

Tentative Rulings for September 13, 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).)

15CECG00741 *Mendoza v. 7th Generation Recycling, Inc.* (Dept. 403)

16CECG01910 *Sanchez v. Clovis Auto Cars* (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.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(2)

Tentative Ruling

Re: **Guzman v. Ortiz**
Superior Court Case No. 14CECG02145

Hearing Date: September 13, 2016 (Dept. 402)

Motion: Petition to Compromise a Minor's Claim

Tentative Ruling:

Having failed to file a petition to approve the compromise the hearing is off calendar. Petitioner must obtain a new hearing date for consideration of any future petition filed. Petitioner must comply with Super. Ct. Fresno County, Local Rules, rule 2.8.4. The Court notes that this is the second time the attorney for the plaintiffs has scheduled a hearing and failed to file the petition.

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

Tentative Ruling

Issued By: JYH on 09/12/16
 (Judge's initials) (Date)

(17)

Tentative Ruling

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

Hearing Date: September 13, 2016 (Dept. 402)

Motion: Defendant Maria Gomez-Bonk's Motion for Distribution and Attorney's Fees
Plaintiff's Motion Distributing Proceeds of Sale of Property
Defendant Maria Gomez-Bonk's Motion to Tax Attorney's Fees and Costs

Tentative Ruling:

To grant the motions to distribute funds. To award attorney's fees to Perkins, Mann & Everett, Inc. in the amount of \$21,308.35 and to award \$4,185.00 in attorney's fees to the Law Offices of Randolph Krbechek.

The Clerk of the Court shall pay the funds deposited in this action with the Clerk of the Court of April 17, 2014, together with any accrued interest as directed: \$21,308.35 shall be paid to the law firm of Perkins, Mann & Everett, Inc. and \$4,185.00 shall be paid to the Law Offices of Randolph Krbechek; and the remaining funds shall be apportioned and paid as follows: 28.572% to Joe Gil Gomez and Helen M. Gomez as Trustees of the Joe Gil Gomez and Helen M. Gomez Trust u/d/t dated October 14, 1988; 14.283% to Joe Gil Gomez, as Personal Representative for the Estate of Enedina Gomez Avila; 2.860% to Rosemary Gomez Wagner; 2.86% to Mary Romana Gomez Bonk; 2.86% to Stephen Michael Gomez; 2.86% to Joe Louis Gomez; 1.428% to Paul Gomez; 1.428% to Valerie Gomez; 14.283% to David R. Gomez and Stella H. Gomez, Co-Trustees of the David G. Gomez and Teresa R. Gomez 2009 Family Trust; 14.283% to Mary M. Gomez, Trustee of the Ruben and Mary Gomez Family Trust u/d/t dated October 12, 1994; and 14.283% to Natalia Gomez, Trustee of the Natalia Gomez Gallardo Living Trust.

Explanation:

Proceeds of the sale must be applied in the following order: (1) expenses of the sale; (2) other costs of partition; and (3) liens on the property in order of priority, except liens that by the terms of the sale are to remain on the property. Any remaining funds are to be distributed among the parties in proportion to their interest in the property as determined by the court. (Code Civ. Proc., § 873.820.) When property is partitioned by sale in California, sale proceeds are first used to pay general costs of the action; costs reimbursed before any distribution to either cotenant include fees for any attorney engaged for the common benefit of the parties, as well as costs and expenses of any referee and third parties hired by the referee, the costs of title reports, and interest on any of these expenditures. (*In re Flynn* (B.A.P. 9th Cir. 2003) 297 B.R. 599, rev'd and remanded on other grounds, (9th Cir. 2005) 418 F.3d 1005 [applying California law].)

Here, there are no liens on the property and the referee's costs and costs of sale were paid out of escrow and are no longer at issue. The fund is ready to distribute.

Attorney's Fees

Attorney Rindlisbacher requests his attorney's fees for the work done on the partition action. Code of Civil Procedure section 874.010, provides in relevant part: "The costs of partition include: [¶] (a) Reasonable attorney's fees incurred or paid by a party for the common benefit." (Italics added.) The purpose of this statute "is to divide the cost of the legal services among the parties benefited by the result of the proceeding." (*Stewart v. Abernathy* (1944) 62 Cal.App.2d 429, 433.) Whether attorney fees were incurred for the common benefit "must be decided upon the facts and circumstances in each particular case." (*Ibid.*)

Party Maria Gomez-Bonk challenges certain fees on several grounds.

1. The Invoices Do Not Support the Total Fees Claimed.

When each billing entry is itemized and totaled, the total is \$30,757.50, not the \$35,032.88 claimed by plaintiff's counsel. In reply, plaintiff's counsel states that an error resulted in fewer than all the pages of the invoices being printed. Plaintiff's counsel again submits 109 pages of invoices. However, they are identical to the 109 pages of invoices submitted in support of the original motion.

