

Tentative Rulings for September 1, 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).)

15CECG00900 *Leon v. Gursaran et al.* (Dept. 503)

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

14CECG00069 *Timothy Sailors v. City of Fresno* is continued to Thursday, October 20, 2016 at 3:30 p.m. in Dept. 503.

16CECG00211 *Padron v. City of Parlier* is continued to Wednesday, September 7, 2016 in Dept. 403.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(5)

Tentative Ruling

Re: ***American Payroll Outsourcing, Inc. v. National Logistics Team, LLC***
Superior Court Case No. 16 CECG 00525

Hearing Date: September 1, 2016 **(Dept. 402)**

Petition: Confirm Arbitration Award

Tentative Ruling:

To deny without prejudice.

Explanation:

Law Governing Petition to Confirm

Until an arbitration award is confirmed by court judgment, it has only the effect of a contract between the parties. [CCP § 1287.6] Accordingly, the party seeking confirmation of the award must file and serve a petition to confirm. See CCP § 1285. If a petition or response requesting confirmation is duly filed and served, the court must confirm the award as made, unless it corrects or vacates the award or dismisses the proceeding. [CCP § 1286 and see *Valsan Partners Ltd. Partnership v. Calcor Space Facility* (1994) 25 Cal.App.4th 809, 819 and *Weinberg v. Safeco Ins. Co. of America* (2004) 114 Cal.App.4th 1075, 1084.]

A party may seek confirmation by filing and serving a petition at least 10 days, but no more than 4 years, after service of the award on that party. [CCP §§ 1288 and 1288.4] The petition must name as respondents all parties to the arbitration and may name any other persons bound by the award. [CCP § 1285; see *Walter v. National Indem. Co.* (1970) 3 Cal.App.3d 630, 634.] The petition or response must also set forth the substance of the arbitration agreement or have a copy attached, name the arbitrator, and set forth or have attached a copy of the award and the arbitrators' written opinion, if any. [CCP § 1285.4.] Service and hearing are governed by the same provisions as petitions to compel arbitration. [CCP § 1290 et seq.]

Merits

The Notice of a hearing on the Petition to confirm the award and motion to confirm was filed on August 28, 2016. As stated supra, the Petition to Confirm must be served in the same manner as a summons. [CCP § 1290 et seq.] Here, the Petitioner has attempted to serve via "mail and acknowledgement of receipt." [CCP § 415.30] This method permits service by mailing the defendant copies of the summons and complaint (or Petition to Confirm with accompanying documents), with a request to acknowledge receipt thereof. If defendant signs the acknowledgment, it waives further

(24)

Tentative Ruling

Re: **Reyes v. Barnell**
Court Case No. 15CECG00659

Hearing Date: **August 25, 2016 (Dept. 402)**

Motion: Plaintiffs' Motion to Compel Responses to Form Interrogatories and Request for Production of Documents and to Compel Financial Wealth Discovery and Request for Sanctions against David Bernel and Joann Bernel¹

Tentative Ruling:

To deny the request to compel discovery responses and the request to compel financial wealth discovery. To deem the Form Interrogatories, Set One, and the Request for Production of Documents, Set One, to have been served on David and Joann Bernel as of the date of the hearing, with their verified responses to be served on plaintiffs on or before September 26, 2016. To order monetary sanctions against plaintiffs in the amount of \$900.00 in attorney fees, payable to defendants no later than September 30, 2016. In the event a hearing is called for by plaintiff, the court will consider increasing the sanctions awarded to include defendants' costs for appearance at the hearing.

Explanation:

Request to Compel Discovery Responses:

The moving papers did not show any proof of service of the discovery at issue on Mr. and Mrs. Bernel, despite plaintiffs' statement in their reply brief that they attached such proof. The "Exhibit 1" attached to the Reply brief was not included with any of the moving papers. Unless the party moving to compel responses proves that the opposing parties were served the court cannot compel responses, as without service there is no duty to respond. The fact that, absent a motion to compel, the discovery itself and the proof(s) of service are not to be filed with the court is immaterial. Both the discovery and proofs of service must be presented as exhibits on a motion to compel, as proving service is the moving parties' initial burden. Plaintiffs did not meet this burden.

In opposition defendants provided credible evidence of past repeated occurrences of plaintiffs failing to serve documents and pleadings on them, which lends credibility to their contention that they never received the papers and thus never had a chance to timely respond. Plaintiffs belatedly attempt to prove service in their Reply brief. In sur-reply, defendants have offered a credible explanation as to what was actually served on May 24, 2016, namely, that they did not receive discovery directed to them, but instead received Interrogatories and a Demand for Production of Documents which had been propounded on the Kutnerian defendants. The court has

¹Defendants have indicated that their names were misspelled in the complaint and subsequent filings. The court uses their correct spelling herein.

considered defense counsel's additional declaration: where the court exercises its discretion to allow new evidence in reply papers, the opposing party must be given an opportunity to respond. (*Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1307-1308.) Even if the Post Office receipt is susceptible of being interpreted as plaintiffs desires it can readily be interpreted as showing service of the Kutnerian discovery rather than the discovery at issue on this motion.

Even though no order compelling responses can be issued, it is clear at this time that defendants are in possession of the discovery documents at issue, so the court will deem the discovery now served, as of the date of the hearing, and allow defendants the opportunity to timely respond, and order them to respond.

Sanctions are mandatory against the party who loses the motion to compel responses to discovery unless the court finds that the party acted "with substantial justification" or other circumstances that would render sanctions "unjust." (Code Civ. Proc., §§ 2030.290, Subd. (c) [Interrogatories], 2031.300, Subd. (c) [Document demands], and 2033.280, Subd. (c) [Requests for admissions].) The court is mindful of the fact that plaintiffs have limited means (as evidenced by the fact they obtained a fee waiver in this action). However, plaintiffs did not act with substantial justification in filing this motion to compel, especially where it appears they did not serve the discovery they sought to compel. This put defendants to needless expense. The court finds it reasonable to award sanctions against plaintiffs, but will reduce it to account for sanctions on this motion alone, as Civil Code section 3295 does not provide for sanctions against the party losing a motion to compel financial condition discovery. The court will allow for 3 hours of opposing counsel's time, at his stated rate of \$300/hour, for a total sanction of \$900.00. **In the event a hearing is needed, the court will consider increasing the sanctions awarded to include defendants' costs/fees for appearance on this motion.**

Request to Compel Financial Wealth Discovery:

Plaintiffs seek to compel defendants' financial wealth information based on plaintiffs' claim for punitive damages. This information is otherwise not directly relevant to the issues being litigated. (*Britt v. Superior Court* (1978) 20 Cal.3d 844, 858.) A court order is required to obtain discovery of defendant's financial condition in actions seeking punitive damages, and will be granted only if the court finds "substantial probability" that plaintiff will prevail on the punitive damage claim. (Civ. Code § 3295, subd. (c); *Rawnsley v. Superior Court* (1986) 183 Cal.App.3d 86, 89; *Kerner v. Superior Court* (2012) 206 Cal.App.4th 84, 119-120, as modified (May 21, 2012); *Jabro v. Superior Court* (2002) 95 Cal.App.4th 754, 757-758.)

The "substantial probability" finding on this motion means that plaintiff has established it is "very likely" or a "strong likelihood" that the plaintiff will prevail on his/her claim. (*Kerner, supra*; *Jabro, supra*.) Evidence is authorized, for both moving and opposing parties, by way of supporting and opposing affidavits. (Civ. Code § 3294, subd. (c).)

As to plaintiff's Request for Judicial Notice, the "Facts to be Judicially Noticed" (pages 3-4 of their Request for Judicial Notice) are simply the facts plaintiffs believe

support their request, and which they seek to establish on this motion. The “basis for judicial notice” paragraphs at pages 6-10, which include references to the attached evidence (the unlawful detainer trial transcript, the Bernels’ answer, and the declarations of Mr. and Mrs. Reyes) are the specific requests for judicial notice. The fact that plaintiffs’ framed their request for consideration of these documents as a “request for judicial notice” is not determinative. The Bernels’ verified answer has been considered as a party admission. The Reyes declarations have been considered as their adoptive admissions, as they could have simply filed new declaration with this motion stating the same information. The court has also considered, as substantive evidence, Mr. Bernel’s testimony in the unlawful detainer trial, as to its potential for constituting prior consistent or inconsistent statements pursuant to Evid. Code §§ 1235-1236. The court denies judicial notice of the court’s finding in that trial (RJN, p.6, ¶13), as this has no collateral estoppel effect on Mr. Bernel; however, as that finding was simply that Mr. Bernel terminated electrical services and Mr. Bernel admitted this in his testimony, that fact itself is judicially noticed.

