

Tentative Rulings for August 16, 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).)

16CECG00866 *California Department of Motor Vehicles v. Grewal* (Dept. 402)

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

16CECG02098 *Wyatt v. Own a Car of Fresno* is continued to Tuesday, August 30, 2016, at 3:30 p.m. in Dept. 502.

15CECG00659 *Reyes v. Barnell* is continued to Thursday, August 25, 2016, at 3:30 p.m. in Dept. 402.

15CECG02886 *Salven v. Wild, Carter & Tipton, A Professional Corp.* is continued to August 30, 2016 in Dept. 402.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(29)

Tentative Ruling

Re: ***Jonathan Munro v. Joseph Dishyan, et al.***
Superior Court Case no. 15CECG03135

Hearing Date: August 16, 2016 (Dept. 402)

Motion: Quash

Tentative Ruling:

Plaintiff's motion to quash or limit Defendants Joseph Dishyan and Avak Dishyan's third party subpoenas is granted. (Code Civ. Proc. §1987.1.) The subpoenas will be limited to Plaintiff's medical records pertaining only to the body parts at issue in the instant action for the last 10 years. Defendants and Defendants' attorney, jointly and severally, shall pay monetary sanctions in the amount of \$997.50 to Plaintiff. (Code Civ. Proc. §2023.010(c).)

Sanctions to be delivered to the Bonakdar Law Firm within 30 days of service of this order.

Explanation:

Though the filing of a lawsuit may be deemed a waiver of privacy as to matters embraced by the action, waivers of constitutional rights are "narrowly construed and not lightly found. [Citations.]" (*Bearman v. Superior Court* (2004) 117 Cal.App.4th 463, 473; see also *Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1014; *Britt v. Superior Court* (1978) 20 Cal.3d 844, 849.) This is especially so with an individual's medical records, which are imbued with a fundamental privacy right, as such "are matters of great sensitivity going to the core of the concerns for the privacy of information about an individual." (*Wood v. Superior Court* (1985) 166 Cal.App.3d 1138, 1147; see also *Allison v. Workers' Comp. Appeals Bd.* (1999) 72 Cal.App.4th 654, 660 [discovery of plaintiff's lifetime medical history for Worker's Compensation claim for carpal tunnel injuries was overbroad]; *Palay v. Superior Court* (1993) 18 Cal.App.4th 919, 934 [no cognizable interest in medical records unrelated to issues being litigated].) Even where discovery of private information is found to be directly relevant to the issues of the litigation, it is not automatically allowed; for such discovery to be permitted, the court must engage in a careful balancing of the compelling public need for discovery against the fundamental right of privacy. (*Binder v. Superior Court* (1987) 196 Cal.App.3d 893.) Where feasible, the court will impose partial limitations rather than denying discovery. (*Valley Bank of Nevada* (1975) 15 Cal.3d 652, 658.)

The party seeking constitutionally protected information through discovery bears the burden of showing the direct relevance of the information sought. (*Davis, supra*, 7 Cal.App.4th at p. 1017.) "Mere speculation" that some portion of the privileged information sought may be relevant to a substantive issue in a case is insufficient to

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Tentative Ruling

Re: ***Millennium Acquisitions, LLC v. Levinson, et al.***

Case No. 15CECG01815

Hearing Date: August 16, 2016 (Dept. 402)

Motion: By Plaintiff to stay execution of order to pay attorney's fees.

Tentative Ruling:

To deny the motion for an "automatic stay."

This ruling is without prejudice to Plaintiffs' ability to prepare an undertaking or other security pursuant to Code of Civil Procedure sections 917.1 and/or 995.710. The request for a temporary stay for ten days is denied.

The Defendants' request to augment the attorney's fees award is denied.

Explanation:

Defendants contend that the award of attorney's fees in this case, pursuant to Code of Civil Procedure section 425.16, is stayed by virtue of the filing of their appeal from the Court's entry of judgment on March 28, 2016.