As a result, the Court sets the loadstar amount at \$30,757.50.

2. Some Fees Were Not Incurred in the Common Benefit

Gomez-Bonk argues that "in the end, the property was purchased by plaintiff," thus "an argument can be made that the services were primarily performed for plaintiff" such that they were not for the common benefit. No authority supports this argument. In fact, fees attorney's fees incurred by a plaintiff or defendant may be for the common benefit in a partition action even when the ultimate purchaser is a party. (See *Stutz v. Davis* (1981) 122 Cal.App.3d 1, 4-5.) Here, all of the parties benefited by certain work performed by plaintiff's counsel because the property was partitioned by sale and they were able to liquidate their interests in a piece of property owned by many persons, several of whom died during the proceedings.

Nevertheless, certain fees were not incurred in the common interest.

A. Fees Incurred Specifically for the Accounting Action Against Natalia Gomez Gallardo

Gomez-Bonk contends that because the complaint filed by plaintiff on December 13, 2007, contained a cause of action for an accounting and damages against Natalia Gomez Gallardo, work performed in connection with this claim was not for the "common benefit" of the other parties. Gomez-Bonk identifies 19 billing entries from May 29, 2007 to December 6, 2007, as incurred in the prosecution of the

accounting action. However, it appears from my review that these time entries were not necessarily related solely to the accounting cause of action, and could easily relate to the partition action, as plaintiff's counsel's sworn declaration asserts that they are. For example, the entries dated 6/1/07, 6/4/07, 6/15/07, and 9/13/07 are not necessarily related to the accounting claim. Moreover the entries dated 6/28/07 [regarding the letter offering to purchase the property in lieu of partition], 6/29/07 [continued preparation of same letter; discussions re same; and investigation re: title report], and the entries relating to the drafting of the complaint for partition (7/12/07, 8/17/07, 11/8/07, 11/29/07 and 12/6/07) all necessarily relate in substantial part to the partition action.

Nevertheless, plaintiff agrees that a reduction of \$2,500 for pursuit of the accounting and damage claims is appropriate. The Court accepts this concession.

B. Unfinished Work – Distribution of Proceeds Motion

Gomez-Bonk asserts that plaintiff's counsel should not be compensated for various entries having to do with preparing a motion for distribution of proceeds of partition sale because the motion was never finished causing her counsel to have to prepare the motion and incur fees and costs for doing so. This argument has merit. Attorney's fees available under Code of Civil Procedure section 874.010, subdivision (a) may only be recovered for "fees incurred or paid by a party for the common benefit." Work never completed is necessarily not for the common benefit. Plaintiff argues that the work billed for preparation for the motion for distribution of property was eventually "revised and submitted in response" to the instant motion(s). However, while plaintiff filed a document on July 26, 2016 entitled "Notice of Motion and Motion for Order Distributing the Proceeds of the Sale of Property," there was no reason to do so: Gomez-Bonk already had such a motion pending before the Court. Moreover, the substance of the July 26, 2016 motion is a request for attorney's fees for plaintiff's counsel. Because the late filed motion for distribution does not benefit the property owners except for plaintiff, it is not in the common benefit, and fees should not be awarded for its preparation regardless of when they were performed. Thus, the sum of \$2,544.10 should be deducted for the entries dated: 6/3/14, 6/4/14, 6/5/14, 6/7/14, and 8/13/15 [Mary Gomez-Bonk telephone call]. The entries for the other telephone call of 8/13/15 and letter of 9/22/15 are not clearly related to the disbursement issue. The other entries are addressed below.

C. Fee Expended Seeking Fees are Not Recoverable

Usually, where a statute authorizes the recovery of attorney's fees, the party entitled to attorney's fees may recover his or her fees for seeking the attorney's fees, i.e., fees for fees. (*Serrano v. Priest* (1982) 32 Cal.3d 621, 639.) The rule is otherwise for common benefit fees. Being forced to pay attorney's fee is collateral to the partition action and not to the "common benefit" of the parties ordered to pay fees. Accordingly, it has long been the rule that an attorney may not recover its time spent collecting fees. (See *Capuccio v. Caire* (1932) 215 Cal. 518, 527.) Accordingly, the time entries for 4/8/14 in the amount of \$106.00, 6/3/14 in the amount of \$132.50 and 12/30/14 in the amount of \$159.00, must be subtracted, for a total deduction of \$397.50.

D. Fees and Costs for the Enedina Gomez Avila Probate

Defendant Enedina Gomez Avila died during the pendency of this lawsuit. A probate was to be opened to further the objectives of this suit. Code of Civil Procedure section 874.020, provides in relevant part: "The costs of partition include reasonable expenses, including attorney's fees, necessarily incurred by a party for the common benefit in prosecuting or defending *other actions or proceedings for the ... perfection of title ... of the property...*" (Italics added.) However, plaintiff agrees that the \$3,525.50 in fees and costs attributable to the probate should have been recovered in the probate and agrees to seek them in that matter in lieu of this matter. Accordingly, they will be deducted from the fees and costs awarded in this matter.