The defendant’s verified answer establishes that the Bernels knew plaintiffs were an elderly couple. However, they did not admit that Mr. Bernel threatened to kill Mr. Reyes. They simply alleged that *Mr. Reyes alleged this*. The answer further admits that Mr. Bernel refused to accept an electricity payment from Mr. Reyes.

While the pages attached to plaintiffs’ declarations, purportedly from medical providers, must be disregarded as not properly authenticated, and as hearsay, the declarations themselves constitute evidence that they were injured after the electricity was cut off.

But even with the evidence submitted, plaintiffs have failed to establish the substantial probability that they will prevail on their punitive damage claim. Simply establishing that Mr. Bernel began to refuse plaintiffs’ payments, cut off the electricity, and that the Reyes’ were elderly and were physically injured by falling in their trailer because of the lack of electricity, does not *ipso facto* establish that they are entitled to punitive damages.

Defendants have provided credible evidence in opposition establishing that they had reasons for their actions; i.e., that their actions were not motivated by oppression, fraud, or malice. They had tried for some time to insist (without cutting off the power) that the plaintiffs obtain their own power but they nonetheless kept using it in ever-increasing quantities. They testified this caused power fluctuations and brown-outs which culminated in an electrical fire, and that it was this damage and the risk of future fires and damage that prompted the cut-off. Plaintiff failed to refute this evidence. In reply Mr. Reyes’ additional testimony admits he never sought to establish his own electrical connection, and never authorized anyone to do so on his behalf, but this does not refute Mr. Bernel’s statement that he contacted PGE on behalf of Reyes. It merely establishes that he was not authorized to do so. Plaintiffs did not refute Mr. Bernel’s contention that he had been attempting for some time before cutting off the power to effect a more peaceful resolution to the issue (i.e., to convince them they needed to get hooked up to their own power source). Plaintiffs do not refute that their usage of the Bernels’ power caused power fluctuations and brown-outs, and caused a fire; plaintiff’s additional statement that he did not “purposefully intend” to increase the

Tentative Rulings for Department 403

(20) Tentative Ruling

Re: ***Powell et al. v. High Class Limousines, et al.***
Case No. 15CECG00961

Hearing Date: **September 1, 2016 (Dept. 403)**

Motion: Defendant U-Haul Co. of Arizona's Motion for Determination of Good Faith Settlement

Tentative Ruling:

To grant. (Code Civ. Proc. § 877, et seq.)

Explanation:

Under Code Civ. Proc. § 877.6, "Any party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors, upon giving notice in the manner provided in subdivision (b) of Section 1005." (Code Civ. Proc. § 877.6(a)(1).)

"The issue of the good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counter affidavits filed in response, or the court may, in its discretion, receive other evidence at the hearing." (Code Civ. Proc. § 877.6(b).)

"A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault." (Code Civ. Proc. § 877.6(c).)

In light of U-Haul's limited liability pursuant to Vehicle Code § 17151, and the lack of any opposition to the motion, the court finds the settlement to be in good faith.

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

Tentative Ruling

Issued By: KCK on 08/30/16.
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Deatherage v. Fresno Unified School District***
Superior Court Case No. 15CECG00417

Hearing Date: September 1, 2016 (**Dept. 403**)

Motion: Petition to compromise minor's claim

Tentative Ruling:

To grant. Order signed. Hearing off calendar.

Pursuant to California Rules of Court, rule 3.1312(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 **08/30/16.**
 (Judge's initials) (Date)

(28)

Tentative Ruling

Re: **Stuart v. Wang**
Case No. 16CECG01362
Hearing Date: September 1, 2016 (Dept. 403)
Motion: By Defendant to Strike Punitive Damages

Tentative Ruling:

To grant the motion to strike the punitive damages prayer on page 4, line 4 of the Complaint with leave to amend.

Plaintiff shall have ten court days in which to file and serve an amended complaint.

Explanation:

No opposition has been filed in response to this motion.

A motion to strike can be used to: "(a) Strike out any irrelevant, false, or improper matter inserted in any pleading"; or "(b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (Code Civ. Proc. §§ 431.10, subd.(b); 436, subd.(a).) A court will "read allegations of a pleading subject to a motion to strike as a whole, all parts in their context, and assume their truth." (*Clauson v. Sup.Ct. (Pedus Services, Inc.)* (1998) 67 CA4th 1253, 1255.)

A motion to strike may lie where the facts alleged do not rise to the level of "malice, fraud or oppression" required to support a punitive damages award. (*Turman v. Turning Point of Central Calif.* (2010) 191 Cal.App.4th 53, 63.) Mere conclusory allegations will simply not suffice. (*Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872.)

It is true that punitive damages are allowed, in certain circumstances, for negligence cases. (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 898 (allowing punitive damages for non-intentional behavior, where there is reckless indifference).) However, a plaintiff must still allege some facts to support some finding of egregious behavior. (*Monge v. Superior Court* (1986) 176 Cal.App.3d 503, 511.)

Here, Plaintiffs simply have not pleaded any facts to demonstrate a basis for punitive damages under any theory. The allegations contained in the complaint are conclusory and contain only the barest of facts concerning the car accident at issue here and no facts of any malicious, false, or oppressive actions on the part of the Defendants. Therefore, the motion is granted with leave to amend.

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: KCK **on** 08/30/16.
(Judge's initials) (Date)

Tentative Rulings for Department 501

03

Tentative Ruling

Re: **Toste v. Gottfried**
Case No. 15 CE CG 01234

Hearing Date: September 1st, 2016 (Dept. 501)

Motion: Defendants' Motions to (1) Compel Plaintiff's Verified Responses to Supplemental Request for Production of Documents, Set One, (2) Compel Plaintiff's Verified Responses to Supplemental Special Interrogatories, Set One, and (3) Strike Plaintiff's Objections to Subpoena to Aria Community Health Center

Tentative Ruling:

To stay the rulings on the defendants' motions to compel and motion to strike plaintiff's objections until after plaintiff has obtained new counsel. To order plaintiff Mea Cole and her guardian *ad litem*, Jennifer Toste, to appear at the hearing and explain what steps they have taken to obtain new counsel for plaintiff. Also, Jennifer Toste shall appear and explain why she should not be removed as guardian *ad litem* for her apparent failure to act in the best interests of the minor plaintiff.

Explanation:

While it does appear that plaintiff has failed to provide adequate responses to the discovery requests and raised improper objections to the business records subpoena, which would ordinarily be sufficient to justify issuing an order compelling her to respond and striking her objections, here the situation is complicated by the fact that plaintiff is a minor, and it appears that her guardian *ad litem*, Jennifer Toste, is the person who is responsible for obstructing the discovery process. Plaintiff's counsel obtained an order allowing him to withdraw from the case on June 20th, 2016. Therefore, plaintiff has been *in pro per* since that date.

However, since plaintiff is a minor, she cannot represent herself *in pro per*, since she must be represented by a guardian *ad litem*. (*Torres v. Friedman* (1985) 169 Cal.App.3d 880, 887.) Nor can her guardian *ad litem*, who is not an attorney, act as the minor's attorney, since she would be effectively practicing law without a license. (Bus. & Prof. Code, § 6125: "No person shall practice law in California unless the person is an active member of the State Bar"; *J.W. v. Superior Court* (1993) 17 Cal.App.4th 958, 968: "We conclude that neither the common law nor guardianship statutes sanction an exception to the State Bar Act prohibition against the unauthorized practice of law in favor of guardians acting for their wards.")

Tentative Rulings for Department 502

(17)

Tentative Ruling

Re: **Garcia v. Suburban Propane, L.P.**
Court Case No. 16 CECG 00418

Hearing Date: September 1, 2016 (Dept. 502)

Motion: Defendant's Motion to Disqualify Plaintiffs' Counsel

Tentative Ruling:

To deny the motion to disqualify counsel. To strike the Stipulation and Order to file the First Amended Complaint entered and filed July 19, 2016.

Explanation:

"A trial court's authority to disqualify an attorney derives from the power inherent in every court '[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.' (Code Civ. Proc., § 128, subd. (a)(5); [citations].)" (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145 (*Speedee Oil*)). However, motions to disqualify generally arise in one of two contexts: (1) in cases of successive representation, where an attorney seeks to represent a client with interests that are potentially adverse to a former client; and (2) in cases of simultaneous representation, where an attorney seeks to represent in a single action multiple parties with potentially adverse interests. (*Western Sugar Coop. v. Archer-Daniels-Midland Co.* (C.D. Cal. 2015) 98 F.Supp.3d 1074, 1080.) Successive representation implicates an attorney's duty of confidentiality. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283.) Simultaneous representation implicates an attorney's duty of loyalty. (*Id.* at p. 284.)