As Defendants point out in their papers, this motion is probably procedurally improper; if there is an automatic stay, then there is no need to make a motion. Nevertheless, Defendants and Plaintiffs have each fully briefed the issue and do not object to proceeding in their papers.

Code of Civil Procedure section 916, subdivision (a) provides:

Except as provided in section 917.1 [and sections irrelevant to this proceeding] the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.

Code of Civil Procedure section 917.1, in turn, provides (in pertinent part):

(a) Unless an undertaking is given, the perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment or order is for any of the following:

- (1) Money or the payment of money, whether consisting of a special fund or not, and whether payable by the appellant or another party to the action.
- (2) Costs awarded pursuant to Section 998 which otherwise would not have been awarded as costs pursuant to Section 1033.5.
- (3) Costs awarded pursuant to Section 1141.21 which otherwise would not have been awarded as costs pursuant to Section 1033.5.

Plaintiffs contend that the attorney's fees awarded in this case fall under the provisions of section 917.1 subdivision (a)(1) insofar as attorney fees are a judgment for "money or the payment of money" and, therefore, such an award is stayed pending the appeal.

Defendants, however, cite to authority which squarely holds that attorney's fees awarded under section 425.16 are not stayed automatically by the perfecting of an appeal. (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1432-33.)

The reasoning for this holding was that the state Supreme Court had held that only awarded "routine" costs were automatically stayed. (*Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, 800-801.) This was in part for policy reasons: if an undertaking was required for costs that were awarded as a matter of course, then an undertaking would be required for nearly every case on appeal to stay such payments. (*Id.*) "Non-routine" costs are those where (1) the "losing" party could recover fees and (2) the trial court has discretion in awarding such fees. (*Id.* at 803 (ruling that expert fees awarded pursuant to a Code of Civil Procedure §998 process were non-routine and required an undertaking to stay the award on appeal).)

The *Dowling* court applied *Bank of San Pedro* and noted that attorney's fees are not awarded in every situation: while a defendant will recover if they succeed on the motion, a plaintiff will only recover if the motion is unsuccessful and if it was "frivolous or solely intended to cause unnecessary delay," and so attorney's fees under section 425.16, subdivision (c) are not reciprocal and, therefore, not routine. (*Dowling, supra*, 85 Cal.App.4th at 1432-33.) As a result, the award of such fees is not automatically stayed upon the perfection of the appeal. (*Id.*, accord *Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, 463.)

Plaintiffs, in their reply brief, make the argument that *Dowling* is wrongly decided: "Although the *Dowling* court support [sic] the idea of preventing SLAPP lawsuits at both the trial court and appellate level, their [sic] reasoning is flawed." (Reply brief at p.3.)

Even if this Court could discard the holding of *Dowling* and *Carpenter*, the arguments presented by Plaintiffs do not indicate that attorney's fees awarded pursuant to section 425.16 are routine.

First, Plaintiffs argue: "nowhere in the code is there anything that would state that reciprocal nature of the attorney's fees are [sic] required to satisfy §1032." (Reply brief at p. 3.) Plaintiffs also argue that the attorney fees awarded here are costs awarded under Code of Civil Procedure section 1032. (Reply brief at p. 4.) Section 1032 merely

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Tentative Ruling

Re: ***Marcum v. St. Agnes Medical Center et al.***, Superior Court
Case No. 15CECG01327

Hearing Date: **August 16, 2016 (Dept. 403)**

Motion: Plaintiff's Motion for Leave to File Third Amended Complaint

Tentative Ruling:

To grant only as to the proposed amendment to paragraph 89 of the proposed pleading. To deny as to the remainder of the amendments. (Code Civ. Proc. § 473(a)(1).)

Explanation:

In moving to amend a pleading, the moving party must file a declaration that specifies: (1) the effect of the amendment, (2) why the amendment is necessary and proper, (3) when the facts giving rise to the amended allegations were discovered, and (4) the reasons why the request for amendment was not made earlier. (Cal. Rules of Court, Rule 3.1324(b).)

