

Tentative Rulings for August 30, 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).)

16CECG00653 *State of California v. Lamoure's Incorporated* (Dept. 501)

15CECG00885 *Uppal v. Quintana* (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.

16CECG00791 *Riddle v. Community Medical Centers* is continued to Tuesday, September 20, 2016 at 3:30 p.m. in Dept. 403.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(6)

Tentative Ruling

Re: ***Hagopian v. Hopkins***
Superior Court Case No.: 15CECG00815

Hearing Date: August 30, 2016 (**Dept. 402**)

Motion: By Defendants Valent Biosciences Corp. and Valent USA Corp. for summary judgment

Tentative Ruling:

To grant summary judgment in favor of Valent Biosciences Corp., with the prevailing party directed to submit directly to this Court, within 5 days of service of the minute order, a proposed judgment consistent with the summary judgment order.

The Court sustains Plaintiff's evidentiary objection.

The Court denies the request for a continuance to conduct additional discovery.

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:

At the outset, the Court notes that Valent USA Corp. was dismissed on July 13, 2016, and thus considers the motion only as to Valent Biosciences Corp.

Defendant Valent Biosciences Corp. ("Defendant") has met its burden to show that it is entitled to summary judgment. (Code Civ. Proc., § 437c, subd. (p)(2).) Defendant did not owe a duty to Plaintiff.

The elements of a cause of action for premises liability are: (1) that defendant owned, leased, occupied, or controlled the property; (2) that defendant was negligent in the use or maintenance of the property; (3) that plaintiff was harmed; and (4) that defendant's negligence was a substantial factor in causing plaintiff's harm. (Judicial Council of Cal. Civ. Jury Instns. (Dec. 2011 rev.) CACI No. 1000.) "A defendant need not own, possess, and control property in order to be liable; control alone is sufficient." [*Italics in original.*] (*Alcaarez v. Vece* (1997) 14 Cal.4th 1149, 1162.)

"The crucial element is control." (*Alvarez v. Vece, supra*, 14 Cal.4th 1149, 1158-1159.)

The facts in *Alvarez v. Vece* were that the plaintiff was injured when he stepped into a water meter box located in the lawn in front of the rental property in which he was a tenant, where the cover was missing or broken. The plaintiff sued his landlords, and the trial court granted summary judgment for the landlords because the meter box was not located on their property, but within an adjacent strip of land owned by the city, running between the sidewalk and the landlords' property line. The California Supreme Court concluded that a triable issue of fact existed as to whether the landlords exercised control over the narrow strip of land owned by the city, that was located adjacent to, and was not noticeably separate from, their property. (*Alvarez v. Vece, supra*, 14 Cal.4th 1149, 1152-1153.)

The landlords had moved for summary judgment on the basis that the meter box was located on the adjacent property, with the closest edge of the meter box being one foot from the landlords' property line. The plaintiff maintained, meanwhile, that the landlords were responsible for his injuries because they either owned the property or, more importantly, maintained and controlled the premises. The plaintiffs submitted photographs of the premises and excerpts of a deposition of a defendant to establish that prior to and at the time of the accident, the defendants maintained the entire lawn from the front of the apartment building to the sidewalk, including that portion of the lawn that lay on the strip of land owned by the city, and that after the incident in question, the landlords constructed a fence that bordered the sidewalk and enclosed the entire lawn in front of their property, including the approximately two-foot wide portion of the strip of land owned by the city lying between the sidewalk and the landlords' property line. (*Alvarez v. Vece, supra*, 14 Cal.4th 1149, 1153-1154.)

Additionally, the plaintiff had submitted the declaration of a neighbor who resided in the same building at the time of the accident to the effect that the neighbor had informed both the defendant landlords and "various water company meter readers" that the cover of the meter box was either broken or missing. Another submission by the plaintiff was the declaration of a licensed land surveyor who, after conducting a survey of the landlords' property, opined that due to various factors, a portion of the property on which the water meter box lay might be located within the landlords' property. (*Alvarez v. Vece, supra*, 14 Cal.4th 1149, 1154.)

The circumstances that the defendants did not own or exercise control over the meter box itself did not entitle them to judgment as a matter of law, because the duty to maintain land in one's possession in a reasonably safe condition exists even where the dangerous condition on the land is caused by an instrumentality that the landowner does not own or control, giving rise to a duty to warn or make safe. If the presence of the broken meter box made it dangerous to walk across land in the landlords' possession or control, the landlords had a duty to place a warning or barrier near the box to protect persons on the land from that danger. (*Alvarez v. Vece, supra*, 14 Cal.4th 1149, 1155-1156.)

The landlords cited *Hamilton v. Gage Bowl, Inc.* (1992) 6 Cal.App.4th 1706, in support of their argument that they were not liable for the plaintiff's injuries because they did not control the meter box itself. In *Hamilton*, the plaintiff had been injured while standing in the parking lot of a bowling alley when a sign fell from the wall of an adjacent building. The bowling alley did not own the sign or the wall, but had refurbished and rehung another sign on the wall and had repainted a small portion of the wall to cover graffiti, all without seeking the owner's permission. The plaintiff argued that the bowling alley had exercised sufficient control over the wall to warrant imposition of a duty to inspect the sign that fell, but the appellate court disagreed, observing that although the defendant had exercised some degree of control over the wall, it had not exercised control over the sign that caused the plaintiff's injuries. Consequently, the plaintiff's evidence was insufficient to establish a duty on the bowling alley's part to discover the condition of the sign. (*Alvarez v. Vece, supra*, 14 Cal.4th 1149, 1157.)

Hamilton was distinguishable from the facts in the *Alvarez* case because the issue was not whether the landlords had a duty to discover a dangerous condition located on property it did not own, the plaintiff alleged that the defendants had received actual notice of the defective condition of the meter box. Thus, the issue was whether, in light of their knowledge of the dangerous condition of the meter box, the landlords had a duty to persons entering the strip of land to protect them from, or warn them of, the hazard. The landlords could have satisfied such a duty by posting warnings or erecting barricades on the property under their control, and would not have been required to inspect or repair the meter box. *Hamilton* would have been more on point to the facts in the *Alvarez* case if the bowling alley had received actual notice that the sign hanging over its parking lot was secured to the wall improperly and in danger of falling, giving rise to a duty to persons using its parking lot to protect them from, or warn them of, the dangerous sign. (*Alvarez v. Vece, supra*, 14 Cal.4th 1149, 1157.)

Nor did it matter that the landlords did not own the land on which the meter box was located. "The duties owed in connection with the condition of land are not invariably placed on the person holding title but, rather, are owed by the person in possession of the land because of the possessor's supervisory control over the activities conducted upon, and the condition, of, the land." [Punctuation omitted.] (*Alvarez v. Vece, supra*, 14 Cal.4th 1149, 1157-1158.)

Other cases and the Restatement Second of Torts use the phrase "possessor of land" rather than the terms "owner" or "lessee" to describe who may be liable for injuries caused by a dangerous condition of land because first, a possessor of land is one who occupies it with the intent to control it, and a defendant's potential liability for injuries caused by a dangerous condition of property may be based on the defendant's exercise of control over the property. Actual exercise of control dominates over title. "The crucial element is control." (*Alvarez v. Vece, supra*, 14 Cal.4th 1149, 1158-1159.)

Although the landlords might not have had a legal interest in the land on which the meter box was located, a triable issue of fact existed concerning whether the landlords nevertheless exercised control over the property surrounding the meter box and thus had a duty to protect plaintiff from, or warn him, of the hazardous condition of

the meter box. Evidence had been submitted by the plaintiff establishing that the defendants maintained the lawn that covered that portion of the two-foot-wide strip of the lawn owned by the city surrounding the meter box and adjoining their property and that following the plaintiff's injuries, the landlord had constructed a fence that enclosed the entire lawn, including that portion located on the narrow strip of land owned by the city. From this evidence, a reasonable trier of fact could infer that the landlord exercised control over the two-foot-wide portion of the strip of land owned by the city and treated the land surrounding the meter box, which lay within inches of the landlords' property, as an extension of their front law. (*Alvarez v. Vece, supra*, 14 Cal.4th 1149, 1161-1162.)