Nevertheless, defendant seeks to have plaintiffs' counsel disqualified for his unethical conduct in filing the stipulation and amended complaint. Defendant alleges that plaintiffs' counsel's conduct violates Business and Professions Code section 6068, subdivision (d), Business and Professions Code section 6106, Business and Professions Code section 6128, Penal Code section 115, subdivision (a) and violates California Rule of Professional Conduct 5-200, subparts (A) and (B). Defendant also alleges the conduct is sanctionable under Code of Civil Procedure section 128.7, subdivision (b)(1). However, none of these citations are authority for disqualifying counsel. This motion not a disciplinary action, a criminal prosecution, a sanctions motion, or a contempt proceeding, and without ruling on the merits of any of those measures, we must answer the question of whether disqualification of plaintiffs' counsel is proper.

Defendant accurately cites authority to the effect that: "The paramount concern [on a motion to disqualify counsel] must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to

counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process. [Citations.]” (*SpeeDee Oil, supra*, 20 Cal.4th at pp. 1145-1146.) However, each of the cases making this observation involved attorneys who violated their duty of loyalty or confidentiality to their own clients. Here, the ethical lapse of Mr. Webb was not a violation of his duty of loyalty or duty of confidentiality of his clients. The Court cannot condone what occurred, but it does not appear to be grounds for disqualification under current case law.

Defendant has not cited and the court is not aware of any case where counsel was disqualified for fraud on the court that did not harm his client's interests. The Court believes the closest analogous case is *Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, in which plaintiff's attorney secretly initiated a social relationship with a secretary at the defense law firm that consisted of two or three meetings after work. The two discussed “personalities involved in the litigation” in a very general way. The defendants moved to have plaintiff's attorney disqualified. In affirming, the appellate court rejected the argument that plaintiff's counsel should be disqualified “because, at the very least, his behavior creates an appearance of impropriety that cannot be countenanced without undermining the integrity of the judicial system.” (*Id.* at p. 305.) “Despite the many references to the appearances standard in our case law, and despite occasional judicial statements that ‘[d]isqualification is proper ... to avoid any appearance of impropriety.’ [citation], there is no California case in which an attorney has been disqualified solely on this basis.” (*Id.* at p. 306.) “There is no doubt that, as found by the trial court, [counsel's] acts ‘were the essence of unprofessionalism and poor judgment.’ However, it is one thing to say [his] conduct was unprofessional and showed bad judgment and quite another to say, as the trial court did not, that it warrants his disqualification.” (*Id.* at p. 309.)

Defendant correctly points out that courts apply heightened scrutiny to class counsel. “In the class action context, the Court has an obligation to closely scrutinize the qualifications of counsel to assure that all interests, including those of as yet unnamed plaintiffs are adequately represented. See Fed. R. Civ. P. 23(a)(4) (representative parties must ‘fairly and adequately represent the interests of the class’). This is because in certifying a class action, the Court confers on absent persons the status of litigants and ‘creates an attorney-client relationship between those persons and a lawyer or group of lawyers.’ [Citations.] Precisely because of the responsibility to absent class members, counsel's qualifications in the class action context are subject to a ‘heightened standard.’ [Citations.]” (*Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1, 12 (*Cal Pak*).)

Defendant argues that the *Cal Pak* case is controlling. However, it does not require disqualification in the instant case. In *Cal Pak*, plaintiffs' counsel admitted he had offered to sell out his client and the class which the client was seeking to represent for a payment to himself personally of approximately \$8 to \$10 million dollars. The trial court disqualified plaintiffs' counsel and the appellate court affirmed, finding no abuse of discretion. The appellate court distinguished the case from the usual disqualification case based on the misuse of confidential information – and on the “magnitude of the ethical lapse.” (*Id.* at p. 11.) However, “[s]urreptitiously contacting the opposing party and offering to dismiss a client's action or forego filing a valid cause of action in return for payment of fees directly to the attorney, creates a conflict of interest,” “constitutes

an obvious breach of the attorney's fiduciary obligation to the client," and breaches the duty of loyalty to the client. (*Ibid.*) However, because "the significant question is whether there exists a genuine likelihood that the status or misconduct of the attorney in question will affect the outcome of the proceedings before the court," and the actions of plaintiffs' counsel raised such a serious doubt as to his ability to be loyal to his clients, especially the absent class members, disqualification was appropriate. (*Id.* at pp. 11-12.) Again, while not approving of plaintiffs' counsel's behavior, the Court points out that it was not a violation of the duty of loyalty or confidentiality owed to either Ms. Garcia or the absent class members like the egregious misconduct in *Cal Pak*.

"The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process." (*SpeeDee Oil, supra*, 20 Cal.4th at p. 1145.) Depending on the circumstances, a disqualification motion may involve weighing such considerations as a client's right to chosen counsel, an attorney's interest in representing a client, the financial burden on a client to replace disqualified counsel, and the possibility that tactical abuse underlies the disqualification motion. (*Ibid.*; *William H. Raley Co. v. Superior Court* (1983) 149 Cal.App.3d 1042, 1048.) While the "preservation of the public trust is a policy consideration of the highest order" but it is "just one of the many policy interests which must be balanced by a trial court considering a disqualification motion," and this interest does not always outweigh the opposing party's right to counsel of its choice. (*Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, 807.) Moreover, a "court must not hesitate to disqualify an attorney when it is satisfactorily established that he or she wrongfully acquired an unfair advantage that undermines the integrity of the judicial process and will have a continuing effect on the proceedings before the court." (*Gregori v. Bank of America, supra*, 207 Cal.App.3d at p. 300.)

Here, plaintiff Sandra Garcia chose Mr. Webb as her attorney and has a right to be represented by counsel of her choice. Mr. Webb has a right to represent Ms. Garcia. Mr. Webb's ability to represent a class will be determined at a not yet scheduled class certification motion. Suffice to say that the court will be watching Mr. Webb for future ethical lapses. Although defendant argues that because the case is in the pleading stages, it should be inexpensive and easy to find replacement counsel, it is difficult to find counsel skilled in both FEHA actions and wage and hour class actions. It is also difficult to find attorneys skilled in such action willing to take over litigation filed by another attorney. There is the prospect that the motion to disqualify was motivated by tactical concerns given the availability of other options including Code of Civil Procedure section 128.5 and contempt sanctions. But most importantly, the ethical lapse of Mr. Webb was not a violation of his duty of loyalty or duty of confidentiality owed to his clients. If anything he was over-zealously representing his clients' interests to the point of committing a fraud on the court. This, of course, cannot be condoned, but it on balance, it is not grounds for disqualification. Nor does it appear that Mr. Webb has "wrongfully acquired an unfair advantage that undermines the integrity of the judicial process and will have a continuing effect on the proceedings before the court," as the court will strike the stipulation allowing the filing of the amended complaint. (No amended complaint has been filed within the time allowed by the stipulation.)

Accordingly, the motion is denied.

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: _____ **DSB** _____ **on 08/29/16.**
(Judge's initials) (Date)

Tentative Rulings for Department 503

(30)

Re: ***Khaled Abualrejal v. Shogay Ahmed***
Superior Court No. 15CECG03604

Hearing Date: Thursday September 1, 2016 (**Dept. 503**)

Motion: (1) Defendants: Shogay Ahmed, Saleh Saleh, Hulad Saleh, Halim Saleh, Cliffside Investments LLC, and Ocean Waves LLCs' Demurrer

(2) Defendant Wells Fargo's Demurrer

Tentative Ruling:

To **OVERRULE** Defendants: Shogay Ahmed, Saleh Saleh, Hulad Saleh, Halim Saleh, Cliffside Investments LLC, and Ocean Waves LLCs' ("LLC Defendants") demurrers: **(2); (3)** based on Code Civ. Proc., 430.10 (e) and Plaintiff's failure to bring the claim as a derivative action; **(4)** based on CCP 430.10 (e) and derivative; **(5); (6); (7)** based on derivative; **(8)** based on CCP 430.10 (e); **(9)** based on CCP 430.10 (e) and Defendants' objection regarding the application to real property; **(10); (11)** based on derivative; **(12); (13); (14); (15); (16); (17)** based on derivative; **(18); (19)** based on CCP 430.10 (e) as it relates to Defendant Hulad Saleh only; **(20); (21); (22)** based on statute of limitations (SOL) and derivative; **(23)** based on SOL; **(24); (26); (27); (28); (29); (30); (31)** based on derivative; **(32); (33)** based on CCP 430.10 (e); **(34); (35); (36); (37)** based on SOL; **(38)** based on SOL; **(39)** based on CCP 430.10 (e); **(40)** based on derivative; **(41)**.