With regards to the change to paragraph 14, the moving papers do not satisfy the requirements of Rule 3.1324(b). Counsel's declaration contends that the information in the amendment was discovered after the SAC was filed, and plaintiff researched "medical records and other documents." (Bolanos Dec. ¶ 5.) However, it is apparent that plaintiff had the decedent's medical records, and reviewed them, prior to filing the initial complaint. Plaintiff amended the pleading twice since then, but there is no explanation for why this new allegation could not have been made earlier.

If the party seeking leave to amend has been dilatory, and the delay has prejudiced the opposing party, it is within the judge's discretion to deny the motion for leave to amend. (*Hirsa v. Superior Court* (1981) 118 Cal.App.3d 486, 490.)

The court finds that plaintiff appears to have been dilatory, and the delay in making this amendment would prejudice Saint Agnes, particularly in light of the 12/5/16 trial date. Accordingly, the addition to paragraph 14 will not be permitted.

The motion is also denied as to the conspiracy allegations sought to be added to the first cause of action. After the court sustained demurrers to the Complaint's cause of action for civil conspiracy on 12/9/15, the court granted plaintiff leave to amend to add conspiracy allegations to the appropriate causes of action. Plaintiff failed to do so in either the first amended or Second Amended Complaints. Now, eight months later, and after trial preference has been granted, plaintiff seeks to add conspiracy allegations to the first cause of action for negligence, and name several new defendants to that cause of action.

Tentative Rulings for Department 501

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Tentative Ruling

Re: ***In re Rashedia Walker-Brown***
Superior Court Case No. 16CECG01613

Hearing Date: August 16, 2016 (Dept. 501)

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: MWS on 8/15/16.
 (Judge's Initials) (Date)

Tentative Ruling

Re: **Whatley v. Wildrose Chapel and Funeral Home**
Case No. 15 CE CG 00484

Hearing Date: August 16th, 2016 (Dept. 501)

Motion: Defendant's Motions for (1) an Order Compelling Plaintiff to Provide Initial Responses to Request for Production, Set One, and for Monetary Sanctions, and (2) an Order Compelling Plaintiff to Provide Further Responses to Form Interrogatories, Set One, and for Monetary Sanctions

Tentative Ruling:

To grant the defendant's motion to compel plaintiff to provide initial responses, without objections, to the request for production of documents, set one. (Code Civ. Proc. § 2031.300, subd. (b).) To grant the request for sanctions against plaintiff, in the amount of \$439.50. (Code Civ. Proc. § 2031.300, subd. (c).) Plaintiff shall serve verified responses without objections within 10 days of the date of service of this order. Plaintiff shall also pay monetary sanctions to defendant within 30 days of the date of service of this order.

To deny the defendant's motion to compel plaintiff to provide further responses to form interrogatories, set one, and the request for monetary sanctions against plaintiff with regard to this motion, as defense counsel has failed to show that he engaged in any meet and confer efforts before bringing the motion. (Code Civ. Proc. § 2030.300, subd. (b).)

Explanation:

Motion to Compel Initial Responses to Request for Production: Plaintiff has failed to provide any responses to the request for production despite being given an extension of time in which to respond, so he is subject to an order compelling him to respond. (Code Civ. Proc. § 2031.300, subd. (b).) In addition, he is deemed to have waived all objections to the requests. (Code Civ. Proc. § 2031.300, subd. (a).) Also, plaintiff is subject to monetary sanctions for his failure to respond, as he has not even attempted to justify his failure to answer the requests. (Code Civ. Proc. § 2031.300, subd. (c).) As a result, the court intends to order plaintiff to provide initial responses without objections to the requests for production, and also order him to pay monetary sanctions of \$439.50.

Motion to Compel Further Responses to Form Interrogatories: Code of Civil Procedure section 2030.300, subd. (b), states that a motion to compel further responses to interrogatories "shall be accompanied by a meet and confer declaration..."

