris and Sharon have lost their economic interest in the companies, they have no right to recover any money that might have been taken from the LLCs, and the LLCs themselves have been dissolved. The money would simply go back to John and Janie as well as the Bank, as they are the only remaining members with any economic rights to the company's money and assets. Thus, the alleged

misappropriation and misconduct did not harm Morris and Sharon, and any resulting damages were have to be repaid to the companies, which no longer exist.

Plaintiffs have alleged as part of the breach of fiduciary claim that defendants failed to pay their taxes “as was the longstanding practice.” (TAC, ¶ 107.) However, it appears that any tax payments would have been distributions from the LLC’s, as shown under the Operating Agreements, section 1.12. The transcript of John Garcia’s examination attached and incorporated into the TAC as Exhibit E also shows that the payments for the members’ taxes were “draws” from the LLCs based on the amount of money that each member drew from the LLCs on a monthly basis. (Exhibit E, pp. 17:11 – 18:6.) Once Morris and Sharon lost their economic interest in the LLCs, John stopped paying them an extra distribution to cover their taxes. (*Id.* at p. 21:1-21.)

Thus, it appears from the documents attached and incorporated into the TAC that the payment to the members was based on their economic interest in the LLCs. However, Morris and Sharon lost their economic interest to the Bank through the foreclosure. Therefore, Morris and Sharon cannot show that they had the right to receive payments from the LLCs after the foreclosure, and they cannot establish damages from the alleged refusal to pay their taxes.

In addition, while plaintiffs allege that the defendants refused to pay them their salaries for work performed for the LLCs (TAC, ¶ 107), they allege no facts regarding what work they performed, what their hourly rate was, how much money they were owed, etc. They also do not cite to any portion of the Operating Agreements that would entitle them to payment of a salary, as opposed to distributions based on their economic interest in the companies. Therefore, plaintiffs have failed to state any facts to support a claim for breach of fiduciary duty based on the failure to pay their salaries. As a result, the court intends to sustain the demurrer to the direct claim for breach of fiduciary duty.

Likewise, to the extent that plaintiffs allege derivative claims for breach of fiduciary duty and accounting on behalf of the LLCs, the claims are defectively pled because there would be no benefit to the LLCs even if plaintiffs prevail on their claims. When plaintiffs bring a derivative claim, they must name the corporation as a defendant, but they are actually suing on behalf of the corporation, which is the potential beneficiary of any recovery. (*Blue Water Sunset, LLC v. Markowitz* (2011) 192 Cal.App.4th 477, 489.) Here, however, the Vista Del Sol entities on whose behalf the claims have been ostensibly brought ceased to exist in 2015. (TAC, ¶¶ 76, 77.) Therefore, there are no longer any companies that would benefit from the derivative claims and there is no basis for alleging a claim on their behalf.

In *Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, the Court of Appeal held that a corporation’s shareholders could bring a derivative claim on behalf of a dissolved corporation. (*Id.* at p. 215.) However, the court’s reasoning was based on the fact that the shareholders of the corporation may benefit from the derivative action even after the corporation has ceased to exist. “[T]he shareholder of a dissolved corporation retains his or her indirect interest in any recovery pursued for the corporation’s benefit. To the extent the action is successful and results in a monetary

award, that asset will be distributed to the shareholders of record at the time of dissolution as a belated realization of the corporation's assets. Thus, the shareholder of the dissolved corporation continues to have a "'dog in the hunt.'" (Id. at p. 217, internal citations omitted.)

Here on the other hand, there is no possible benefit to the shareholders if the plaintiffs prevail on their derivative claims. Even if plaintiffs did prevail on their claims, any damages that might be recovered would have to be paid to the remaining economic interest holders, who are John, Janie and the Bank. Since these are the very people who are alleged to have committed the misconduct, ordering them to repay the misappropriated money to themselves would not provide any benefit to any of the shareholders. Again, Morris and Sharon would gain nothing from the suit, since they have only a non-economic membership interest in the LLCs.

Also, while plaintiffs argue that they would be entitled to attorney's fees if they prevail on their derivative claims, they have failed to explain how they could create any benefit for the LLCs or their members even if they prove that assets were misappropriated by John and Janie. Thus, it does not appear that they would be able to recover attorney's fees any more than they can recover money damages. Therefore, the court intends sustain the demurrer as to the derivative claims for breach of fiduciary duty and accounting.

The conversion claim also fails to state facts sufficient to constitute a cause of action, since the claim is based on the theory that John and Janie retained the value of the capital accounts and converted them to their own use. (TAC, ¶ 119.) However, as discussed above, plaintiffs had no right to recover any money from the capital accounts once the Bank foreclosed on their economic interest in the LLCs. Therefore, plaintiffs have failed to show that John and Janie converted property that belonged to plaintiffs, or that plaintiffs were damaged as a result of the alleged conversion. Consequently, the court intends sustain the demurrer to the conversion claim.

Next, since the other claims all fail to state valid causes of action, the court intends to sustain the demurrer to the declaratory relief claim as well. The declaratory relief claim is based on the other claims and the allegation that defendants have deprived plaintiffs of their membership rights in the LLCs. (TAC, ¶ 149.) However, since plaintiffs have not shown that they suffered any harm from the alleged deprivation of their rights in the LLCs, their other claims fail and there is no basis for the declaratory relief claim.