To **SUSTAIN** LLC Defendants' demurrers: **(3)** based on Plaintiff's failure to state a claim against Defendant Ocean Waves, LLC; **(4)** based on Plaintiff's failure to state a claim against Defendant Ocean Waves, LLC; **(7)** based on CCP 430.10 (e); **(8)** based on derivative; **(9)** based on derivative; **(11)** based on CCP 430.10 (e); **(17)** based on CCP 430.10 (e) and Sham Pleading objection; **(19)** based on CCP 430.10 (e) as it relates to Defendant Shogay Ahmed only; **(22)** based on CCP 430.10 (e); **(23)** based on CCP 430.10 (e); **(25); (31)** based on CCP 430.10 (e); **(33)** based on derivative; **(37)** based on CCP 430.10 (e); **(38)** based on CCP 430.10 (e); **(39)** based on derivative; **(40)** based on CCP 430.10 (e); **(40a); (40b)**.

To **SUSTAIN** Wells Fargo's demurrer, see **(40b)**.

Demurrers are sustained without prejudice. Plaintiff is granted 10 days leave to amend. (Cal. Rules of Court, rule 3.1320(g).) The time in which an amended pleading may be filed will run from service by the clerk of the minute order. (Code Civ. Proc., § 472b.)

Explanation:

Defendant LLCs' demurrer is discussed below; bold headings correspond with each objection as it is listed in their demurrer. Wells Fargo's demurrer is number **40(b)**.

(1) The forty-one causes of action fail to state a claim.

- Causes of action one through forty-one are each analyzed according to Code of Civil Procedure section 430.10(e) below.

(2) The Third Amended Complaint and the claims alleged therein are unintelligible, uncertain, and vague.

- California Rules of Court, rule 3.1113, subdivisions (a) and (b) require the moving party to serve and file a memorandum that contains "a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced. The court may treat the absence of a memorandum of points and authorities as an admission that the motion or special demurrer is not meritorious and cause for its denial. (*ibid*; *Dickers v. Superior Court* (1948) 88 Cal.App.2d 816, 818-819.) As the term is commonly used, a special demurrer is one that calls attention to some particular defect of pleading, rather than the "general" defect that the complaint does not state a cause of action. (*Cameron v. Evans Securities Corp.* (1931) 119 Cal.App. 164, 167-169.)

Here, Defendant filed a *special* demurrer based on Code of Civil Procedure section 430.10(f) [uncertainty]. But Plaintiff did not submit a memo. Therefore, This Court will treat it as non-meritorious. Demurrer overruled.

(3) The first cause of action fails to state a claim, should have been brought as a derivative action, and fails to state a claim against Defendant Ocean Waves, LLC.

- Breach of Contract *against Shogay Ahmed, Saleh Saleh, Cliffside, and Ocean Waves*: "A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.)

Here, Plaintiff adequately alleges breach of contract. *First*, Plaintiff pleads the contract; Plaintiff incorporates the written contract into the plea (see TAC, Exhibit A: Operating Agreement). *Second*, Plaintiff performed under the contract; he contributed funding and labor (TAC, ¶ 32-40, 73). *Third*, Defendants breached by (among other things) not contributing funding or labor as agreed and by putting assets in their name alone (TAC, ¶ 72). Plaintiff suffered damages as a result of Defendants' breach; he did not receive the benefit of the contract and he lost his investments (TAC, ¶¶ 35-50, 75). Demurrer overruled.

- Derivative: Damages would directly benefit Plaintiff, not the LLC. Therefore, Plaintiff is permitted to proceed individually. Derivative action is not required. Demurrer overruled.

- Ocean Waves: Where writings attached to a complaint conflict with the contents thereof, the writing controls over the complaint. (*Holland v. Morse Diesel Int'l, Inc.* (2001) 86 Cal.App.4th 1443, 1447; *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1585.) Also, it is essential to the validity of a contract, not only that the parties should exist, but that it should be possible to identify them. (Civ. Code, § 1558.)

Here, Plaintiff alleges breach of contract against Defendants: Shogay Ahmed Ahmed, Cliffside Investment, and Ocean Waves. However, the writing attached to the TAC as Exhibit A conflicts with Plaintiff's assertions, and it controls. Since it *only* lists Plaintiff and Defendant Shogay Ahmed as contracting parties, Defendant Ocean Waves is not liable. Demurrer sustained.

(4) The second cause of action fails to state claim, should have been brought as a derivative action, and fails to state a claim against a Defendant Ocean Waves, LLC.

- Breach of Implied Covenant of Good Faith and Fair Dealing *against Shogay Ahmed, Cliffside, and Ocean Waves*: "There is implied in every contract a covenant by each party not to do anything which will deprive the other parties thereto of the benefits of the contract. ... This covenant not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose." (*Harm v. Frasher* (1960) 181 Cal.App.2d 405, 417; see also *Universal Sales Corp. v. California Press Mfg. Co.* (1942) 20 Cal.2d 751, 771; *Nelson v. Abraham* (1947) 29 Cal.2d 745, 751; *California Lettuce Growers v. Union Sugar Co.* (1955) 45 Cal.2d 474, 484; *Carma Developers (Calif.) v. Marathon Dev. Calif.* (1992) 2 Cal.4th 342, 371.)

Here, Plaintiff adequately alleges breach of the implied covenant of good faith and fair dealing. Plaintiff alleges that Defendants acted in disregard of Plaintiff's interests, preventing Plaintiff from obtaining the benefit of the LLC agreement (i.e. he put the LLC bank account and gas station in his name alone [TAC, ¶¶ 35-50, 42, 78]). Demurrer overruled.

- Derivative: Damages would directly benefit Plaintiff, not the LLC. Therefore, Plaintiff is permitted to proceed individually. Derivative action is not required. Demurrer overruled.

- Ocean Waves: The prerequisite for any action for breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties, because the covenant is an implied term in the contract. (*Smith v. San Francisco* (1990) 225 Cal.App.3d 38, 49.) Here, Ocean Waves was not a party to the underlying contract (see #3 above), therefore it cannot be held liable. Demurrer sustained.

(5) The third cause of action fails to state a claim and should have been brought as a derivative action.

- Quantum Meruit *against Shogay Ahmed*: "Quantum meruit refers to the well-established principle that 'the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered.' " (*Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 458.) Non-payment creates damages of the constructive contract. The measure of recovery in quantum meruit is the reasonable value of the services, provided they were of direct benefit to the defendant. (*Palmer v. Gregg* (1967) 65 Cal.2d 657, 660.) However, a common count is not a specific cause of action. Rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to

make restitution under an assumpsit theory. (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 14–15.) When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable. (*Farmers Ins. Exchange v. Zerlin* (1997) 53 Cal.App.4th 445, 459–460; *Zumbrun, supra*, 25 Cal.App.3d at p. 14.) Thus, a common count must stand or fall with its foundational cause of action. (*McBride v. Boughton* (2004) 123 Cal.App.4th 379)

Here, Plaintiff adequately alleges quantum meruit. Plaintiff pleads that he provided effort, industry, advise, consultation, and expertise to Defendant Shogay Ahmed's partnership and business assets which he has not been compensated for (i.e. he repaired the gas station, worked there, and contributed funding, see TAC, ¶¶ 32, 36-40, 83-84). Plaintiff was damaged in an amount equal to the reasonable value of his services or his investments (TAC, ¶ 86). But regardless, Plaintiff adequately pleads breach of contract, the alternative of which is this cause of action for quantum meruit. Demurrer overruled.

- Derivative: Damages would directly benefit Plaintiff, not the LLC. Therefore, Plaintiff is permitted to proceed individually. Derivative action is not required. Demurrer overruled.

(6) The fourth cause of action fails to state a claim should brought as a derivative action.

- Breach of Fiduciary Duty *against Shogay Ahmed*: "The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." (*Knox v. Dean* (2012) 205 Cal.App.4th 417, 432.) Examples of relationships that impose a fiduciary obligation to act on behalf of and for the benefit of another are 'a joint venture, a partnership, or an agency. (*Cleveland v. Johnson* (2012) 209 Cal.App.4th 1315, 1339.) Whether the defendant breached that duty towards the plaintiff is a question of fact. (*Marzec v. Public Employees' Retirement System* (2015) 236 Cal.App.4th 889, 915.) Self-dealing is a breach of the fiduciary duty of loyalty proscribed to managers of limited liability companies by the Corporations Code section 17704.09(b) (see *Feresi v. The Livery, LLC* (2014) 232 Cal.App.4th 419.)

Here, Plaintiff adequately alleges breach of fiduciary duty. He alleges that his business partner, Defendant Shogay Ahmed engaged in self-dealing (i.e. Defendant put the LLC bank account and gas station in his name alone [TAC, ¶¶ 42, 93]). These acts directly injure Plaintiff; he did not receive the benefit of the LLC agreement and he lost his investments (TAC, ¶¶ 35-50, 94). Demurrer overruled.

- Derivative: Damages would directly benefit Plaintiff, not the LLC. Therefore, Plaintiff is permitted to proceed individually. Derivative action is not required. Demurrer overruled.

(7) The fifth cause of action fails to state a claim should have been brought as a derivative action.