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Tentative Ruling

Re: ***Etchison v. Mason***

Case No. 16CECG00974

Hearing Date: August 16, 2016 (Dept. 501)

Motion: By Plaintiff for leave to file Second Amended Complaint

Tentative Ruling:

To continue the hearing on the motion to 3:30 p.m. on September 7, 2016 in Department 501 to allow the moving party the opportunity to file and serve a declaration that complies with California Rule of Court 3.324, subdivision (b). The declaration must be filed and served by August 23, 2016. Any objection or opposition to this declaration must be filed and served no later than August 30, 2016.

Explanation:

The Court notes that no opposition appears to have been filed regarding this motion.

Judicial policy favors resolution of all disputed issues between parties in the same lawsuit, therefore the court's discretion will usually be exercised liberally to permit amendment of the pleadings. (*Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939.) A plaintiff must also attach a declaration specifying "(1) the effect of the amendment; (2) why the amendment is necessary and proper; (3) when the facts giving rise to the amended allegations were discovered; and (4) the reasons why the request for amendment was not made earlier." (Cal. Rule of Ct. 3.1324, subdivision (b).).

The Amended Declaration of David M. Overstreet, IV, submitted with the motion does not meet the standards set forth by California Rule of Court 3.1324. It does not explain the effect of the amendment, why it is necessary, when the facts giving rise to the allegations were discovered or the reasons why the requests were not made earlier.

Therefore, the motion is continued to 3:30 p.m. on September 7, 2016 in Department 501 to allow the moving party the opportunity to file and serve a declaration that complies with California Rule of Court 3.324, subdivision (b). The declaration must be filed and served by August 23, 2016. Any objection or opposition to this declaration must be filed and served no later than August 30, 2016.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The

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Tentative Ruling

Re: ***State of California v. Lamoure's Incorporated***
Court Case No. 16CECG00653

Hearing Date: **August 16, 2016 (Dept. 501)**

Motion: Plaintiff's Motion for Order for Possession

Tentative Ruling:

To deny without prejudice.

Explanation:

Plaintiff's objection to the declaration of Mr. Cobb is based on a mischaracterization of the issue raised in opposition: defendant is not attempting to establish that not enough compensation was offered, but rather that no offer was made, thus rendering the Resolution of Necessity invalid. To the extent this objection is interpreted as being on the ground of relevance pursuant to Evidence Code section 350, it is overruled, as the evidence is relevant. Defendant's evidence supports its argument attacking one of the elements that plaintiff must establish on this motion, i.e., plaintiff's entitlement to take the property. (See, e.g., 7 Cal. Real Est. § 24:55 (4th ed.)—"Since a finding that plaintiff is entitled to take the property by eminent domain is required for an order for possession, a defendant contesting the plaintiff's right to take the property should be raised in an opposition to a motion for order for possession." See also *Redevelopment Agency of City of Chula Vista v. Rados Bros.* (2001) 95 Cal.App.4th 309, 316, *as modified on denial of reh'g* (Jan. 7, 2002), *as modified* (Jan. 15, 2002)—"A property owner may obtain judicial review of the validity of a resolution of necessity...after commencement of the [eminent domain] action by objection to the right to take.")

Defendant has challenged plaintiff's right to take by way of affirmative defense in its Answer, and also on this motion. It is entitled to a trial on its objections to the right to take and is entitled to introduce evidence in support of those claims. (*Santa Cruz County Redevelopment Agency v. Izant* (1995) 37 Cal.App.4th 141, 152.) It has made a colorable argument that the terms of the offers presented to defendant prior to the adoption of the Resolution of Necessity were not definite or certain. It is a well-established principle of contract law that an offer must be definite and certain, such that "the performance promised is reasonably certain." (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811.) "Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain." (Rest.2d, Contracts, § 33.) There is no indication that the term "offer" used in Government Code section 7267.2 is to be interpreted in a different manner.

Tentative Rulings for Department 503

(29)

Tentative Ruling

Re: **Brian Gwartz, et al. v. Dowling Aaron, Inc., et al.**
Superior Court Case No. 15CECG03230

Hearing Date: August 16, 2016 (Dept. 503)

Motion: Strike portions of third amended complaint

Tentative Ruling:

To deny.