The opinion went on to discuss the dissent which would have added as a requirement, that the element of deriving a commercial benefit from the control of the property should be an element of the decision as to whether or not a property owner could be liable for a dangerous condition on property not his or her own. (*Alvarez v. Vece, supra*, 14 Cal.4th 1149, 1162-1166.) The majority opinion rejected this element.

The California Supreme Court concluded the opinion by discussing an issue not relevant here: whether it was error to exclude evidence the landlords put the fence around the lawn after the accident as a "subsequent remedial measure" and stated it was error because the evidence suggested that the landlords treated this portion of the strip as if they did own it. (*Alvarez v. Vece, supra*, 14 Cal.4th 1149, 1167-1171.)

Here, the evidence is that Defendant did not own or have any ownership interest in the subject residential property. (Fact #7, decl. of William Martin, ¶15.) Defendant Rick Hopkins worked for Valent Biosciences Corp. on February 7, 2015, and was later transferred and hired by Valent USA Corp. on April 1, 2015. (Facts #8-9, exhibit B to decl. of Cameron Thomas, depositions of Rick Hopkins, p. 5:20-24, decl. of William Martin, ¶¶13-4.)

Mr. Hopkins' duties as a research and development scientist included planning field work with existing and new products, interacting with private contractors and public research agencies, interpreting and reporting research data, and providing technical service to sales and marketing staff. Owning a dog is not one of Mr. Hopkins' job duties as a research and development scientist. (Decl. of William Martin, ¶13, exhibit A, job description.)

Mr. Hopkins worked in the field and maintained a home office. (Decl. of William Martin, ¶13, exhibit A, job description.)

Defendant never asked or required Mr. Hopkins to own dogs (or any other security measure) to protect Valent equipment stored at the subject residential property. (Decl. of William Martin, ¶13, exhibit A, job description.) Rick and Sally Hopkins owned the dogs involved in the incident. (Decl. of Cameron Thomas, exhibit B, depositions of Rick Hopkins at pp. 7:11-21, 24:4-11; exhibit D, Defendant Sally Hopkins' response to requests for admission #1; exhibit E, Rick Hopkins' response to request for admission #1.)

Plaintiff Dawn McFall Hapopian's ("Plaintiff") disputations of Defendant's facts are immaterial. The disputation of facts #7-9, deal with which of the Valent entities Mr.

Hopkins worked for, which isn't relevant to the issue of whether or not Defendant had control of the premises or whether or not Mr. Hopkins was in the course and scope of his employment when the incident occurred.

Plaintiff's disputation of fact #12, that the job description of Mr. Hopkins' position as a research and development scientist, doesn't say anything about owning a dog, is not a true disputation based on the inference that because the job description doesn't mention owning a dog, it's not a job requirement of a research and development scientist. In determining whether the papers show there is no triable issue as to any material fact, the court shall consider all of the evidence not objected to and all inferences reasonably deducible from the evidence, unless contradicted by another inference. (Code Civ. Proc., § 437c, subd. (c).) The Court can infer that by excluding references to owning dogs in Mr. Hopkins' job description, that ownership of dogs was not a part of his job duties.

Fact #13 is validly objected-to, because the discovery responses do not support the fact #13 that "The Valent Defendants never asked or required Mr. Hopkins to own dogs (or any other security measure) to protect Valent equipment stored at the subject residential property." But the exclusion of fact #13 is not fatal to the motion, since owning a dog was not part of the job description for Mr. Hopkins' job.

Plaintiff's additional facts do not raise a triable issue of fact. These facts are: (15) the Valent Defendants were aware that Mr. Hopkins kept dogs on the property; (16) the Valent Defendants made no inquiry about the dogs' breed, disposition, habits, or whether they were penned or allowed to run free; (17) Mr. Hopkins worked independently, was not required to report in on a daily or even weekly basis, and did not have regular or fixed hours; (18) it was Mr. Hopkins' responsibility to conduct field trials, analyze data, and write reports to be submitted to the Valent Defendants; (19) Mr. Hopkins would get plant material from the field and bring it to his property to evaluate; (20) the Valent Defendants stored tractors, trailers, spray rigs, an ATV, freezer, and other equipment Mr. Hopkins used for research on the property; (21) the Valent Defendants stored samples on the property; (22) the Valent Defendants stored chemicals on the property; (23) the Valent Defendants paid no rent or storage fees for storing items on the property; (24) the Valent Defendants did not do anything to make sure their property was secure; (25) the Valent Defendants left it up to Mr. Hopkins to determine how to secure the Valent property stored at the property; (26) aside from the office at his house, Mr. Hopkins did not have another office in the Fresno area; (27) Valent products were delivered to Mr. Hopkins at the property; (28) third parties came to the property to conduct business with Mr. Hopkins as a Valent representative; (29) the Valent Defendants paid for internet connection and telephone service at the property; (30) the address of the property was listed on Mr. Hopkins' business cards; and (31) Mr. Hopkins conducted experiments and tests for Valent on his property.

None of these facts raise a triable issue of material fact and to the contrary, facts #24 and #25, that the Valent Defendants did not do anything to make sure their property was secured, and that the Valent Defendants left it up to Mr. Hopkins to determine how to secure the Valent property stored at the subject property, make it clear that control over the Valent property stored at the Hopkins' residence fell to Mr.

Hopkins, not to either or any of the Valent Defendants. These two facts are based the deposition testimony of William Martin, at pages 11:9-12, 25:7-10, 34:4-15, 35:6-13, and 34:17-20. In determining whether or not a triable issue of fact, the court "shall consider all of the evidence set forth in the papers..." (Code Civ. Proc., § 437c, subd. (c).)

Liability does not hinge on obtaining an economic benefit from the use of the property. This is exactly the argument of the dissent rejected in *Alvarez v. Vece*, *supra*, 14 Cal.4th 1149, 1162-1166. "If a visitor is injured on property controlled by the defendant, liability does not depend upon whether the defendant derived a commercial benefit from the property." (*Id.* at p. 1166.) "The crucial element is control." (*Id.* at p. 1158.)

As to Plaintiff's "course and scope" argument or attempted disputation of fact concerning whether or not Mr. Hopkins was in the back yard working "in the landscape" or "on his landscaping"; it doesn't matter, because even if Mr. Hopkins had been testing or evaluating plant materials in the back yard while in the course and scope of his employment, the testing and evaluation of plant material in the backyard is not the instrumentality that injured Plaintiff. Plaintiff was injured across the street from the Hopkins' property when she was attacked by the Hopkins' dogs. The other fact, fact #12, that owning a dog is not one of Rick Hopkins' job duties as a research and development scientist, makes it clear that even if he was in the backyard testing or evaluating plant materials, the element of benefit to the employer for the doctrine of respondeat superior to apply would be missing. Letting the dogs out did not benefit Defendant.

The plaintiff has the burden to prove the tort was committed in course and scope of employment by the following factors: "In making this decision, the trier of fact considers whether the conduct benefited the employer, whether it was authorized or directed by the employer, the reasonable expectations of the employer, the amount of freedom the employee has to perform the duties of the job, the type of work the employee was hired to do, the nature of the conduct involved, and the time and place of the accident, among other things." [Underlining added.] (*Tognazzini v. San Luis Coastal Unified School District* (2001) 86 Cal.App.4th 1053, 1059.)