- Dissolution of Partnership *against Shogay Ahmed*: According to California Corporations Code section 1800, a **verified complaint** for involuntary dissolution of a

corporation may be filed in the superior court of the proper county by one-half or more of the directors in office when there is internal dissension and two or more factions of shareholders in the corporation are so deadlocked that its business can no longer be conducted with advantage to its shareholders or the shareholders have failed at two consecutive annual meetings at which all voting power was exercised, to elect successors to directors whose terms have expired or would have expired upon election of their successors. (Corp. Code, § 1800.) To verify a complaint, *generally the plaintiff* must include a declaration stating the allegations made are "true of [the plaintiff's] own knowledge, except as to the matters which are therein stated on his or her information or belief, and as to those matters that he or she believes it to be true." (Code Civ. Proc., § 446(a).) A verification is sufficient if it is so clear and certain that an indictment for perjury may be sustained on it if false. (*Sheeley v. City of Santa Clara* (1963) 215 Cal.App.2d 83, 85.) The verification may be executed anywhere, as long as it states it was executed under penalty of perjury "under the laws of the state of California." (Code Civ. Proc., § 2015.5.) Here, Plaintiff satisfies all elements, except that the TAC is not verified. Demurrer sustained.

- Derivative: Plaintiff seeks dissolution of the Partnership between himself and Defendants. Plaintiff properly brings this action in accordance with California Corporations Code section 16405. Derivative action is not required. Demurrer overruled.

(8) The sixth cause of action fails to state a claim and should have been brought as a derivative action.

- Misappropriation of Money or Property, *breach of fiduciary duty against Shogay Ahmed* (see #6 above): A member in a member-managed limited liability company owes a fiduciary duty to the company and the other members. (Corp. Code § 17704.09(a) and (b).)

Here, Plaintiff adequately alleges breach of fiduciary duty. He alleges that Defendant Shogay Ahmed transferred funds from the merchant bank account to his personal bank account (TAC, ¶ 103). Demurrer overruled.

- Derivative: Plaintiff alleges that Defendant misappropriated partnership money (TAC, ¶ 101). This act directly injures the LLC. Therefore, Plaintiff is not permitted to proceed individually and must conform to the procedure proscribed for derivative suits (see Corp. Code, § 17709.02). Demurrer sustained.

(9) The seventh cause of action fails to state a claim, an action for conversion cannot be as to real property, should have been brought as a derivative action.

- Conversion *against Shogay Ahmed, Hulad Saleh, and Cliffside*: Conversion is the wrongful exercise of dominion over the *personal* property of another. (*Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal.App.4th 97, 119.)

Here, Plaintiff adequately alleges conversion. Plaintiff asserts that Defendants withdrew money from the merchant bank account (TAC, ¶ 107). Demurrer overruled.

- Derivative: Plaintiff alleges that Defendants converted partnership assets (TAC, Cause of Action Seven). This act directly injures the LLC. Therefore, Plaintiff is not permitted to

proceed individually and must conform to the procedure proscribed for derivative suits (see Corp. Code, § 17709.02). Demurrer sustained.

- Conversion does not apply to real property. (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1295.) But here, Plaintiff does not allege conversion of real property. Demurrer overruled.

(10) The eighth cause of action fails to state a claim and should have been brought as derivative action.

- Fraud against Shogay Ahmed: The tort of *fraud (deceit)* requires a misrepresentation, knowledge of falsity, intent to induce reliance, reliance, causation and resulting damages. (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 990; *Lazar v. Sup.Ct. (Rykoff-Sexton, Inc.)* (1996) 12 Cal.4th 631, 638; *Behnke v. State Farm Gen. Ins. Co.* (2011) 196 Cal.App.4th 1443, 1452-1453.) Moreover, "[F]raud must be pled specifically; general and conclusory allegations do not suffice. Thus the policy of liberal construction of the pleadings will not ordinarily be invoked to sustain a pleading defective in any material respect. This particularity requirement necessitates pleading facts which show how, when, where, to whom, and by what means the representations were tendered. (*Morgan v. AT & T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235, 1261-1262.)

Here, Plaintiff adequately alleges fraud. Defendant Shogay Ahmed knowingly made false representations about sharing in the profits and contributions of the LLC to induce Plaintiff to invest time and energy in the LLC (TAC, ¶¶ 114, 118). Defendant Shogay Ahmed's scienter is evinced by the assertion that he put LLC assets in his name alone (TAC, ¶ 120). Plaintiff suffered damages as a result of Defendant Shogay Ahmed's fraud; he did not receive the benefit of the LLC agreement and he lost his investments (TAC, ¶¶ 35-50, 124). Demurrer overruled.

- Derivative: Damages would directly benefit Plaintiff, not the LLC. Therefore, Plaintiff is permitted to proceed individually. Derivative action is not required. Demurrer overruled.

(11) The ninth cause of action fails to state a claim and should have been brought as a derivative action.

- Accounting against Shogay Ahmed: The object of a suit for accounting is a distribution of the partnership assets under direction of the court, including determination of the share of each partner after payment of partnership claims. (*Isaacs v. Jones* (1898) 121 Cal. 257.) The right to an accounting is established prima facie by the mere showing that the partnership has been dissolved. (*Ferem v. Olson & Mahony* (1917) 176 Cal. 652.) Accordingly, when the plaintiff in an action for dissolution and accounting is entitled to a judgment for dissolution, an account is a necessary incident to the dissolution and follows as a matter of course. (*Olivet v. Frischling* (1980) 104 Cal.App.3d 831 [disapproved of on other grounds in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503].) Here, Plaintiff asserts a deficient cause of action for dissolution. Therefore, this cause of action is also deficient. Demurrer sustained.

- Derivative: Plaintiff alleges that Defendant has not allowed Plaintiff an opportunity to fully inspect and account for partnership expenditures, investments, profits, and the like (TAC, ¶ 126). Further, Plaintiff pleads Dissolution, which requires an accounting (TAC, p18). In this situation, a partner has the right to maintain an action against the partnership or another partner for legal or equitable relief (see Corp. Code, § 16405). Derivative action is not required. Demurrer overruled.

(12) The tenth of cause of action fails to state a claim and should have been brought as derivative action.

- Constructive Trust *against Shogay Ahmed*: A constructive trust may only be imposed where the following three conditions are satisfied: (1) the existence of a res (property or some interest in property); (2) the *right* of a complaining party to that res; and (3) some *wrongful* acquisition or detention of the res by another party who is not entitled to it. (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062 citing *Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980, 990.) Further, "[A] constructive trust may be imposed in practically any case where there is a wrongful acquisition or detention of property to which another is entitled." (*Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 600.)

Here, Plaintiff adequately alleges the elements of constructive trust. *First*, Plaintiff alleges the existence of a res—LLC assets and profits (TAC, ¶ 132). *Second*, Plaintiff alleges his right to the res. He pleads that he made various investments into the LLC with the expectation of a share in the profits (TAC, ¶¶ 31, 39). *Third*, Plaintiff pleads that Defendant Shogay Ahmed obtained the property via wrongful acquisition and maintains the property via wrongful detention (i.e. TAC, ¶ 131). Demurrer overruled.

- Derivative: A constructive trust would directly benefit Plaintiff, not the LLC. Therefore, Plaintiff is permitted to proceed individually. Derivative action is not required. Demurrer overruled.

(13) The eleventh cause of action fails to state a claim and should have been brought as derivative action.

- Declaratory Relief *against Shogay Ahmed*: A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and requests that these rights and duties be adjudged by the court. (*Maguire v. Hibernia Savings & Loan Soc.* (1944) 23 Cal.2d 719, 728; *Leonard Carder, LLP v. Patten, Faith & Sandford* (2010) 189 Cal.App.4th 92, 97.)

Here, Plaintiff is entitled to declaratory relief. He submits the LLC agreement (TAC, Ex. A) and contends that he and Defendant Shogay Ahmed entered into this contract/partnership agreement. To the contrary, Defendant Shogay Ahmed has acted as if Plaintiff possesses no contractual or partnership rights of any kind (TAC, ¶¶ 135-139). Therefore, an actual controversy exists relating to the parties rights and duties under the LLC agreement. Declaratory relief is appropriate. Demurrer overruled.

- Derivative: Plaintiff is seeking a judicial determination of his own rights and duties under the contract, not those of the LLC (TAC, ¶ 140). Therefore, Plaintiff is permitted to proceed individually. Derivative action is not required. Demurrer overruled.

(14) The twelfth cause of action fails to state a claim and is time-barred.

- Battery *against Hulad Saleh*: A battery is any intentional, unlawful and harmful contact by one person with the person of another... A harmful contact, intentionally done is the essence of a battery. A contact is 'unlawful' if it is unconsented to." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 611.)