Explanation:

Motion to Strike:

A motion to strike is the proper procedure to challenge an improper request for relief, or improper remedy, within a complaint. (Code Civ. Proc. §431.10(b); *Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166-167.) To defeat a motion to strike punitive damages, ultimate facts showing a right to relief must be pled. (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166.) The court will read the allegations in the complaint as a whole, and not in isolation, with each part in context, and assume the truth of the matters alleged. (*Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.)

Emotional Damages/Legal Malpractice:

Where the sole harm alleged by plaintiff in a legal malpractice action based on attorney negligence is economic, emotional distress damages are not recoverable. (*Merenda v. Superior Court* (1992) 3 Cal.App.4th 1, 9-11 [disapproved on other grounds in *Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP* (2003) 30 Cal.4th 1037, 1053]; *Camenisch v. Superior Court* (1996) 44 Cal.App.4th 1689, 1697-1698.) A plaintiff seeking emotional distress damages in a legal malpractice action must show intentional or affirmative misconduct by the attorney or have sustained a non-economic injury as a direct and reasonably foreseeable consequence of the attorney's negligence. (*Merenda*, supra, 3 Cal.App.4th at pp. 10-11; see *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1040, and cases cited therein; see also *Pleasant v. Celli* (1993) 18 Cal.App.4th 841 [disapproved on other grounds by *Adams v. Paul* (1995) 11 Cal.4th 583.]

The elements of a cause of action for legal malpractice are: "(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence. [Citation.]" (*Charnay v. Cobert* (2006) 145

Cal.App.4th 170, 179.) Plaintiff must show the alleged breach was the proximate cause of his or her damages by establishing that "but for the alleged malpractice, it is more likely than not the plaintiff would have obtained a more favorable result." (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1244.)

In the case at bench, Plaintiffs' third amended complaint alleges that Plaintiffs engaged Defendants to provide legal services with regard to obtaining proper permits and building code compliance for a covered riding arena on the Parlier property ("property"). Plaintiffs allege they informed Defendants from the outset that their goal was to quickly, and properly, build a covered arena on the property, and that time was of the essence because Plaintiff Gwartz was under strict time constraints in relation to practice hours needed prior to trying out for the U.S. Equestrian Team. Plaintiffs state they informed Defendants from the beginning that Plaintiff Gwartz needed the covered arena in order to practice and that getting the arena constructed as quickly as possible and in conformance with applicable codes and permit requirements was Plaintiffs' priority. Plaintiffs allege that, despite their repeated and clear instructions that Defendants do whatever was needed to achieve this goal, that Defendants failed to abide by Plaintiffs' instructions, and pursued litigation for Defendants' own economic gain, resulting in the covered arena not being built in time for Plaintiff Gwartz to use it for Plaintiffs' articulated purpose. Plaintiffs state that had Defendants not pursued their own ends, a covered arena could have been properly permitted and built in time for Plaintiff Gwartz's training needs. Plaintiffs allege that even after litigation commenced, Plaintiff Gwartz continued with repeated requests to get the proper permits so that the arena could be built, but that Defendants were unavailing.

Plaintiffs allege that, because Defendants failed to abide by their fiduciary duties, Plaintiff Gwartz lost any chance of using the property for the purpose for which Plaintiffs purchased it, and as a direct consequence of that loss, Plaintiff Gwartz lost his last opportunity to try out for, or possibly obtain, a spot on the U.S. Equestrian Team. Plaintiffs state that the interest they seek to vindicate is non-economic in nature, that the loss they allege was Plaintiff Gwartz's ability to use the property to train, and to realize a goal for which he had devotedly been preparing for an extended period. Plaintiffs allege there is no monetary basis for this loss, that the loss is purely emotional in nature - i.e., Plaintiff Gwartz's horse has since died, his children who were actively participating in his efforts to join the team are now in college and not able to engage in what was a family pursuit, the arrangements that had been made for Plaintiff Gwartz's absence from work are no longer in place. Plaintiffs allege that from the very beginning, they represented to Defendants that Plaintiffs' main objective was not monetary, but to get the covered arena built as soon as possible and with the proper permits. Plaintiffs allege that had Defendants not engaged in misrepresentation, Plaintiffs could have had the original structure demolished and a new one built for significantly less than the litigation costs, and within a timeframe that would have allowed Defendant Gwartz sufficient time in the arena to try out for the team. Plaintiffs allege that Defendants chose their course of action with their own financial gain in mind, such that Plaintiffs' interests were intentionally ignored, despite Plaintiffs' repeated pleas and instructions. Plaintiffs have sufficiently supported their request for emotional distress damages at the pleading stage. Accordingly, Defendants' motion to strike is denied.