Request for continuance to conduct discovery

Concerning Plaintiff's request for a 60-day continuance to permit Plaintiff to conduct more discovery to oppose the motion, it is denied. Attorney Kevin Kalajian says his office is in the process of preparing interrogatories and documents requests "to obtain information which may provide evidence to support our belief that defendants Valent Biosciences Corp. and Valent USA Corp. are legally a single entity/joint venture and/or an alter ego of each other or with Sumitomo Chemical and/or joint employer of Hopkins, which will have been served by the date of the hearing on this motion. Specifically, out interrogatories and document requests are designed to obtain among other things: The nature and extent of the business relationship between Valent Biosciences Corp. Valent USA Corp., and Sumitomo Chemical; the business purpose of the entities; the organization structure of the entities; the amount of financial interest each entity has in the others; whether the entities have separate headquarters; the degree to which corporate formalities have been observed and corporate property

(5)

Tentative Ruling

Re: **James Salven v. Wild, Carter & Tipton, PC**
Case No. 15 CECG 02886

Hearing Date: August 30, 2016 **(Dept. 402)**

Motion: Disqualify the Plaintiff's Attorney

Tentative Ruling:

To deny the motion without prejudice on the grounds that it appears that the Bankruptcy Court has sole jurisdiction to remove Mr. Spitzer as attorney for the Trustee. [28 USC § 1334(e)(2)]

Explanation:

Bankruptcy Law Re: Employment of Professionals

Trustees or “Debtors in Possession” [DIPs] must seek court approval to employ attorneys, accountants, appraisers and auctioneers on behalf of the bankruptcy estate. [See 11 USC § 327(a)] Approval/disapproval of a professional's employment application is within the bankruptcy judge's sound discretion, and may properly be based on the judge's prior experience with the applicant. [*In re Complaint of Judicial Misconduct* (9th Cir. 2014) 761 F3d 1097, 1099—judicial misconduct not found where judge denied employment of applicant/financial group that repeatedly refused to abide by financial limits judge set in prior case in which financial group employed]

To qualify for employment, a professional person must:

- not hold or represent an *interest adverse to the estate*;
- be *disinterested*; and
- not have served as an examiner in the case [11 USC § 327(a), (f)]

“These statutory requirements—disinterestedness and no interests adverse to the estate—serve the important policy of ensuring that all professionals appointed pursuant to section 327(a) tender undivided loyalty and provide untainted advice and assistance in furtherance of their fiduciary responsibilities.” [*In re Tevis* (9th Cir. BAP 2006) 347 BR 679, 687; see also *In re Lee* (BC CD CA 1988) 94 BR 172, 178]

The Bankruptcy Code may prohibit an attorney's representation in situations where state rules of professional conduct *do not*. [See *In re Perry* (ED CA 1996) 194 BR 875, 880—§ 327(a) “has a strict requirement of disinterestedness and absence of

representation of an adverse interest which trumps the rules of professional conduct"; *In re Bell* (BC ED CA 1997) 212 BR 654, 658—§ 327(a) may impose more stringent requirements on professionals than state bar rules] The § 327(a) requirements are mandatory and *nonwaivable*. [*In re Granite Partners, L.P.* (BC SD NY 1998) 219 BR 22, 34 (collecting cases); *In re Congoleum Corp.* (3rd Cir. 2005) 426 F3d 675, 692—"waivers under § 327(a) are ordinarily not effective"]

A professional's obligations under § 327(a) are **ongoing**: "(T)he need for professional self-scrutiny and avoidance of conflicts of interest does not end upon appointment." [*Rome v. Braunstein* (1st Cir. 1994) 19 F3d 54, 57-58; *In re Sundance Self Storage-El Dorado LP* (BC ED CA 2012) 482 BR 613, 625, fn. 32 (citing *Rome*, supra); *In re Best Craft Gen. Contractor & Design Cabinet, Inc.* (BC ED NY 1999) 239 BR 462, 466] Indeed, the court generally may reduce or entirely deny allowance of compensation if **at any time** during the professional's employment he or she is not a *disinterested person* or represents or holds an *interest adverse* to the interest of the estate. [11 USC § 328(c); estate. [11 USC § 328(c); *Rome v. Braunstein*, supra, 19 F3d at 57-58]

"(T)he court can both remove a professional employed by an estate and deny or limit that professional's compensation for failure to live up to the requirements of § 327(a) on an ongoing basis." [*In re Diamond Mortg. Corp. of Ill.* (BC ND IL 1990) 135 BR 78, 89, fn. 7; *In re McNar, Inc.* (BC SD CA 1990) 116 BR 746, 753; and see *In re Kobra Properties* (BC ED CA 2009) 406 BR 396, 402—"Disclosure that later turns out to be incomplete can be remedied by denial of fees"] In addition to fee disgorgement, lawyers may be subject to *criminal liability* for failing to disclose conflicts of interest in bankruptcy cases. [18 USC § 152 (criminal liability for making false oath to bankruptcy court); and see *United States v. Gellene* (ED WI 1998) 24 F.Supp.2d 922, 926, aff'd (7th Cir. 1999) 182 F3d 578]

Motion at Bench

The Court will grant the request for judicial notice of the Application filed by the Trustee in the United States Bankruptcy Court for the Eastern District of California (Fresno Division) seeking court approval of the appointment of Mr. Spitzer as special counsel for Trustee pursuant to Evidence Code § 452(d)(2). First, upon examination of the Application attached as Exhibit 2 to the Declaration of Whitney, the Court notes that the Application fails to state in a "clear and concise" manner that Mr. Spitzer is in essence seeking to maintain an action for legal malpractice against **his adversary** in the underlying action of *Gwartz et al. v. Weilert et al.* Fresno County Superior Court Case No. 09 CECG 01032. While it is true that the Application does state that he represented "the Pendragon Trust" in various cases, he referred to the underlying matter as a "fraudulent transfer" case. But, the Fourth Amended Complaint filed by his clients alleged fourteen causes of action including: breach of written contract, breach of oral contract, negligence, fraud (deceit/misrepresentation); fraud (suppression of facts); quiet title; civil conspiracy; fraud in the inducement and rescission. A true fraudulent transfer case is one filed post judgment. See Civil Code § 3439.07(a).

In addition, the citation in the application to the case of *Stoumbos v. Kilimnik* (9th Cir. 1993) 988 F.2d 949 is misplaced. That case involved a preference action. This type of action seeks to subordinate the claim of a creditor where the transfer of funds from

the bankruptcy estate was “in preference” to those of other creditors. [*In re Smith's Home Furnishings, Inc.* (9th Cir. 2001) 265 F3d 959, 963; *In re Powerine Oil Co.* (9th Cir. 1995) 59 F3d 969, 972] In *Stoumbos*, the court stated: “Here, with respect to the Kilimnik preference action, the interests of Cabot and the trustee coincide: if money is recovered for the estate, Cabot's pro rata recovery will ultimately be greater.” Accordingly, the citation appears to be misleading.

Finally, as stated in the Declaration of Whitney, Mr. Spitzer is now representing Gwartz & Skigin aka “the Pendragon Trust” in a proceeding against the law firm of Dowling & Aaron alleging legal malpractice in Fresno Superior Court Case No. 15 CECG 03230. See Exhibit 4 attached to the Declaration of Whitney. All of these circumstances appear to support the disqualification of Mr. Spitzer pursuant to the doctrine set forth in *Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197. But, it also appears that jurisdiction to remove Mr. Spitzer as attorney for the Chapter 7 Trustee rests with the Bankruptcy Court. See 28 USC § 1334(e)(2)-- *Exclusive jurisdiction* over all claims or causes of action that involve employment of professionals under 11 USC § 327 and disclosure requirements thereunder. As a result, the motion will be denied without prejudice.