Finally, the court intends to deny leave to amend the complaint again. Plaintiffs have failed to explain how they could allege any additional facts that would cure the defects in their complaint, and it does not appear that they can do so in light of the lack of any damage to them from the alleged misconduct. Furthermore, plaintiffs have already filed four different versions of their complaint, and they have not been able to allege any valid claims. Thus, it does not appear that they are likely to be able to do so if they are given further leave to amend.

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Tentative Ruling

Re: **Moultrie v. Bed, Bath, and Beyond, et al.**

Case No. 15CECG03102

Hearing Date: July 20, 2016 (Dept. 403)

Motion: By Defendants Bed, Bath, and Beyond, Inc. and Tristar Products LLC to strike portions of Plaintiff's First Amended Complaint.

Tentative Ruling:

To grant the motion to strike the prayer for punitive damages and allegations made on "information and belief" with leave to amend. In all other respects, the motion is denied.

Therefore, the following allegations from Attachment One to the First Amended Complaint are ordered stricken: Page 3, Paragraph 11(g): "punitive damages against Tristar Products, Inc., only"; page 6, ¶¶ 4, 5, the sentences beginning "on information and belief"; and page 9, paragraph 2 of the Prayer.

Plaintiff shall have ten court days in which to file and serve a Second Amended Complaint, if she so chooses. Any new or changed allegations must be set forth in **boldface** typeset.

Explanation:

Defendants have moved to strike certain portions of Plaintiff's First Amended Complaint on the basis that they either do not support the prayer for punitive damages or because they do not state the basis for the "information and belief" allegations.

California Code of Civil Procedure 436 states that a court may "[s]trike out any relevant, false, or improper matter inserted into any pleading," or, alternatively, "[s]trike out all or any part of any pleading not drawn in conformity with the laws of this state." A motion to strike is therefore the vehicle by which a defendant can challenge the pleading of punitive damages allegations. (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1683.)

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.

(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.

Defendant argues that the punitive damages should be stricken for several reasons: First, the assertions in the complaint do not show malice or "evil motive" on the part of Defendant; Second, Plaintiff cannot make allegations on information and belief; and, Third, Plaintiff has not alleged sufficient facts to hold the corporation accountable for punitive damages.

First, Plaintiff has alleged that Defendants marketed a product it knew, or had reason to believe, was dangerous. Punitive damages are allowable in similar circumstances. (See, e.g., *Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1690-91 (intentionally marketing a defective product knowing that it might cause injury and death is "highly reprehensible" and justified punitive damages (*citing Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 755); *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 898 (allowing punitive damages for non-intentional behavior, where there is reckless indifference).) Therefore, the motion cannot be denied on that ground, and the allegations that support those contentions cannot be stricken as irrelevant.

Second, Plaintiff has alleged two items on "information and belief": that the AquaRug was manufactured in China for a particular price and marketed for a particular price and that "Tristar executives built in anticipated slip-and-fall accidents in pricing the AquaRug" (FAC, p. 6); and that "Tristar did not test the AquaRug for safety in

Tentative Rulings for Department 501

(6)

Tentative Ruling

Re: **Barboza v. Stengel**
Superior Court Case No.: 15CECG00974

Hearing Date: July 20, 2016 (**Dept. 501**)

Motion: Demurrer to first amended complaint by Defendant Sean Stengel

Tentative Ruling:

To overrule, with Defendant granted 10 days' leave within which to answer. The time in which the complaint can be answered will run from service by the clerk of the minute order.

Oral argument on this matter is continued to August 17, 2016 at 3:30 in Dept. 501 so that the Plaintiff may be present for oral argument via Court Call.

Explanation:

A demurrer is sustained only if the complaint fails to state a cause of action under any possible legal theory. (*Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 998; *Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908 ["Erroneous or confusing labels attached by the inept pleader are to be ignored if the complaint pleads facts which would entitle the plaintiff to relief."])

The complaint states a valid cause of action for battery. (Judicial Council of Cal. Civ. Jury Instns. (Oct 2004 rev.) CACI No. 1300.)

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 7/19/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 502

Tentative Rulings for Department 503

(5)

Tentative Ruling

Re: ***Samsung SDS America, Inc. et al. v. Koo***
Superior Court Case No. 16 CECG 00390

Hearing Date: July 20, 2016 (**Dept. 503**)

Petition: Release Mechanic's Lien

Tentative Ruling:

To continue the hearing to Thursday, July 28, 2016 at 3:30 p.m. in Dept. 503 on the grounds stated infra.

Explanation:

On June 2, 2016, the Clerk's Office returned to Petitioner's attorney, the Declarations of Robert D. Lewis and Yong Soo "Brian" Han without filing on the grounds that original signatures were required. See Notice of Documents Returned without Filing entered on June 2, 2016. Yet, the Verified Petition filed on May 31, 2016 refers to both these declarations. See ¶¶ 7-9, 16, 18 and 19. Therefore, the hearing will be continued to allow the Petitioner time to properly file these documents.

Pursuant to California Rules of Court, Rule 391(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: A.M. Simpson on 7/18/16.

(Judge's initial (Date)