Pursuant to California Rules of Court, rule 3.1312, subdivision (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** 08/15/16 .
(Judge's initials) (Date)

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Tentative Ruling

Re: ***Blackstone-Nees Partners v. Sandhu et al.***, Superior Court
Case No. 16CECG00830

Hearing Date: **August 16, 2016 (Dept. 503)**

Motion: Plaintiff's Motion to Strike Answer and Cross-Complaint

Tentative Ruling:

To grant and strike the Answer and Cross-Complaint filed on June 6, 2016. (Code Civ. Proc. § 436(b).)

Explanation:

Defendant Pritam Sandhu, individually, and dba Port of Subs, was personally served on March 19, 2016. Defendant Prubjote Sandhu, individually, and dba PORT OF SUBS was served by substituted service on April 1, 2016. On June 3, 2016, both defendants' default was entered by the court clerk. Though their defaults had already been entered, on June 6, 2016, defendants filed an Answer and Cross-Complaint. These pleading should not have been allowed to be filed, as entry of default terminated defendants' rights to take any affirmative steps in this litigation. (See *Devlin v. Kearny Mesa Amc/Jeep/Renault* (1984) 155 Cal.App.3d 381, 385-386.) Because the Answer and Cross-Complaint should have been rejected for filing, the motion to strike those pleadings should be granted.

Defendants contend that they have grounds to set aside the default pursuant to Code Civil Procedure section 473 based on counsel's mistake, inadvertence, surprise or excusable neglect. Of course defendants are free to file such a motion. The court will not rule on a motion that has not been properly noticed and placed on calendar.

The opposition also requests that the court strike the defaults on the ground that the Request for Entry of Default form is defective because box 1.c is not checked.

The court finds that the form is not defective, and default was properly entered, even though box 1.c was not checked. Plaintiff checked the box clearly indicating that they were requesting entry of default, and filled in defendants' names in paragraph 1.c. The failure to check the box did not in any way render the request unclear or uncertain.

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: A.M. Simpson **on 08/11/16 .**
(Judge's initials) (Date)

Tentative Ruling

Re: ***Sihota v. Sihota***
Case No. 11 CE CG 01919

Hearing Date: August 16th, 2016 (Dept. 503)

Motion: Plaintiffs' Motion to Tax/Strike Costs

Tentative Ruling:

The motion to tax or strike the memo of costs is off calendar as moot, since plaintiff has stipulated to withdraw most of the costs in the previously filed memoranda and has now filed a new memo of costs that supersedes the prior memos and eliminates most of the disputed items.

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: A.M. Simpson **on** 08/15/16 .
(Judge's initials) (Date)

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Tentative Ruling

Re: ***Talesfore v. Clovis Auto Cars dba Clovis Volkswagen***
Court Case No. 16 CECG 00480

Hearing Date: August 16, 2016 (Dept. 503)

Motion: Petitioners John and Wendy Talesfore's Petition for Appointment of Arbitrator

Tentative Ruling:

To grant the petition to appoint an arbitrator. The parties shall meet and confer on the selection of a neutral arbitrator. The parties shall appear on Tuesday, September 6, 2016, at 3:30 p.m. in Department 503 to inform the court of the identity of the agreed arbitrator or have the court appoint an arbitrator at that time.