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: JYH **on 8/29/16.**
 (Judge's initials) (Date)

Tentative Rulings for Department 403

(6)

Tentative Ruling

Re: **Scott v. Whalen**
Superior Court Case No.: 15CECG01601

Hearing Date: August 30, 2016 (**Dept. 403**)

Motion: By Plaintiff Marvin Scott to enforce settlement agreement

Tentative Ruling:

To deny, without prejudice.

Any new hearing date must be obtained pursuant to The Superior Court of Fresno County, Local Rules, rule 2.2.1.

Explanation:

Defendants Jeffrey Whalen dba Whalen Dairy, and San Martin Milk Company, Inc., were served with the summons and complaint, but have never appeared in the action. Consequently, service of the motion on Defendant Jeffrey Whalen by mail, was thus inappropriate. (Code Civ. Proc., §1013, subd. (a).) Service of the motion on San Martin Milk Company, Inc., was not made at all.

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: KCK on 8/29/16.
 (Judge's initials) (Date)

(24)

Tentative Ruling

Re: **Lloyd v. Jebian**
Court Case No. 12CECG00576

Hearing Date: **August 30, 2016 (Dept. 403)**

Motion: Guarantee Real Estate's Motion to Determine Good Faith Settlement

Tentative Ruling:

To grant the motion of Guarantee Real Estate for determination of good faith settlement. (Code Civ. Proc. § 877, *et seq.*)

Explanation:

All parties required to be noticed have been given notice of this motion and no one has filed opposition or objected to the settlement, and cross-complainants/cross-defendants Bill Pfeif and Bill Pfeif and Associates, Inc. have filed a notice of non-opposition. The settlement between Cliff Lloyd, Anthony Jebian, and Mojdeh Yarshater on one hand, and Guarantee Real Estate on the other is found and determined to be in good faith as set forth in Code of Civil Procedure § 877.6. (*Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499.)

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 ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling

Issued By: **KCK** on **8/29/16.**
(Judge's initials) (Date)

Tentative Rulings for Department 501

(29)

Tentative Ruling

Re: **Technology Insurance Company v. Moya Farms, et al.**
Superior Court Case No. 15CECG00836 [lead case]
Wesco Insurance Company v. Moya Farms, et al.
Superior Court Case No. 15CECG00839

Hearing Date: August 30, 2016 (Dept. 501)

Motion: Strike doe amendment

Tentative Ruling:

To deny. (Code Civ. Proc. §473.)

Explanation:

Motion to strike:

Where the statute of limitations has not yet run, there is no merit in challenging an amendment naming a Doe defendant on the ground that plaintiff was not in fact ignorant of defendant's identity when the complaint was filed, because plaintiff could simply have sought leave to amend the complaint to add the person as a defendant. (*Davis v. Marin* (2000) 80 Cal.App.4th 380.) "There is no reason to treat [a Doe amendment] to the complaint any differently than...an amended complaint naming [the Doe] as a defendant. To do so would elevate form over substance and would ignore common sense." (*Id.* at p. 387.) The policy behind statutes of limitation is to put defendants on notice of the need to defend against a claim in time to prepare a fair defense on the merits; this policy is satisfied when recovery under an amended complaint is sought on the same basic set of facts as the original pleading. (*Garrison v. Board of Directors* (1995) 36 Cal.App.4th 1670, 1678.)

In the case at bench, both complaints allege that Defendants entered into written agreements with Plaintiffs that provided for the repayment of workers' compensation insurance premiums by August 15, 2014. Plaintiffs are well within the statute of limitations in naming Doreen Moya as Doe 2. (See Code Civ. Proc. §337.) Whether Plaintiffs knew moving party's identity or facts giving rise to a claim against moving party prior to filing the instant actions is irrelevant. Accordingly, the motion to strike is denied.

Request for judicial notice:

The Court declines to take judicial notice as requested by moving party.

(23)

Tentative Ruling

Re: ***Shaw's Structures Unlimited, Inc. v. Friends of the Big Fresno Fair***
Superior Court Case No. 15CECG01373

Hearing Date: Tuesday, August 30, 2016 (**Dept. 501**)

Motion: Cross-Defendant NCI Group, Inc. dba Metallic Building Co.'s
Demurrer to Cross-Complainant Friends of the Big Fresno Fair's First
Amended Cross-Complaint

Tentative Ruling:

To sustain with leave to amend Cross-Defendant NCI Group, Inc. dba Metallic Building Co.'s demurrer to Cross-Complainant Friends of the Big Fresno Fair's third and fourth causes of action pursuant to Code of Civil Procedure section 430.10, subdivision (e).

To overrule Cross-Defendant NCI Group, Inc. dba Metallic Building Co.'s demurrer to Cross-Complainant Friends of the Big Fresno Fair's third and fourth causes of action pursuant to Code of Civil Procedure section 430.10, subdivision (f).

To grant Cross-Complainant Friends of the Big Fresno Fair 10 days, running from service of the minute order by the clerk, to file and serve a second amended cross-complaint. (Code Civ. Proc., § 472a, subd. (c).) All new allegations in the second amended cross-complaint are to be set in **boldface** type.

Explanation:

1. Cross-Defendant's Demurrer to Cross-Complainant's Third Cause of Action
 - a. *Code of Civil Procedure Section 430.10, Subdivision (e)*

Cross-Defendant NCI Group, Inc. d/b/a Metallic Building Company ("Cross-Defendant") demurs to Cross-Complainant Friends of the Big Fresno Fair's ("Cross-Complainant") third cause of action for violation of the Cartwright Act on the ground that the cause of action fails to state sufficient facts to constitute a viable cause of action against Cross-Defendant.

"[Business and Professions Code s]ection 16750, subdivision (a) ... generally allows any person injured in [their] business or property 'by reason of anything forbidden or declared unlawful by this chapter' to bring a private action for treble damages or injunctive relief. Section 16720, subdivision (a), defines the prohibited kinds of 'trusts' (combinations of capital, skill or acts by two or more persons) as include those created for or carrying out unreasonable restrictions in trade or commerce. [¶] The elements of [a] Cartwright Act claim are (1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such

act or acts. [Citations.] 'An antitrust claim must plead the formation and operation of the conspiracy and the illegal acts done in furtherance of the conspiracy. [Citation.] California requires a high degree of particularity in the pleading of Cartwright Act violations [citation], and therefore generalized allegations of antitrust violations are usually insufficient.' " (*Marsh v. Anesthesia Service Medical Group, Inc.* (2011) 200 Cal.App.4th 480, 492-493 [some internal quotation marks omitted].)

First, Cross-Defendant argues that Cross-Complainant has failed to allege a viable Cartwright Act cause of action because Cross-Complainant has not alleged facts sufficient to demonstrate a tying arrangement. While Cross-Complainant asserts in its opposition to Cross-Defendant's demurrer that it is not alleging an illegal tying agreement in its first amended cross-complaint, Paragraph 38 of Cross-Complainant's first amended cross-complaint specifically alleges that Cross-Defendant and Shaw's Structures Unlimited, Inc. "conspired to and in fact did enter into an agreement creating [an] illegal tying agreement[.]" (Cross-Complainant's First Amended Cross-Complaint, ¶ 38.) Therefore, the Court considers whether or not Cross-Complainant has alleged a violation of the Cartwright Act based on a tying arrangement.