Here, Plaintiff adequately alleges battery against Hulad Saleh. Defendant Hulad Saleh intentionally punched him in the eye—a "touching which he did not consent to," causing injury and a scar (TAC, ¶ 145-147). Demurrer overruled.

- SOL: Where the dates alleged in the complaint show the action is barred by the statute of limitations, a general demurrer lies. (*Saliter v. Pierce Bros. Mortuaries* (1978) 81 Cal.App.3d 292, 300; *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 995; *Vaca v. Wachovia Mortg. Corp.* (2011) 198 Cal.App.4th 737, 746.) The running of the statute must appear "clearly and affirmatively" from the face of the complaint. It is not enough that the complaint *might* be time-barred. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; *Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 324-325; *Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 321.)

Here, the battery occurred in June 2013 (TAC, ¶ 144). At first, it seems the statute of limitations ran in June 2015. But this is premised on the November 25, 2015 filing date (Demurrer Memo: p3 ln28), which fails to consider Plaintiff's allusion to equitable tolling (see TAC, p12 paragraph 7). If the statute of limitations is tolled, then Plaintiff's complaint is timely. Thus, since the complaint *might* be time-barred, the running of the statute does not appear "clearly and affirmatively" from the face of the complaint. Demurrer overruled.

(15) The thirteenth cause of action fails to state a claim and is time-barred.

- Assault *against Hulad Saleh*: Generally speaking, an assault is a demonstration of an unlawful intent by one person to inflict immediate injury on the person of another then present. A civil action for assault is based upon an invasion of the right of a person to live without being put in fear of personal harm. (*Lowry v. Standard Oil Co. of California* (1944) 63 Cal.App.2d 1, 6-7.) The tort of assault is complete when the anticipation of harm occurs. (*Kiseskey v. Carpenters' Trust for Southern California* (1983) 144 Cal.App.3d 222, 232.)

Here, Plaintiff adequately alleges assault against Hulad Saleh. Defendant Hulad Saleh made gestures indicating his intent to physically harm Plaintiff and that as a result, Plaintiff was placed in apprehension of a harmful contact (TAC, ¶¶ 152, 154). Demurrer is overruled.

- SOL: Here *again*, Defendant's argument is premised on the on the November 25, 2015 filing date (Demurrer Memo: p3 ln28), which fails to consider the possibility of equitable tolling. Demurrer overruled (see #14 above).

(16) The fourteenth cause of action fails to state a claim.

- Conversion of the Vehicle *against Hulad Saleh* (see #9 above): Here, Plaintiff adequately alleges the elements. Defendant Hulad Saleh wrongfully exercised dominion over his vehicle when he forged his name to wrongfully transfer the ownership title of Plaintiff's vehicle (TAC, ¶ 160). Demurrer overruled.

(17) The fifteenth cause of action fails to state a claim, it is a sham, and should have been brought as a derivative action.

- Fraud *against Hulad Saleh, Cliffside, and Shogay Ahmed* (see #10 above): Here, Plaintiff fails to allege any representation was made directly to him; or that he relied on the misrepresentation. Demurrer sustained.

- Sham: "The general rule ... is that *material factual* allegations in a *verified* pleading that are omitted in a subsequent amended pleading without adequate explanation will be considered by the court in ruling on a demurrer to the later pleading." (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 12-13 [emphasis added].) Plaintiff can avoid the effect of earlier admissions by including in the complaint a satisfactory explanation why the earlier admissions are incorrect. Absent such explanation, however, the self-destructive allegations in the earlier pleading or discovery response are "read into" the complaint, and allegations inconsistent therewith treated as sham and disregarded. (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 384; *Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1061.)

Here, when pleading this cause of action in the First amended Complaint, Plaintiff stated that after he "filed a formal complaint with the bank . . . the funds were deposited back into his account" (FAC, ¶ 156). Now, Plaintiff omits this detail and instead alleges that he was "harmed." (TAC, ¶ 174). Plaintiff provides no explanation for this abrupt and contradictory allegation. Therefore, previous allegations are read into this complaint. No damages are alleged, so demurrer sustained *on this basis as well*.

- Derivative: Damages would directly benefit Plaintiff, not the LLC. Therefore, Plaintiff is permitted to proceed individually. Derivative action is not required. Demurrer overruled.

(18) The sixteenth cause of action fails to state a claim, is time-barred, and should have been brought as a derivative action not direct claim.

- Conversion *against Shogay Ahmed for Money taken from Business* (see #9 above): Demurrer overruled.

- SOL (see #14 & 15 above): Demurrer overruled.

- Derivative (see #9 above): Demurrer sustained.

(19) The seventeenth cause of action fails to state a claim, and fails to state a claim as to Defendant Shogay Ahmed.

- Invasion of Privacy *against Hulad Saleh and Shogay Ahmed*: A privacy violation based on the common law tort of intrusion has two elements. First, the defendant must intentionally intrude into a place, conversation, or matter as to which the plaintiff has a reasonable expectation of privacy. Second, the intrusion must occur in a manner highly offensive to a reasonable person. (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 231; *Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 286; *Taus v. Loftus* (2007) 40 Cal.4th 683, 724-725, 730; *Sanders v. American Broadcasting Cos., Inc.* (1999) 20 Cal.4th 907, 914-915.) The tort includes “unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying.” (*Shulman, supra*, 18 Cal.4th at p. 230-231.) Regarding damages, the invasion of plaintiff's right to privacy constitutes the harm, entitling plaintiff to recover for all damage caused by the invasion. While special damages may be awarded if sustained, general damages are recoverable without a showing of specific loss. (Civ. Code, § 3333; *Fairfield v. American Photocopy Equip. Co.*, (1955) 138 Cal.App.2d 82, 89.)

Here, Plaintiff adequately alleges invasion of privacy against Defendant Hulad Saleh. Plaintiff asserts that Defendant Hulad Saleh intentionally intruded into his confidential email conversations between himself and his attorney (TAC, ¶ 186, 189-190). Plaintiff does not however, adequately assert a cause of action against Defendant Shogay Ahmed. Instead, Plaintiff asserts that Defendant Shogay Ahmed was sent the emails from Defendant Hulad Saleh (TAC, ¶ 186). Demurrer sustained regarding Defendant Shogay Ahmed.

(20) The eighteenth cause of action fails to state a claim and is time-barred.

- Intentional Infliction of Emotional Distress (IIED) *against Shogay Ahmed*: The essential elements to pleading an action for intentional infliction of emotional distress are: (1) outrageous conduct by the defendant; (2) intention to cause or reckless disregard of the probability of causing emotional distress; (3) severe emotional suffering; and (4) actual and proximate causation of the emotional distress. (*Yau v. Santa Margarita Ford, Inc.* (2014) 229 Cal.App.4th 144, 160-161.) In order to avoid a demurrer, the plaintiff must allege with “great specificity” the acts which he or she believes are so extreme as to exceed all bounds of that usually tolerated in a civilized community. (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 832.)

Here, Plaintiff adequately alleges IIED. *First*, Defendant acted outrageously when he [i.e.] removed his name from the LLC business bank account so that he could misappropriate the funds (TAC, ¶ 198); this allegation satisfies the great specificity requirement. Further, “[E]ach evidentiary fact that might eventually form part of the Plaintiffs' proof need not be alleged” (*William S. Hart Union High School Dist, supra*, 53 Cal.4th at p. 872.); a failure to include exact dates is unimportant at this stage. *Next*, Defendant intended to inflict emotional distress or acted in reckless disregard of the probability of inflicting emotional distress (TAC, ¶ 197). *Third*, Plaintiff suffered emotional distress—he now suffers from severe headaches and sees a psychologist (TAC, ¶ 62).

Last, Defendant is the actual and proximate cause of his emotional distress (TAC, ¶1202). Demurrer overruled.

- SOL (see #14 & 15 above): Demurrer overruled.

(21) The nineteenth cause of action fails to state a claim and is time-barred.

- ILED *against Hulad Saleh* (see # 20 above): Demurrer overruled.

- SOL (see #14 & 15 above): Demurrer overruled.

(22) The twentieth cause of action fails to state a claim, is time-barred, and should have been brought as a derivative action.

- Negligent Infliction of Emotional Distress (NIED) *against Shogay Ahmed*: 'Direct victim' cases are cases in which the plaintiff's claim of emotional distress is not based upon witnessing an injury to someone else, but rather is based upon the violation of a duty owed directly to the plaintiff. (*Wooden v. Raveling* (1998) 61 Cal.App.4th 1035, 1038.) Duty is found where the plaintiff is a 'direct victim,' in that the emotional distress damages result from a duty owed the plaintiff that is assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two. (*McMahon v. Craig* (2009) 176 Cal.App.4th 222, 230.) Even then, with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial interests. (*Cooper v. Superior Court* (1984) 153 Cal.App.3d 1008, 1012-1013; *Holliday v. Jones* (1989) 215 Cal.App.3d 102, 117, 119.)

