

Tentative Rulings for August 23, 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).)

15CECG00739 *Intrade Industries, Inc. v. Kainth Freight Lines, Inc. et al.* (Dept. 503)
16CECG02458 *Adam Haro v. Lorenzo Rodriguez* (Dept. 502)
13CECG02711 *Harpains Meadows, L.P. et al. v. Stockbridge et al.* (Dept. 501)
15CECG03853 *Kaur, et al. v. Sandoval, et al.* (Dept. 501)

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

14CECG01317 *Moffett v. California Cancer Associates for Research and Excellence, Inc.* – all motions are continued to Wednesday, September 21, 2016 at 3:30 p.m. in Dept. 503.
15CECG01816 *Bosquez v. Gates* (Dept. 402) [Hearing continued to Tuesday, November 15, 2016, at 3:28 p.m. in Dept. 402]

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(30)

Re: **Bank of America v. Janice Thompson**
Superior Court Case No. 15CECG02115

Hearing Date: Tuesday August 23, 2016 (**Dept. 402**)
Motion: Default Hearing

Tentative Ruling:

To Grant.

Explanation:

An account stated is a type of novation (Civ. Code § 1530; *Bennett v. Potter* (1919) 180 Cal. 736; *Partridge v. Butler* (1896) 113 Cal. 326; *Mitchell v. Fleming* (1926) 77 Cal.App. 241; *Klein-Simpson Fruit Co. v. Hunt, Hatch & Co.* (1924) 65 Cal. App. 625.) It is born as a result of a balance being struck on an account. (*Biltmore Press v. Usadel* (1970) 6 Cal.App.3d 896; *Gleason v. Klamer* (1980) 103 Cal.App.3d 782.) For an account stated to exist, there must be a debt from one party to the other at the time of the statement, a balance must then be determined and agreed to be the correct sum owing from the debtor to the creditor, and the debtor must expressly or impliedly promise to pay to the creditor the amount determined to be owing. (*Maggio, Inc. v. Neal* (1987) 196 Cal.App.3d 745.)

The amount agreed on must be either specifically stated or readily calculable. (*H. Russell Taylor's Fire Prevention, supra*, 99 Cal.App.3d at p. 711-- plaintiff could not successfully plead account stated "in excess" of specified amount.) The agreement necessary to establish an account stated need not be expressed and is frequently implied from the circumstances. Where a statement is rendered to a debtor and no reply is made in a reasonable time, the law implies an agreement that the account is correct as rendered. (*Maggio, Inc. v. Neal, supra*, 196 Cal. App. 3d at p. 745.)

Here, in April 2013, Plaintiff sent a final credit card statement to Defendant showing an amount due of \$31,617.29 (Ammons Dec, filed: 10/15/15). Defendant's implied ratification and agreement to pay is evinced by her failure to object to statements mailed demanding payment (Complaint, p3 CC-4(d)). This forms the account stated on which Plaintiff may proceed to judgment.

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** 8/22/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 403

(6)

Tentative Ruling

Re: ***Jumao-As v. Volkswagen Group of America, Inc.***
Superior Court Case No.: 16CECG00702

Hearing Date: August 23, 2016 (**Dept. 403**)

Motion: By Defendants Volkswagen Group of America, Inc., and Michael Cadillac, Inc., dba Michael Automotive Center for summary judgment or, in the alternative, summary adjudication

Tentative Ruling:

To grant as to the claim for statutory civil penalties, and to deny the remainder of the motion.

The Court sustains evidentiary objections #1-4 on the grounds of hearsay and lack of foundation.

Evidence and "reply separate statements" submitted with the reply will not be considered. There is no statutory provision permitting supplemental separate statements or additional evidence to be filed with the reply. (Code Civ. Proc. § 437c, subd. (b)(4); *San Diego Watercrafts v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 312-316.) The court will consider only those facts contained in the parties' separate statements. (*Mills v. Forestex* (2003) 108 Cal.App.4th 625, 640-641.)

Explanation:

A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff or cross-complainant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto. (Code Civ. Proc. § 437c, subd. (p)(2).)

Analysis of a motion for summary judgment or summary adjudication is a three-step process. First, the court identifies the issues framed by the pleadings since it is these allegations to which the motion must respond. Second, the court determines whether

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Tentative Ruling

Re: **Green v. CDCR**
Court Case No. 15CECG03951

Hearing Date: **August 23, 2016 (Dept. 403)**

Motion: Motion by Defendant Brown to Quash service of Summons and Complaint

Tentative Ruling:

To grant.