"A tying arrangement is 'a requirement that a buyer purchase one product or service as a condition of the purchase of another. [Citation.] Traditionally the product which is the inducement for the arrangement is called the "tying product" and the product of service the buyer is required to purchase is the "tied product." ' " (*Morrison v. Viacom, Inc.* (1998) 66 Cal.App.4th 534, 540-541.) Cross-Complainant alleges that Cross-Defendant and Shaw's Structures Unlimited, Inc. entered into an illegal tying agreement when Cross-Defendant agreed to only communicate with Shaw's Unlimited Structures, Inc. regarding the Directors Building and not to communicate or engage in commerce with Cross-Complainant or any agent of Cross-Complainant in exchange for Shaw's Structures Unlimited, Inc. continuing to purchase significant amounts from Cross-Defendant. (Cross-Complainant's Cross-Complaint, ¶ 38.) However, since the alleged agreement does not require a buyer to purchase one product or service as a condition for the purchase of another product or service, Cross-Complainant has failed to adequately allege that Cross-Defendant and Shaw's Structures Unlimited, Inc. entered into a tying arrangement.

Second, Cross-Complainant argues that it has pled a viable Cartwright Act cause of action based on an allocation of trade or commerce theory. In order to establish a viable Cartwright Act cause of action based on allocation of trade or commerce, Cross-Complaint must allege sufficient facts to establish an agreement between two or more competitors not to compete for the business of particular customers, with each other in particular territories, or in the sake of a particular product. (CACI No. 3401.) While Cross-Complainant alleges that Cross-Defendant and Shaw's Structures Unlimited, Inc. are each competitors of Cross-Complainant and/or the contractor selected by Cross-Complainant to erect the Director's Building, Cross-Complainant has failed to allege that Cross-Defendant and Shaw's Structures Unlimited, Inc. are competitors of each other. (Cross-Complainant's First Amended Cross-Complaint, ¶¶ 15-16.) Therefore, Cross-Complainant has failed to allege a viable Cartwright Act cause of action based on an allocation of trade or commerce theory.

Third, based on the facts alleged in the first amended cross-complaint, it appears that Cross-Complainant may be attempting to allege a viable Cartwright Act cause of action based on a group boycott theory. "The antitrust laws do not preclude a part from unilaterally determining the parties with whom, or the terms on which, it will transact business. However, it is a violation of the antitrust laws for a group of competitors with separate and independent economic interests, or a single competitor with sufficient leverage, to force another to boycott a competitor at the same level of distribution." (*Freeman v. San Diego Association of Realtors* (1999) 77 Cal.App.4th 171, 195.) In this case, while Cross-Complainant has alleged that Shaw's Structures Unlimited, Inc. exerted substantial influence over Cross-Defendant and entered into an agreement with Cross-Defendant in which Cross-Defendant agreed to only communicate with Shaw's Structures Unlimited, Inc. regarding the Director's Building and not to communicate or engage in commerce with any other contractor that Cross-Complainant hired to erect the Director's Building, Cross-Complainant has failed to allege specific facts establishing that Shaw's Structures Unlimited, Inc. coerced, threatened, or intimidated Cross-Defendant into entering the agreement with Shaw's Structures Unlimited, Inc. (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 267-269.) Therefore, Cross-Complainant has failed to allege a viable Cartwright Act cause of action based on a group boycott theory.

Accordingly, the Court sustains with leave to amend Cross-Defendant's demurrer to Cross-Complainant's third cause of action for violation of the Cartwright Act pursuant to Code of Civil Procedure section 430.10, subdivision (e).

b. *Code of Civil Procedure Section 430.10, Subdivision (f)*

Cross-Defendant demurs to Cross-Complainant's third cause of action for violation of the Cartwright Act on the ground that the cause of action is uncertain. However, Cross-Defendant can reasonably determine what issues should be admitted or denied and what claims are directed against it. Therefore, Cross-Complainant has sufficiently pled its third cause of action for violation of the Cartwright Act in certain and unambiguous terms.

Accordingly, the Court overrules Cross-Defendant's demurrer to Cross-Complainant's third cause of action for violation of the Cartwright Act pursuant to Code of Civil Procedure section 430.10, subdivision (f).

2. Cross-Defendant's Demurrer to Cross-Complainant's Fourth Cause of Action

a. *Code of Civil Procedure Section 430.10, Subdivision (e)*

Cross-Defendant demurs to Cross-Complainant's fourth cause of action for unfair business practices on the ground that the cause of action fails to state sufficient facts to constitute a viable cause of action against Cross-Defendant. "Sections 17200 through 17210 of the Business and Professions Code do not have a specific statutory title; however, California courts have referred to these statutes as the Unfair Competition Law ("UCL")." (*Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 520.) "The UCL prohibits, and provides civil remedies for, unfair competition, which is defines

as 'any unlawful, unfair, or fraudulent business act or practice.'" (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 320 [quoting Bus. & Prof. Code, § 17200].)

The Court finds that Cross-Complainant has failed to plead all of the facts necessary for a viable cause of action for unfair business practices based on unlawful business practices or unfair business practices. First, "[u]nlawful business practices within the meaning of the UCL include anything that can properly be called a business practice and that at the same time is forbidden by law. [Citation.] A practice is forbidden by law if it violates any law, civil or criminal, statutory or judicially made [citation], federal, state or local [citation]." (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1474 [internal quotation marks removed].) Here, Cross-Complainant alleges that Cross-Defendant's and Shaw's Structures Unlimited, Inc.'s agreement violated both the Cartwright Act and the Sherman Antitrust Act because the agreement is an illegal group boycott and/or an illegal tying agreement. (Cross-Complainant's First Amended Cross-Complaint, ¶ 48.)

Initially, as discussed above, Cross-Complainant has failed to allege facts sufficient to establish either a tying agreement or a group boycott that violates the Cartwright Act. Next, the Court determines that Cross-Complainant has failed to allege a *per se* group boycott violation under the Sherman Act because Cross-Complaint has not adequately alleged that Cross-Defendant and Shaw's Structures Unlimited, Inc. are direct competitors. (*NYNEX Corp. v. Discon, Inc.* (1998) 525 U.S. 128, 135-138.) Further, the Court determines that Cross-Complainant has failed to allege a rule of reason group boycott violation under the Sherman Act because Cross-Complainant has not sufficiently alleged an injury to competition generally within the defined market of the erection of buildings produced by Cross-Defendant in the Fresno area. (*Orchard Supply Hardware LLC v. Home Depot USA, Inc.* (2013) 939 F.Supp.2d 1002, 1010-1011; see Cross-Complainant's First Amended Cross-Complaint, ¶ 50.) Finally, since Cross-Complainant has failed to allege that Cross-Defendant and Shaw's Structures Unlimited, Inc. entered into an agreement "by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier[.]" Cross-Complainant has failed to allege a viable tying arrangement violation under the Sherman Act. (*Eastman Kodak Co. v. Image Technical Services, Inc.* (1992) 504 U.S. 451, 461-462.) Therefore, Cross-Complainant has failed to allege a viable cause of action for unfair business practices based on unlawful business practices.

Second, "[w]hen a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes section 17200, the word 'unfair' in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 187.) In this case, Cross-Complainant alleges that Cross-Defendant and Shaw's Structures Unlimited, Inc. entered into an unfair conspiracy when the parties agreed that Cross-Defendant would not communicate or do business with Cross-Complainant or any agent of Cross-Complainant and that Cross-Complainant could only deal with Shaw's Structures Unlimited, Inc. regarding erection

Tentative Rulings for Department 502

(23)

Tentative Ruling

Re: ***Haley Clowers v. County of Fresno***
Superior Court Case No. 13CECG01718

Hearing Date: Tuesday, August 30, 2016 (**Dept. 502**)

Motion: Defendant Ronald Kurt Rossi's Motion to File Interpleader of Funds and Discharge of Liability

Tentative Ruling:

To deny Defendant Ronald Kurt Rossi's motion to file interpleader of funds and discharge of liability.