Here, it is alleged that Plaintiff and Defendant Shogay Ahmed were business partners (TAC, ¶ 34). This is the foundation for the fiduciary duty, the breach of which caused Plaintiff's emotional distress. But the breaches were all related to stealing money; none threatened physical injury. Demurrer sustained.

- SOL (see #14 & 15 above): Demurrer overruled.

- Derivative: Damages would directly benefit Plaintiff, not the LLC. Therefore, Plaintiff is permitted to proceed individually. Derivative action is not required. Demurrer overruled.

(23) The twenty-first cause of action fails to state a claim and is time-barred.

- NIED *against Hulad Saleh* (see #22 above): Here, no underlying relationship (which might create a duty) is alleged. Demurrer sustained.

- SOL (see #14 & 15 above): Demurrer overruled.

(24) The twenty-second cause of action fails to state a claim and should have been brought as a derivative action.

- Negligence *against Shogay Ahmed*: The elements of a cause of action for negligence are (a) a legal duty to use due care; (b) a breach of such legal duty; and (c) the

breach as the proximate or legal cause of the resulting injury. (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917.)

Here, Plaintiff adequately alleges negligence against Defendant Shogay Ahmed. Defendant Shogay Ahmed breached his (proscribed) duty of care by denying Plaintiff access to the gas station, stealing money, etc (TAC, ¶ 222). Defendant's breach caused him damages; he did not receive the benefit of the LLC agreement and he lost his investments (TAC, ¶¶ 35-50, 223-224). Demurrer overruled.

- Derivative: Damages would directly benefit Plaintiff, not the LLC. Therefore, Plaintiff is permitted to proceed individually. Derivative action is not required. Demurrer overruled.

(25) The twenty-third cause of action fails to state a claim.

- Negligence *against Hulad Saleh* (see # 24 above): Here, Plaintiff asserts that Defendant Hulad Saleh owed him a duty of reasonable care (TAC, ¶ 226), but does not specify an affirmative action by Defendant Hulad Saleh giving rise to such a duty. Demurrer sustained.

(26) The twenty-fourth cause of action fails to state a claim and should have been brought as a derivative action.

- Fraud and Deceit, Intentional Misrepresentation *against Shogay Ahmed* (see #10 above): Here, Plaintiff adequately alleges fraud. Defendant Shogay Ahmed knowingly made false representations about purchasing Plaintiff's interest in the gas station, so that he could use Plaintiff's signature to withdraw money from the gas station account and remove Plaintiff's name from the LLC (TAC, ¶¶ 49-50, 231). Plaintiff suffered damages as a result of Defendant's fraud; he did not receive the benefit of the selling agreement and he lost his investments (TAC, ¶¶ 51, 53, 228). Demurrer overruled.

- Derivative: Damages would directly benefit Plaintiff, not the LLC. Therefore, Plaintiff is permitted to proceed individually. Derivative action is not required. Demurrer overruled.

(27) The twenty-fifth cause of action fails to state a claim and should have been brought as a derivative action.

- Concealment *against Shogay Ahmed*: The elements of an action for fraud and deceit based on a concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." (*Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248.) Concealment is actionable when the defendant is in a fiduciary relationship with the plaintiff. (*Limandri v. Judkins* (1997) 52 Cal.App.4th 326, 336-337.)

Here, Plaintiff adequately alleges concealment. Defendant hid numerous facts from him so that he could steal Plaintiff's portion of the LLC profits (TAC, ¶ 216). Had Plaintiff

been aware of these facts, he would have acted differently to protect his investments (i.e. not continue to make agreements with Defendant) (TAC, ¶¶ 217,219). These acts directly injure Plaintiff; he did not receive the benefit of the LLC agreement and he lost his investments (TAC, ¶¶ 35-50). Demurrer overruled.

- Derivative: Damages would directly benefit Plaintiff, not the LLC. Therefore, Plaintiff is permitted to proceed individually. Derivative action is not required. Demurrer overruled.

(28) The twenty-sixth cause of action fails to state a claim and should have been brought as a derivative action.

- Fraud and Deceit, False Promise *against Shogay Ahmed*: A promise of future conduct is actionable as fraud only if made without a present intent to perform. Moreover, something more than nonperformance is required to prove the defendant's intent not to perform his promise... [I]f plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of an oral promise, he will never reach a jury.' " (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 481; *Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 157; *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973- 974.)

Here, Plaintiff adequately alleges Fraud and Deceit. *First*, Defendant made representations which were false (TAC, ¶ 223). *Second and third*, Defendant had knowledge of the falsity and intended to defraud Plaintiff (TAC, ¶ 224). Defendant's scienter and intent is evidenced by his *multiple* misappropriations of partnership assets (TAC, ¶¶ 49-60). *Fourth*, Plaintiff relied on Defendant's misrepresentations; Plaintiff made multiple investments in the partnership ([i.e.] TAC, ¶¶ 35-38), contributed his labor (TAC, ¶ 51), and he even agreed to rescind the "Bill of Sale" in reliance on Defendant's promises (TAC, ¶ 51). *Finally*, these acts directly injure Plaintiff; he did not receive the benefit of the LLC agreement and he lost his investments (TAC, ¶¶ 35-50, 228). Demurrer overruled.

- Derivative: Damages would directly benefit Plaintiff, not the LLC. Therefore, Plaintiff is permitted to proceed individually. Derivative action is not required. Demurrer overruled.

(29) The twenty-seventh cause of action fails to state a claim and should have been brought as a derivative action.

- Fraud and Deceit, Negligent Misrepresentation *against Shogay Ahmed*: Negligent misrepresentation is a form of deceit, the elements of which consist of (1) a misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) ignorance of the truth and justifiable reliance thereon by the party to whom the misrepresentation was directed, and (5) damages. (*Fox v. Pollack* (1986) 181 Cal.App.3d 954, 962.) See # 28 above. Demurrer overruled.

- Derivative: Damages would directly benefit Plaintiff, not the LLC. Therefore, Plaintiff is permitted to proceed individually. Derivative action is not required. Demurrer overruled.

(30) The twenty-eighth cause of action fails to state a claim.

- Trespass to Chattels *against Hulad Saleh*: In order to prevail on a claim for trespass to chattels, the plaintiff must establish: (1) defendant intentionally and without authorization interfered with plaintiff's possessory interest in the property; and (2) defendant's unauthorized use proximately resulted in damage to plaintiff. (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1566-1567; *Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 551.)

Here, Plaintiff adequately alleges trespass to chattels against Defendant Hulad Saleh. Defendant Hulad Saleh took money from his personal bank account, emails from his personal email account, and his vehicle without permission (TAC, ¶ 239). Defendant's unauthorized use resulted in damage to Plaintiff (TAC, ¶ 241). Demurrer overruled.

(31) The twenty-ninth cause of action fails to state a claim and should have been brought as a derivative action.

- *Conspiracy to Trespass to Chattels against Shogay Ahmed, Cliffside, and Hulad Saleh*: Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.)

Here, Plaintiff is attempting to allege conspiracy as a cause of action, which it isn't. Demurrer sustained.

- Derivative: Damages would directly benefit Plaintiff, not the LLC. Therefore, Plaintiff is permitted to proceed individually. Derivative action is not required. Demurrer overruled.

(32) The thirtieth cause of action fails to state a claim and should have been brought as a derivative action.

- Duty of Undivided Loyalty *against Shogay Ahmed* (see #6 above): Demurrer overruled.

- Derivative: Damages would directly benefit Plaintiff, not the LLC. Therefore, Plaintiff is permitted to proceed individually. Derivative action is not required. Demurrer overruled.

(33) The thirty-first cause of action fails to state a claim and should have been brought as a derivative action.

- Fraud and deceit, Suppression of Fact *against Shogay Ahmed* (see #27 above): Demurrer overruled.

- Derivative: Plaintiff alleges that Defendant lied about withdrawing money from the LLC business account for his own personal use (TAC, ¶ 256). This act directly injures the LLC. Therefore, Plaintiff is not permitted to proceed individually and must conform to the procedure proscribed for derivative suits (see Corp. Code, § 17709.02). Demurrer sustained.

(34) The thirty-second cause of action fails to state a claim and is time-barred.

- Nonpayment of wages *against Shogay Ahmed*: If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately. (Lab. Code §§ 201, 218.)

Here, Plaintiff adequately alleges nonpayment of wages. Defendant owes him \$25,000 in unpaid wages for work that he performed from March 2013 through January 2014, the result of an additional promise between the parties (TAC, ¶¶ 51, 262). Demurrer overruled.

- SOL (see #14 & 15 above): Demurrer overruled.

(35) The thirty-third cause of action fails to state a claim and is time-barred.