Oral argument on this matter is continued to Thursday, September 15, 2016, at 3:30 p.m. in Dept. 403 so that the Plaintiff may be present for oral argument via Court Call. Also note: The court intends to hear oral argument for plaintiff's motion for sanctions, also scheduled for September 15, 2016, on that same date and time.

Explanation:

Defendant Brown has been named twice in the Complaint, once as "Jerry Brown" and once as "Edmund G. Brown, Governor of California." (Compl., p. 6.) There have been a total of four proofs of service filed showing attempts at service on the Governor. This motion concerns the fourth one that was done on June 13, 2016.¹ At the time the motion was filed defense counsel only had the Summons and Complaint in hand, and she indicated the proof of service was not yet showing in the court's online docket. It was filed the same day this motion was filed, July 13, 2016. The court has taken judicial notice of this Proof of Service.

As noted in the court's prior ruling on other defendants' motion to quash, the Summons as issued is defective. The declaration of defense counsel, Maureen C. Onyeagbako, establishes that the Summons served on defendant Brown on June 13, 2016, was the defective Summons issued on February 25, 2016. Plaintiff improperly included information in the "Notice to Person Served" section at the bottom of Form SUM-100. Service of this defective Summons caused the service to be defective. The portion below the clerk's signature should have been left blank, except for the clerk's

¹ The first three proofs of service filed were clearly defective, not even considering the defective Summons that was served each time, as noted *supra*. The first two, filed on March 17 and April 4, 2016, showed service by mail, which is insufficient to confer jurisdiction over a defendant unless either: 1) a Notice and Acknowledgment of Receipt form is signed by that defendant and is attached to the proof of service (no such form was attached), or 2) service is to a nonresident of California (inapplicable here). (Code Civ. Proc. §§ 415.30, 415.40.) The third proof of service, Filed May 20, 2016, was defective because it indicated service on "Edward G. Brown, Governor of California," and there is no such defendant named in this action. The clerk correctly marked this as defective.

Tentative Rulings for Department 501

(23)

Tentative Ruling

Re: **Rodney Haron v. Matthew Beebe**
Superior Court Case No. 14CECG02013

Hearing Date: Tuesday, August 23, 2016 (**Dept. 501**)

Motion: Cross-Complainant In Interpleader Allstate Insurance Company's Motion for Order to Interplead Proceeds, to Dismiss Allstate, and to Award Allstate Its Costs and Attorney's Fees

Tentative Ruling:

To deny without prejudice Cross-Complainant In Interpleader Allstate Insurance Company's motion for order to interplead proceeds, to dismiss Allstate, and to award Allstate its costs and attorney's fees.

Explanation:

Cross-Complainant Allstate Insurance Company ("Cross-Complainant") moves the Court for an order permitting Cross-Complainant to deposit with the Clerk of the Court the periodic annuity payments that have become due and payable, discharging Cross-Complainant from the action, awarding Cross-Complainant its costs and attorney's fees, and entering judgment in favor of Cross-Complainant. Specifically, Cross-Complainant argues that Cross-Defendants Rodney Haron, Tracy Tumlin, and Matthew Beebe ("Cross-Defendants") each make a claim to all or part of the periodic payments made from an annuity of which Cross-Complainant is a disinterested stakeholder.

The proof of service of Cross-Complainant's motion states that Cross-Complainant's motion was served by e-mail or electronic transmission on each of the counsel for Cross-Defendants. However, Cross-Complainant's proof of service fails to include the time of the electronic service, as required by California Rules of Court, rule 2.251(h)(i)(1)(B), and the electronic service address of the persons served, as required by California Rules of Court, rule 2.251(h)(i)(1)(C). Therefore, since the proofs of service fail to contain all of the required information, Cross-Complainant has failed to demonstrate that this unopposed motion was properly electronically served on all Cross-Defendants.

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Tentative Ruling

Re: **John R. Lawson Rock & Oil, Inc. v. California Air Resources Board**
Superior Court Case No.: 14CECG01494

Hearing Date: August 23, 2016 (**Dept. 501**)

Motion: By Petitioners/Plaintiffs John R. Lawson Rock & Oil, Inc., and California Trucking Association, for attorney's fees under Code of Civil Procedure section 1021.5

Tentative Ruling:

To deny.