In Plaintiffs' opposition, Plaintiffs request that the Court approve the petitions for minor's compromise filed by Plaintiffs even though Plaintiffs' current guardian ad litem refuses to sign the petitions for minor's compromise or grant Plaintiffs leave to file a motion to appoint a new guardian ad litem for Plaintiffs. Initially, even assuming that the Court has the power to approve the petitions for minor's compromise even though Plaintiffs' guardian ad litem refuses to sign the petitions, the petitions are not currently before the Court as Plaintiffs have failed to calendar a hearing on the petitions. Further, Plaintiffs do not need leave of court to file a motion to remove the current guardian ad litem and appoint a new guardian ad litem. Plaintiffs are free to file such a motion at any time.

Explanation:

Defendant Ronald Kurt Rossi ("Defendant") moves the Court for an order allowing Defendant to interplead funds and discharging Defendant of all liability by entry of an order of satisfaction of judgment. Defendant asserts that his motion is made pursuant to Code of Civil Procedure sections 386 and 386.5.

However, the Court finds that neither Code of Civil Procedure sections 386 nor 386.5 authorize Defendant to interplead the amount of the judgment against him in the instant action. First, Code of Civil Procedure section 386, subdivision (a) does not apply because Defendant is not "[a] defendant, against whom an action is pending upon a contract, or for specific personal property" and because Defendant has not filed his own separate action for interpleader. Second, Code of Civil Procedure section 386, subdivision (b) does not apply because Defendant has not filed his own separate action for interpleader and because Defendant is not "a defendant in an action brought upon one or more of [the double or multiple] claims" which may "give rise to double or multiple liability[.]" Third, Code of Civil Procedure section 386.5 does not apply because this is not an action "[w]here the only relief sought against one of the

(5)

Tentative Ruling

Re: **Fisher v. Sran**
Superior Court Case No: 15 CECG 00197

Hearing Date: August 30, 2016 (**Dept. 502**)

Petition: Approval of Compromise of Minor's Claim

Tentative Ruling:

To grant. The orders have been signed and the hearing is off calendar.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 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: DSB on 8/29/16.
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: **Wyatt v. Own A Car of Fresno**
Court Case No. 16CECG02098

Hearing Date: **August 30, 2016 (Dept. 502)**

Motion: 1) Clinton Wyatt's Petition to Confirm Arbitration Award
2) Own A Car of Fresno's Petition to Vacate Arbitration Award

Tentative Ruling:

To grant Clinton Wyatt's petition to confirm the arbitration award. To deny Own A Car of Fresno's petition to vacate. The parties are ordered back to the arbitral forum for determination of the issue of fees and costs.

Explanation:

Whether Petition to Confirm is "Premature"

The first issue is whether, as respondent¹ argues, the petition to confirm is premature, as the award was denominated as an "Interim Award," and thus is not a final award. The *Cinel* case cited by respondent did not hold that the award had to be "final" to be ripe for confirmation or vacatur, but only that the court had to determine it was an award within the meaning of Code of Civil Procedure section 1283.4.² (*Cinel v. Christopher* (2012) 203 Cal.App. 4th 759, 767—finding that the arbitrator's ruling "did not address any of the issues in controversy but instead refused to commence the proceedings for failure to pay fees," and thus did not constitute an 'award' within the meaning of section 1283.4.) Here, it is not the title the arbitrator gave to his decision that is determinative, but rather its substance. An award is an "award" under Code of Civil Procedure section 1283.4, if it is in writing, signed by the arbitrator, and includes "a determination of all the questions submitted to the arbitrators *the decision of which is necessary in order to determine the controversy.*" (Code Civ. Proc., § 1283.4, emphasis added.)

The award in question determined all issues between the parties, leaving only the amount of fees and costs to be determined. The amount of fees and costs to be paid by respondent was not "necessary in order to determine the controversy." Furthermore, the parties' arbitration clause stated that "[a]ny award by the arbitrator...will be final and binding...." A reasonable interpretation of this is that "any award" includes a written award denominated as "interim." The petition is not premature, and this court has jurisdiction to confirm or vacate the award, notwithstanding the fact that the issue of fees and costs is still to be determined in the arbitral forum.

¹ Since these are cross-petitions, each party is a "petitioner" and a "respondent." For ease of reference and to avoid confusion, Mr. Wyatt will be referred to as petitioner and OAC will be referred to as respondent.

² This analysis assumes, *arguendo* that California law applies to the award in question.

Whether FAA or California Arbitration Law Applies

Under California law, grounds for vacation of the award are found at Code of Civil Procedure section 1286.2. The ground argued here is that the arbitrator “failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware.” (*Id.*, subd. (a)(6)(A).) The California Arbitration Act requires a neutral arbitrator to disclose “all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial....” (Code Civ. Proc., § 1281.9, subd. (a).) This includes disclosure of whether he/she has served in another matter as arbitrator involving any party or lawyer for any party to the present dispute, and the disclosure must include the names of the parties involved in the other dispute, the date and amount of any monetary award, and identification of the prevailing party. (*Id.*, subd. (a)(3)-(4).) An arbitration award must be vacated if an arbitrator fails to timely disclose a required matter. (Code Civ. Proc. § 1286.2, subd. (a)(6)(A); *Ovitz v. Schulman* (2005) 133 Cal.App.4th 830, 844-845; *Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP* (2013) 219 Cal.App.4th 1299, 1310-1312.)

Under the FAA, failures in disclosure are not necessarily grounds for vacatur. Federal courts are divided on whether arbitrators have a duty to investigate and disclose potential conflicts of interest. (*Montez v. Prudential Securities, Inc.* (8th Cir. 2001) 260 F.3d 980, 983—surveying cases and noting conflict.) Some federal courts also find that a party’s failure to object to the actual or evident partiality waives the right to challenge the award. (*Fidelity Federal Bank, FSB v. Durga Ma Corp.* (9th Cir. 2004) 386 F.3d 1306, 1313—waiver doctrine applies where party had constructive notice of potential conflict but failed to timely object.) The focus under an FAA analysis is whether the evidence shows “evident partiality” or corruption of an arbitrator. (9 U.S.C. § 10, subd. (a)(2).) The Ninth Circuit has ruled that in nondisclosure cases “evident partiality” should be found when the undisclosed facts show “a reasonable impression of partiality.” (*Schmitz v. Zilveti* (9th Cir. 1994) 20 F.3d 1043, 1046—stating that this is “the most succinct expression” of the standard enunciated by the U.S. Supreme Court in *Commonwealth Coatings Corp. v. Continental Cas. Co.* (1968) 393 U.S. 145.)

The parties dispute whether the FAA or California law applies. The parties’ agreement expressly provided that it was governed by the FAA. Respondent points out that in *Ovitz v. Schulman*, *supra*, the court held that even though the arbitration agreement was governed by the FAA, the FAA did not expressly preempt California’s disclosure requirements for arbitration, as California disclosure requirements were not inconsistent with the purpose of the FAA nor with the parties’ agreement. (*Id.*, *supra*, 133 Cal.App.4th at pp. 850-855.) However, *Ovitz* is distinguishable on its facts, as the holding regarding preemption was expressly based on “the language of the relevant sections of the FAA, the congressional purpose of that legislation, and the parties’ arbitration agreement.” (*Id.* at p. 833, emphasis added.) The parties’ agreement stated that judicial review would be “*limited as provided by California Code of Civil Procedure § 1286.2 or other applicable law.*” (*Id.* at p. 855, emphasis added.) Here, however, the parties’ agreement has no such provision, and instead states very clearly that arbitration “shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et. Seq.) and

not by any state law concerning arbitration." (Sadr Supp. Dec., Ex. 2, emphasis added.) This weighs against application of the holding in *Ovitz*.