Explanation:

Alternative Petition to Appoint Arbitrator

The subject arbitration clause reads, in pertinent part, as follows:

Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of the Arbitration Provision, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors, and assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. ... You may choose the American Arbitration Association, 1633 Broadway, 10th Floor, New York, New York 10019 (www.adr.org), or any other organization to conduct the arbitration subject to our approval. You may get a copy of the rules of an arbitration organization by contacting the organization or visiting its website.

Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. ... Any arbitration under this Arbitration Provision shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and not by any state law concerning arbitration.

Under the FAA (9 USC § 5), the existence of an arbitration agreement is a predicate to an order appointing an arbitrator. Here, there is clearly an agreement to arbitrate the dispute. What is unclear is which arbitral forum the parties have selected.

Where the arbitration agreement designates an arbitrator or a method for selection or an arbitrator; or incorporates arbitration rules that provide such method,

such “method shall be followed.” (Code Civ. Proc., § 1281.6; 9 USC § 5.) However, where the arbitration clause does not designate the arbitrator or a method for selecting the arbitrator; or the method provided cannot be followed; or the designated arbitrator fails to act and the parties are unable to agree on a replacement, court intervention is appropriate. (Code Civ. Proc., § 1281.6; 9 USC § 5.)

Here, the relevant language offers the consumer a choice, the consumer “may” chose AAA, “or any other organization subject to ... approval” by the dealership. The dealership disagrees, interpreting this language as requiring the consumer to choose AAA unless the dealership approves another forum.

“Generally speaking, ‘the word “may” is permissive—you can do it if you want, but you aren’t being forced to—while the word “shall” is mandatory—no way you can do it. (See, e.g., *Woodbury v. Brown–Dempsey* (2003) 108 Cal.App.4th 421, 433 ... [“Ordinarily, the word ‘may’ connotes a discretionary or permissive act; the word ‘shall’ connotes a mandatory or directory duty.”]; *Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382, 1389 ... [generally explaining that may is discretionary, shall is mandatory]; see also *Dean v. Kuchel* (1951) 37 Cal.2d 97, 101–102 ... [“The word ‘may’ is at least reasonably susceptible of a permissive meaning rather than mandatory or prohibitory....”].)’ [Citation.]” (*Woolfs v. Superior Court* (2005) 127 Cal.App.4th 197, 208.) Further, “[t]he words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.” (Civ. Code, § 1644.)

If contractual language is clear and explicit, it governs. (Civ. Code § 1638; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) Just as the statutes did in the cases cited in *Woolfs v. Superior Court*, *supra*, 127 Cal.App.4th 197, the arbitration clause at issue uses the terms both “may” and “shall.” The drafters of the arbitration clause knew how to create a mandatory procedure or requirement by using the word “shall.” For example, disputes “shall” be resolved by arbitration, and arbitrators “shall” be attorneys or retired judges. Accordingly, the deliberate choice of the word “may” in the forum selection clause must be interpreted as meaning something other than “shall.” Thus, the forum selection clause presents the consumer the choice of the arbitral forum. The consumer “may” choose AAA or the consumer “may” choose another forum, if the dealership approves the other forum. The consumer is not contractually required to choose AAA, and the contract does not specify what occurs if the consumer does not choose AAA and the dealership refuses to approve the consumer’s choice. Accordingly, there has been a failure or lapse in the method of naming an arbitrator, such that the Court must appoint one pursuant to 9 USC § 5.

Alternatively, the forum selection clause is ambiguous, and any ambiguity in the language of the arbitration clause must be interpreted against the drafter. (Civ. Code § 1654; *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 745.) If the clause can be interpreted as providing that the consumer “shall” choose AAA or unless the dealership agrees to another provider, the clause is also reasonably susceptible of the meaning that the consumer may choose either provider. Moreover, the dealership’s interpretation renders the consumer’s forum selection authority a nullity. (See Civil

Code § 1641 [requiring all parts of a contract to be read together, “so as to give effect to every part,” if practicable]; Civil Code § 3541 [providing that an “interpretation which gives effect is preferred to one which makes void”].)

Thus, the Court will exercise its authority to appoint an arbitrator.

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 08/15/16 .
(Judge's initials) (Date)