Explanation:

"When the record indicates that the primary effect of a lawsuit was to advance or vindicate a plaintiff's personal economic interest, an award of fees under section 1021.5 is improper." (*Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 635.) Section 1021.5 should not result in a fee award for plaintiffs "motivated by their own pecuniary interests who only coincidentally protect the public interest." (*Beach Colony II v. California Coastal Commission* (1985) 166 Cal.App.3d 106, 114.)

As the party moving for attorney's fees, Petitioners John R. Lawson Rock & Oil, Inc., and California Trucking Association ("Petitioners") have the burden of proving every element of the fees claim, including a showing that the burden of private enforcement makes the award appropriate. (*Ryan v. California Interscholastic Federation* (2001) 94 Cal.App.4th 1033, 1044.) An award of attorney's fees under section 1021.5 requires the claimant to show the cost of its legal victory transcended its personal interest in the litigation. (*Jobe v. City of Orange* (2001) 88 Cal.App.4th 412, 419; *Save Open Space Santa Monica Mountains v. Superior Court* (2000) 84 Cal.App.4th 235, 247-248.)

An award of attorney's fees is not justified under section 1021.5 if the public benefit gained from the lawsuit and the important public right enforced by the lawsuit are coincidental to the monetary or other personal gain realized by the party seeking fees. (*Pacific Mutual Life Insurance Co. v. State Board of Equalization* (1996) 41 Cal.App.4th 1153, 1165.) An award of attorney's fees under the statute has always served as "a bounty" for pursuing public interest litigation, not as a reward for litigants motivated by their own interests who coincidentally serve the public. (*People ex rel. Brown v. Tehama County Board of Supervisors* (2007) 149 Cal.App.4th 422, 454.) An award of attorney's fees on the private attorney general theory is appropriate when the cost of the claimant's legal victory transcends his personal interest, meaning when the necessity for pursuing the lawsuit placed a burden on the plaintiff "out of proportion

to his individual stake in the matter." (*In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1215.)

Petitioners unequivocally asserted in the verified writ petition that it was protecting the financial interest of its 350,000 members. The financial interest of its members is sufficient to establish its "financial stake in pursuing this matter to the same extent as its members." (*California Licensed Foresters Association v. State Board of Forestry* (1994) 30 Cal.App.4th 562, 570.) "Where the enforcement or advancement of any public interest with the defense of the action was secondary and incidental to achieving personal business goals, an award of fees under Code of Civil Procedure section 1021.5 is not warranted." (*DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 200; *Planned Parenthood v. City of Santa Monica* (1993) 16 Cal.App.4th 685, 691 ["No evidence was presented that the litigation transcended Planned Parenthood's financial interests and imposed a financial burden disproportionate to its individual state in the matter."])

Here, the verified petition itself admitted that the California Trucking Association serves "the commercial motor carrier industry" and that it "represents members who have over 350,000 trucks" and that its members have "invested millions of dollars proactively complying with the operative Regulation in order to reach compliance in advance of [CARB's] originally stated deadline of January 1, 2014." (Petition, ¶¶11-13.)

The verified writ petition is replete with allegations that members were being financially harmed by the amendments. A constant theme was that "Petitioners and/or their members" are "responsible owners and operators of diesel trucks and buses" and had invested "millions of dollars...to comply with the Regulation" and that "[d]espite millions of dollars invested," CARB "announced that the Regulation would not be enforced against certain owners or operators of trucks, many of whom had simply elected not to comply." (Petition, ¶¶2, 3, 25.) Petitioners further alleged its members "were being punished for complying with [the regulation] and being undercut by competitors who had simply chosen not to comply with the Regulation." (Petition, ¶15.) Petitioners alleged its members were among the "85% of trucking interests who has sought to actively comply" and CARB's adoption of the amendments placed them at a "competitive disadvantage." (Petition, ¶¶26, 28, 91-96.)

These economic concerns were repeated throughout the opening, reply, and post-hearing briefs. In the opening brief, Petitioners argued that "responsible owners and operators of diesel trucks and buses incurred millions of dollars in an effort to comply...before the initial compliance date...of January 1, 2014," and that "[d]espite the millions of dollars invested...in November 2013, [CARB] announced...the deadline would not be enforced against...15% that had not complied." (Opening brief, 1:21-23, 2:1.4) Petitioners further argued the amendments "penalized" its members, and that they "were being severely damaged by being undercut in the marketplace by the 15% of truckers who had chosen not to comply...." (Opening brief, p. 2:11-13, 4:26-28, 5:1-2.)