Nor has petitioner waived the application of the FAA simply by filing his petition for confirmation in a state court of competent jurisdiction, and citing to California procedural law for confirmation of arbitration awards. The petition likely could not have been brought in a federal court, under federal procedural law: a federal court has no power to vacate or confirm an arbitration award unless it otherwise has subject matter jurisdiction (i.e., federal question or diversity) over the action itself. (*Vaden v. Discover Bank* (2009) 556 U.S. 49, 58.) It does not appear this case involves a federal question, as both of petitioner's claims were under California law, nor does there appear to be diversity jurisdiction. Thus, petitioner brought the petition to confirm the award in a state court, and cited state procedural law for doing. This did not waive the provisions of the agreement.

Under the federal standards, the court cannot find that the evidence shows a "reasonable impression of partiality." The facts presented by respondent do not clearly show that there actually was a *non-disclosure* here, as much as there was an *ambiguous* disclosure. It appears the "AAA Provider Organization Disclosure Report" submitted to the parties listed all AAA arbitrations involving any party or attorney involved in the present action. It showed cases involving, *inter alia*, respondent, respondent's counsel (Mr. Parvanian), and petitioner's counsel (Mr. Sadr). The one case about which Respondent is concerned which actually involved Arbitrator Tucker and Mr. Sadr was on the list. This information did not show any more "partiality" toward Mr. Sadr than it did toward Mr. Parvanian or Own A Car of Fresno. And the facts supplied by petitioner further shows there is no basis to find an impression of partiality, as Mr. Tucker did not rule in favor of Mr. Sadr's client.

Even if California law applied, rather than the FAA, the holding in *Dornbirer v. Kaiser Foundation Health Plan, Inc.* (2008) 166 Cal.App.4th 831 is applicable, as it also involved what the court termed an "ambiguous" disclosure rather than non-disclosure. (*Id.* at p. 841.) That case established that not every case where a failure of disclosure is found will result in automatically nullifying the award. The court in *Dornbirer* found this was particularly so "where neither party challenged the arbitrator despite being aware that this information was not contained in the arbitrator's disclosure." (*Id.* at p. 842.) In *Dornbirer*, the party moving for vacatur ("petitioner") was put on notice that the arbitrator "had served as an arbitrator in a number of cases in which [respondent] was a party. [Petitioner] was clearly aware that [the arbitrator] had not provided the particulars surrounding the prior matters he disclosed, but she did not raise this as an issue prior to the arbitration" (*Id.* at pp. 842-843, brackets added.) The court therefore found "the disclosure was sufficient to put [petitioner] on notice that [the arbitrator] had served as an arbitrator in a large number of such cases. If [petitioner] was concerned about the number of times [he] had served as an arbitrator for [respondent], she had the opportunity to ask for clarification. However, she did not do so." (*Id.* at p. 841, brackets added.)

The court explained: "When a party has been informed of the existence of a prior relationship between the arbitrator and another party or an attorney, that party is

Tentative Rulings for Department 503

03

Tentative Ruling

Re: **Harris Construction Co. Inc. v. Viking Ready Mix Co., Inc.**
Case No. 14 CE CG 02904

Hearing Date: August 30th, 2016 (Dept. 503)

Motion: Defendant's Motion for Leave to File Cross-Complaint

Tentative Ruling:

To grant defendant's motion for leave to file its cross-complaint. (Code Civ. Proc. § 426.50.) Defendant shall serve and file its cross-complaint within 10 days of the date of service of this order. The discovery cutoff date shall be extended to October 8th, 2016 for the narrow purpose of allowing discovery as to the defendant's new cross-claim. All other dates shall remain as previously set.

Explanation:

Defendant moves for leave to file a cross-complaint against plaintiff under Code of Civil Procedure section 426.50. Section 426.50 states,

A party who fails to plead a cause of action subject to the requirements of this article, whether through oversight, inadvertence, mistake, neglect, or other cause, may apply to the court for leave to amend his pleading, or to file a cross-complaint, to assert such cause at any time during the course of the action. The court, after notice to the adverse party, **shall grant**, upon such terms as may be just to the parties, leave to amend the pleading, or to file the cross-complaint, to assert such cause **if the party who failed to plead the cause acted in good faith**. This subdivision shall be liberally construed to avoid forfeiture of causes of action. (Code Civ. Proc., § 426.50, emphasis added.)

"The legislative mandate is clear. A policy of liberal construction of section 426.50 to avoid forfeiture of causes of action is imposed on the trial court. A motion to file a cross-complaint at any time during the course of the action must be granted unless bad faith of the moving party is demonstrated where forfeiture would otherwise result. Factors such as oversight, inadvertence, neglect, mistake or other cause, are insufficient grounds to deny the motion unless accompanied by bad faith." (*Silver Organizations Ltd. v. Frank* (1990) 217 Cal.App.3d 94, 98–99.)

"While it may be argued that appellants, acting as their own counsel, may have been guilty of neglect, inadvertence or oversight, thereby causing delay, section 426.50 expressly disallows denial of a motion based on these grounds. There must be bad faith and this record fails to demonstrate that element. We conclude the late filing of the

motion to file a compulsory cross-complaint absent some evidence of bad faith is insufficient evidence to support denial of the motion.” (*Id.* at p. 101.)

“By the same token, any ‘surprise’ that may be visited on a party due to a belated motion pursuant to section 426.50 may be mitigated by postponement or other conditions to prevent injustice. The legislative committee comment to section 426.50 provides that, ‘[w]here necessary, the court may grant such leave subject to terms or conditions which will prevent injustice, such as postponement or payment of costs.’” (*Ibid.*)

Here, defendant contends that its cross-claim is compulsory, since it arises out of the same contractual dispute as the underlying complaint, and therefore defendant will waive the right to bring another action on its claim if the claim is not raised in a cross-complaint in the present action. (Code Civ. Proc. § 426.30.) It does appear that the proposed cross-complaint is alleging a compulsory cross-claim, so the defendant’s proposed cross-complaint is compulsory.

Plaintiff argues that defendant has excessively delayed before bringing the motion to file the cross-complaint, since the case has been pending for about two years and defendant points to no new facts that have come to light that would justify the delay in seeking to file the cross-complaint. However, as discussed above, simply engaging in excessive delay is not a sufficient reason to justify denial of a motion to file a cross-complaint. (*Silver Organizations, supra*, at p. 101.) Any prejudice to plaintiff from the delay can be mitigated by other means, such as extending the discovery cutoff or continuing the trial, if necessary. (*Ibid.*)

Plaintiff cites *Kolani v. Gluksa* (1998) 64 Cal.App.4th 402 in support of the proposition that a motion to file a cross-complaint may be denied where there is a lengthy, prejudicial delay in seeking leave to file the cross-complaint. However, *Kolani* dealt with a motion to amend a complaint under Code of Civil Procedure section 473, subdivision (a), not a motion to file a cross-complaint under section 426.50. (*Id.* at p. 411.) As discussed above, excessive delay in seeking leave to file a cross-complaint, even where there might be prejudice to the other parties, is not a ground for denying leave to file a compulsory cross-complaint under section 426.50 unless the moving party acted in bad faith. (*Silver Organizations, supra*, at p. 101.) Here, there is no evidence that defendant is acting in bad faith, and defendant’s delay in seeking to file the cross-complaint is not enough, by itself, to justify denying the motion.

Also, even assuming that a showing of prejudice would justify denial of the motion, here plaintiff has not shown that it would suffer any real prejudice if the motion is granted. While plaintiff claims that it would be prejudiced because it will not have time to conduct discovery as to the new cross-claim, defendant’s sole cross-claim is based on its alleged right to recover expert witness fees if it prevails at trial, which is based on the plain language of the parties’ contract. It is unclear what discovery plaintiff would need to conduct on this issue, other than the identities and hourly rates of the defendant’s experts, as well as the hours they spent on the case. Some of this information will be provided as part of the expert witness exchange, and the rest can be readily obtained through simple written discovery. Therefore, plaintiff has not shown

that it is likely to suffer any real prejudice if the motion is granted. However, the court will grant an extension of the discovery cutoff to October 8th, 2016 to allow further discovery on the issues raised by the cross-complaint.