- Waiting time penalties *against Shogay Ahmed*: If an employer willfully fails to pay in accordance with the California Labor Code, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days. (Cal. Lab. Code § 230.)

Here, Plaintiff adequately alleges waiting time penalties. He worked for Defendant, who has not paid him (TAC, ¶ 267). Damages are approximately \$2,500 (one month worth of pay). Demurrer overruled.

- SOL (see #14 & 15 above): Demurrer overruled.

(36) The thirty-fourth cause of action fails to state a claim.

- Breach of Contract *against Shogay Ahmed* (see #3 above): Demurrer overruled.

(37) The thirty-fifth cause of action fails to state a claim and is time-barred.

- Conspiracy to commit Battery *against Shogay Ahmed* (see #31 above): Demurrer sustained.

- SOL (see #14 & 15 above): Demurrer overruled.

(38) The thirty-sixth cause of action fails to state a claim and is time-barred.

- Conspiracy to commit Assault *against Shogay Ahmed and Saleh Saleh* (see #31 above): Demurrer sustained.

- SOL (see #14 & 15 above): Demurrer overruled.

(39) The thirty-seventh cause of action fails to state a claim and should have been brought as a derivative action.

- Conversion *against Saleh Saleh, Shogay Ahmed, Cliffside, and Hulad Saleh* (see #9 above): Demurrer overruled.

- Derivative: Plaintiff alleges that Defendants converted partnership assets (TAC, ¶ 290); they withdrew money from the business account. This act directly injures the LLC. Therefore, Plaintiff is not permitted to proceed individually and must conform to the procedure proscribed for derivative suits (see Corp. Code, § 17709.02). Demurrer sustained.

(40) The thirty-eighth cause of action fails to state a claim and should have been brought as a derivative action.

- Intrusion into private affairs *against Saleh Saleh, Shogay Ahmed, Cliffside, and Hulad Saleh* (see #19 above): Here, Plaintiff does not assert that either named Defendant intruded into his email. Demurrer sustained.

- Derivative: Damages would directly benefit Plaintiff, not the LLC. Therefore, Plaintiff is permitted to proceed individually. Derivative action is not required. Demurrer overruled.

(40a) The thirty-ninth cause of action fails to state a claim.

- Negligent supervision *against Wells Fargo*: Negligent supervision requires Plaintiffs to plea not only that that an employee was unfit to perform the work for which he was hired, but that Defendant knew that he was unfit. (*Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, 664.)

Here, Plaintiff does not assert any facts to support the assertion that Defendant knew that Jeremy Salviejo was unfit for the job. Demurrer sustained.

(40b) The fortieth cause of action fails to state a claim (also Wells Fargo's Demurrer)

- Breach of Fiduciary duties *against Wells Fargo*: For decades, if not for a century, the case law in California had been that the relationship between a bank and its depositor was merely that of debtor and creditor. (*Morse v. Crocker National Bank* (1983) 142 Cal.App.3d 228; *Lawrence v. Bank of America* (1985) 163 Cal.App.3d 431.) Further, it was held that the debtor/creditor relationship was contractual. (*Smith's Cash Store v. First Nat. Bank* (1906) 149 Cal. 32, 34.) However, in the mid-1980s, the court of appeal for the Fourth District declined to follow that clear precedent and held that the relationship of a bank to its depositor was "at least quasi-fiduciary." (*Commercial Cotton Co. v. United California Bank* (1985) 163 Cal.App.3d 511.) The same appellate court applied the Commercial Cotton precedent to the bank-borrower relationship in *Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362. However the reasoning of Commercial Cotton has been roundly criticized. Other California courts have declined to follow the Fourth District's lead, especially after the decision of the Supreme Court in *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654. Although *Foley* was an employment case, its reasoning has inhibited the expansion of claims based on implied covenants of good-faith and fair dealing in other contexts. In the banking field, several decisions have clearly held that the bank-borrower relationship is not fiduciary in nature: *Mitsui Manufacturers Bank v. Superior Court* (1989) 212 Cal.App.3d 726; *Careau & Co. v.*

Security Pacific Business Credit, Inc. (1990) 222 Cal.App.3d 1371; and *Das v. Bank of America, N.A.* (2010) 186 Cal.App.4th 727. In at least two cases, courts have specifically rejected the *Commercial Cotton/Barrett* line of cases: *Lee v. Bank of America* (1990) 218 Cal.App.3d 914 and ***Copesky v. Superior Court* (1991) 229 Cal.App.3d 678.**

The *Copesky* case was decided by the same court that had decided *Commercial Cotton* six years earlier. Plaintiffs included a cause of action for breach of the implied covenant of good faith and fair dealing, arguing that the case was the "mirror image" of *Commercial Cotton*. The trial court sustained the bank's demurrer without leave to amend, and the court of appeal affirmed and concluded that:

Commercial Cotton's characterization of a bank-depositor relationship as quasi-fiduciary is now inappropriate. While some aspects of that relationship may resemble aspects of the insurer-insured relationship, there are equally marked differences between those relationships. Since appending the label quasi-fiduciary to the ordinary bank-depositor relationship runs counter to both pre and post *Commercial Cotton* authority, and such a label provides no analytical framework against which to evaluate (after *Foley*) the propriety of extending tort remedies for contractual breaches, we no longer approve the denomination of the ordinary bank-depositor relationship as quasi-fiduciary in character. (*Copesky v. Superior Court* (1991) 229 Cal.App.3d 678, 693, 694.)

Here, Plaintiff pleads breach of fiduciary duties (TAC, p46) and his assertions are based on the premise that Defendant Wells Fargo owed him a fiduciary duty. Plaintiff cites to *unpublished King v. Mortimer* (1950) 224 P.2d 733, 743 to support his assertion that banks have a dual character, but he ignores the vast body of modern, published cases to the contrary. There is no fiduciary relationship between a bank and a depositor. Demurrer sustained.

(41) The forty-first cause of action fails to state a claim and is time-barred.

- Defamation *against Shogay Ahmed, Saleh Saleh, Hulad Saleh, and Halim Saleh*: Defamation requires (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage. (Civ. Code § 46; *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645; *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 809.)

Here, Plaintiff adequately alleges the elements of defamation. Defendants told members of the mosque that he was a terrorist (TAC, ¶¶ 314-315). This was a false statement, which has a natural tendency to injure or cause damage (TAC, ¶ 315). Demurrer overruled.

- SOL (see #14 & 15 above): Demurrer overruled.

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

Tentative Ruling

Issued By: A.M. Simpson on 08/31/16.
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Ervin-Diffey v. Minasyan***
Court Case No. 15CECG00969

Hearing Date: September 1, 2016 (**Dept. 503**)

Motion: Petition to Approve Compromise of Minor in Pending Action

Tentative Ruling:

To deny without prejudice. In the event that oral argument is requested minor is excused from appearing.

Explanation:

The petition's exhibits fail to substantiate the medical costs claimed, and in some cases the negotiated reduction claimed in the petition. Specifically:

- The St. Agnes charges show a starting balance of \$4,458.65 (agreeing with the petition), and further shows an insurance payment of \$1,000, leaving a balance due of \$3,458.65 (see Petn., p. 22-23).² There is nothing showing the claimed negotiated reduction, purportedly leaving the balance due at \$2593.99 as stated in the Petition.
- The Progressive – Med Pay amount due of \$1,000 appears to be the payment showing as made to St. Agnes at page 23. However, there is nothing substantiating the claimed negotiated reduction of \$250.00.
- The substantiation for the amount owed to “Med Data” appears to be at pages 65-67 of the Petition. However, the provider there is shown to be “North Fresno Emergency Medical Group,” not “Med Data,” and the exhibits show a request to send payment to a different address than listed in the Petition.
- The exhibit for Community Medical Imaging shows that \$0 is due (See Petn., p. 68), so the figures shown in the petition (amount due and negotiated reduction) are not substantiated.

Pursuant to California Rules of Court, Rule 3.1312 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 08/31/16.
(Judge's initials) (Date)

² All page references are to the page number of the petition as a whole, as scanned into the Court's Odyssey system, rather than being a page number of a particular exhibit.

(28)

Tentative Ruling

Re: **Freeman v. Davis**

Case No. 16CECG00490

Hearing Date: September 1, 2016 (Dept. 503)

Motion: By Plaintiff for Leave to File a First Amended Complaint.

Tentative Ruling:

To grant the motion.

Plaintiff shall file and serve the First Amended Complaint within ten court days of this order.

Explanation:

The Court notes that there appears to be no opposition or reply brief on file for this motion.

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

Plaintiff has filed a declaration that just meets the requirements of Rule of Court 3.1324, subdivision (b). Therefore, the motion for leave to amend is granted.

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

Tentative Ruling

Issued By: A.M. Simpson on 08/31/16.
(Judge's initials) (Date)