These assertions were reiterated in the reply brief. Petitioners argued there was "extensive evidence and testimony" of economic harm and that their members would be "penalized" and "would suffer economic hardship because their 'business expenses

are much higher'" than the 15 percent of truckers that were given additional time to comply. (Reply brief, p. 17:14-17, 18:13-15.)

In its post-hearing brief, Petitioners repeated the "adverse economic impacts" placed upon its members and its members providing "extensive testimony" of economic harm. (Post-hearing brief, p. 8:19-21, 9:20-21.)

The Court acknowledged and "adopted" Petitioners claims that its members would be suffering economic harm from CARB's action, and the statement of decision adopted verbatim all of the economic harm claims in Petitioners' briefs. (Statement of decision, at pp. 507, pp. 39-41.)

It is Petitioners' burden to show the costs of their legal victory transcend their pecuniary interest. (*Jobe v. City of Orange, supra*, 88 Cal.App.4th 412, 419.)

Petitioners say they are "not aware of any direct economic benefit" to John R. Lawson Rock and Oil, Inc. and that the "primary purpose" of the litigation was to require CARB to comply with "their procedural requirements under CEQA and APA" and to "ensure that Respondents analyzed the significant increases in criteria pollutants and GHG emissions, and disclose the true impacts of the 2014 Amendments on the owners and operators of trucks who voluntarily complied with the Truck and Bus Regulation, before adopting the implementing the 2014 Amendments." (Decl. of John Lawson, ¶¶2-3.) This was echoed in the declaration of Shawn Yadon, the chief executive officer of the California Trucking Association. (Decl. of Shawn Yadon, ¶¶3-4.) These statements are conclusory and incomplete, because they leave out the fact that the "true impact" to be analyzed were economic impacts, economic impacts that would benefit Petitioners.

The effect of the regulation is that the California Air Resources Board will be required to consider the potential for adverse economic impact on California business enterprise and individuals pursuant to the Administrative Procedures Act. (See statement of decision, pp. 38:7-44:25.) This will economically benefit Petitioners going forward.

Petitioners thus did not meet their burden to show the cost of their legal victory transcended their personal interest in the litigation. (*Jobe v. City of Orange, supra*, 88 Cal.App.4th 412, 419; *Save Open Space Santa Monica Mountains v. Superior Court, supra*, 84 Cal.App.4th 235, 247-248.)

Finally, it is not necessary to separate the Petitioners when through the verified petition, the briefings, etc., Petitioners referred to themselves in the plural and "their members" etc. If Petitioner John R. Lawson Rock & Oil, Inc.'s cost of legal victory transcended its own separate personal interest in the litigation, it was its burden to so demonstrate in the moving papers.

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

Tentative Rulings for Department 502

(2)

Tentative Ruling

Re: **Long v. Calantropio**
Superior Court Case No. 16CECG00268

Hearing Date: August 23, 2016 (Dept. 502)

Motion: Michael Calantropio's motion to compel response to request for production, set one, responses to form interrogatories, set one, special interrogatories, set one and sanctions

Tentative Ruling:

To grant defendant Michael Calantropio's motions to compel plaintiff Amy Long to provide initial verified responses to form interrogatories, set one, special interrogatories, set one and request for production of documents, set one. (Code of Civil Procedure sections 2030.290(b) and 2031.300(b).) Plaintiff Amy Long to provide complete verified responses to all discovery set out above, without objection within 10 days after service of this order.

To grant defendant Michael Calantropio's motion for sanctions. Amy Long is ordered to pay monetary sanctions to the Law Offices of Vail & Wells in the amount of \$960 within 30 days after service of this order. CCP §§2030.290(c), 2031.300(c).

Explanation:

Prior to the filing of the motion the plaintiff served discovery responses. However, there is no evidence that the responses were in substantial compliance with Code of Civil Procedure sections 2030.210, 2030.220, 2030.230, 2030.240 and 2031.280. The untimely responses do not divest the court of authority to compel responses. Under Civil Discovery Act provisions, the court has discretion to rule on motion to compel initial responses to ensure that the propounding party receives responses it is entitled to. (*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390.)

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: DSB on 08/22/16.
(Judge's initials) (Date)

Tentative Rulings for Department 503