Defendant contends that it is necessary for it to raise a cross-claim for expert witness fees because there is at least one case that holds that a prevailing defendant cannot recover such fees after prevailing at trial unless the defendant has alleged an affirmative claim for expert fees. (*Carwash of America-PO, LLC v. Windswept Ventures No. 1, LLC* (2002) 97 Cal.App.4th 540, 546.) In *Carwash of America*, the Third District Court of Appeal stated that,

In *Ripley*, we explained that, even where expert witness fees are expressly allowed by contract, this does not mean such fees may be recovered as an item of costs. We explained: "[T]he Legislature has chosen to provide for the recovery of contractual attorney fees in a cost award. But the Legislature has declined to adopt that procedure for the recovery of expert witness fees. (Code Civ. Proc., § 1033.5, subd. (b)(1).) Accordingly, assuming expert witness fees may be recovered under a contractual provision, they must be specially pleaded and proven at trial rather than included in a memorandum of costs." In other words, while the parties may agree to allow recovery of expert witness fees by the prevailing party, this is a matter that must be pleaded and proven at trial rather than submitted in a cost bill. (*Id.* at p. 544, internal citations omitted.)

However, there is another case out of the Fourth District that holds the opposite, stating that a prevailing defendant does not have to allege a separate claim for expert witness fees, nor does a defendant have to prove such fees at trial in order to recover them. (*Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050, 1065-1067.) The *Thrifty Payless* court held that, as long as the parties' agreement expressly provides that the prevailing party shall be entitled to recover its expert fees, and not just that the prevailing party shall be entitled to recover its "attorney's fees and costs", the court should allow recovery of expert fees by way of a post-trial motion. (*Ibid.*)

This does not mean—and we do not hold—that expert witness fees are recoverable in every case where "costs" are merely mentioned in a contract. A general cost provision should be interpreted according to the established statutory definition. But where sophisticated parties knowingly and intentionally negotiate a broader standard into their contract — and particularly where, as here, that standard specifically includes 'witness and expert fees' — the intent of the parties should be upheld by the court.

We see no reason why that intent cannot be effectuated through the normal procedures for requesting and taxing costs. The prevailing party must establish it is entitled to recover such costs under the contract. If there is any issue as to whether the amount sought was actually incurred and whether that amount is reasonable, it can be addressed in a motion to tax costs or at an evidentiary hearing, if the court deems it necessary. (*Id.* at p. 1066, internal citation omitted.)

Therefore, there is a split of authority as to whether a defendant needs to plead and prove its entitlement to expert witness fees before it can recover them after prevailing at trial. While this court believes that *Thrifty Payless* is the better-reasoned decision, in order to avoid any possible prejudice to defendant, the court intends to grant leave to file the cross-complaint so that there will be no doubt as to whether defendant has sufficiently alleged a claim for expert witness fees.

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 8/25/16.
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: **Serrano v. Neil Jones Food Company dba Toma-Tek**
Superior Court Case No. 14 CECG 00470

Hearing Date: August 30, 2016 (**Dept. 503**)

Motion: By Defendant seeking an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted

Tentative Ruling:

To grant the motion seeking an order deeming the truth of matters specified in the Requests for Admission Set One established pursuant to CCP § 2033.280(b) against Plaintiff **unless** responses in substantial conformity with CCP § 2033.220 are served **prior** to the hearing. Sanctions in the amount of \$ 960 will be imposed in favor of the moving party and against Plaintiff. Sanctions are due and payable within 30 days of notice of the ruling.

Explanation:

On May 27, 2016, Defendant propounded and served via mail Requests for Admissions Set One upon the attorney for the Plaintiff. No responses were served. See Declaration of Garcia at ¶¶ 3-5.

On July 25, 2016, Defendant filed and served a motion seeking an order that the genuineness of any documents and the truth of any matter specified in the requests be deemed admitted pursuant to CCP § 2033.280(b). No opposition to the motion has been filed. No responses have been served since the filing of the motion.

The motion seeking an order deeming the truth of matters specified in Requests for Admissions (Set One) deemed established will be granted pursuant to CCP § 2033.280(b) **unless** responses in substantial conformity with CCP § 2033.220 are served **prior** to the hearing. Sanctions are mandatory for failure to timely respond to Requests for Admissions. See CCP § 2033.280(c) and *Appleton v. Sup.Ct. (Cook) (1988) 206 Cal.App.3d 632, 634.*

Here, sanctions in the amount of \$1890 are sought. See Declaration of Garcia at ¶ 6. However, it should not have taken more than 2.5 hours of attorney time to prepare the motion. No opposition was filed; therefore, no fees were incurred in the preparation of a reply. Accordingly, \$960 will be awarded.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 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 8/26/16.**
 (Judge's initials) (Date)

(20)

Tentative Ruling

Re: ***Sanchez et al. v. Clovis Auto Cars***
Superior Court Case No. 16CECG01910

Hearing Date: **August 30, 2016 (Dept. 503)**

Motion: Motion to Compel Arbitration, or Alternatively to Appoint Arbitrator

Tentative Ruling:

To continue the hearing to September 6, 2016, at 3:30 p.m. in Department 503. Prior to the continued hearing the parties are directed to meet and confer as discussed below.

Explanation:

There is no dispute about the arbitrability of Petitioners' claims. The question is what arbitration forum will be selected. Petitioners insist on JAMS; Respondent insists on AAA.

The contractual arbitration provision provides:

You [i.e., Petitioners] 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 Clause shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and not by any state law concerning arbitration.

(Emphasis added.)

Petitioners and Respondent both treat this provision as giving them each the right to unilaterally choose the arbitration provider. As the court interprets the arbitration agreement, AAA would be the arbitration forum if agreed to by Petitioners. But Petitioners do not want to arbitrate through AAA, they could choose a different forum, which must be agreed to by Respondent. In other words, the parties both have to agree on the arbitration forum, though in the arbitration agreement Respondent pre-approved AAA.

Unfortunately, the parties are at an impasse. The FAA and CAA both require that arbitrator selection clauses be enforced according to their terms. (9 U.S.C. § 5 ["If in the agreement provision be made for a method of naming or appointing an arbitrator such

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Tentative Ruling

Re: ***Bradshaw v. Acqua Concepts, Inc. et al.***
Court Case No. 16 CECG 00949

Hearing Date: August 30, 2016 (Dept. 503)

Motion: Defendants' Motion to Compel Responses to Demand for
Production, Set One

Tentative Ruling:

To deny the motion to compel. To strike the Demand for Production of Documents, Set One.

Explanation:

Defendants filed their motion for bond pursuant to Corporations Code section 800, subdivision (c) on May 6, 2016. The Demand for Production of Documents, Set One at issue in this motion was served by mail on May 9, 2016. (Stokes Decl. ¶ 3; Ex. A.) The instant motion was filed June 24, 2016. The Motion for Bond was ruled on by this court on August 18, 2016.

Corporations Code section 800, subdivision (f) states, in relevant part: "[i]f a motion is filed pursuant to subdivision (c) ... the prosecution of the action shall be stayed until 10 days after the motion has been disposed of." It is well established that this stay encompasses discovery. (*Melancon v. Superior Court In and For Los Angeles County* (1954) 42 Cal.2d 698, 707; *Barber v. Lewis & Kaufman, Inc.* (1954) 125 Cal.App.2d 95, 98-99.) Accordingly, both the Demand for Production and the instant motion were served while the action was stayed.

The motion must be denied for having been filed during the time a stay was in effect and the discovery is stricken for having been served during the time a stay was in effect. (See Code Civ. Proc. § 187.)

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 8/26/16.
(Judge's initials) (Date)