3. Certain Costs Should Be Taxed

Gomez-Bonk challenges four costs. Two are interest charges on overdue balances and are not in any way related to the common benefit of all the parties. Thus, the sum of \$5.60 must be taxed. The other two charges represent mileage to obtain a waiver of a hearing and a delivery charge. There has been no showing that these were for the common benefit of the parties; that they were "reasonably necessary" for the litigation as opposed to "merely convenient." Accordingly, the sum of \$40.20 will be taxed as well.

4. Additional Deductions to the Lodestar

The Court is limited to only awarding a reasonable fee and to fees incurred in the partition action itself which benefit all the property owners. (Code Civ. Proc., § 874.010, subd. (a).) A court assessing attorney's fees begins with a touchstone or lodestar figure, based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case.' (*Serrano v. Priest (Serrano III)* (1977) 20 Cal.3d 25, 48.) As our Supreme Court has repeatedly made clear, the lodestar consists of "the number of hours *reasonably expended* multiplied by the *reasonable hourly rate*. . . ." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095, italics added; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1134.) The California Supreme Court has noted that anchoring the calculation of attorney fees to the lodestar adjustment method "'is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.'" (*Serrano III, supra*, 20 Cal.3d at p. 48, fn. 23.)

While the fee awards should be fully compensatory, the trial court's role is not to simply rubber stamp the defendant's request. (*Ketchum v. Moses, supra*, 24 Cal.4th at p. 1133; *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 361.) Rather, the court must ascertain whether the amount sought is reasonable. (*Robertson v. Rodriguez, supra*, 36 Cal.App.4th at p. 361.) The person seeking an award of attorney's fees "is not necessarily entitled to compensation for the value of attorney services according to [his] own notion or to the full extent claimed by [him]. [Citations.]" (*Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 950.)

Clerical/Secretarial

"[P]urely clerical or secretarial tasks should not be billed ..., regardless of who performs them." (*Missouri v. Jenkins* (1989) 491 U.S. 274, 288; see also *Eiden v. Thrifty Payless Inc.* (E.D. Cal. 2005) 407 F.Supp.2d 1165, 1171.) Numerous portions of the block billed entries contain descriptors of clerical tasks. Some of these include the 12/4/07 filling out of instruction forms and forwarding of documents by biller "KK;" the 12/21/07 filling of proofs of service and preparing and sending a simple enclosure letter by biller "KK;" the 4/30/09 preparation of and sending of another enclosure letter. The court will exercise its discretion, apportion minimal time to these tasks and strike 3.05 hours of KK's time at a rate of \$85 per hour, for a total of \$259.25, 1 hour of KK's time at a rate of \$100 per hour, for a total of \$100, and .7 hours of KK's time at a rate of \$110 per hour, for a total deduction of \$436.25.

5. Reasonable Hourly Compensation

Reasonable hourly compensation is the "hourly prevailing rate for private attorneys in the community conducting noncontingent litigation of the same type" (*Ketchum v. Moses, supra*, 24 Cal.4th at p. 1133.) Ordinarily, "the value of an attorney's time . . . is reflected in his normal billing rate." (*Mandel v. Lackner* (1979) 92 Cal.App.3d 747, 761.)

Mr. Rindlisbacher's rates of between \$265.00 per hour and \$345.00 per hour for a lawyer admitted to practice since 1989 are reasonable. His paralegal's rates of \$85 per hour to \$110 per hour are reasonable.

6. Mary Gomez-Bonk's Attorney Fees

It is appropriate to award multiple parties' attorney's fees in a partition action where they have all contributed to the common benefit. (See *Riley v. Turpin* (1960) 53 Cal.2d 598, 603 [trial court's order awarding attorney fees as costs in partition action to both parties was not abuse of discretion based on trial court's finding both counsel contributed services for the common benefit of the cotenancy].)

Counsel for Gomez-Bonk seeks \$4,185.00 in attorney's fees for preparing the motion for distribution and the motion to tax attorney's fees and costs. Both motions have benefited the owners' of the property. The motion for distribution brought this matter to the court's attention and the motion to tax was helpful in evaluating the plaintiff's requested fees.

I have reviewed the time requested by Gomez-Bonk's counsel. It is pretty reasonable. I am still of the opinion that five hours is a smidge high for preparing the initial motion, but it is not high enough to warrant cutting it. Also, Mr. Krbechek's billing rate of \$300 per hour is reasonable given his experience. The Court will award the full amount of requested fees.

(5)

Tentative Ruling

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

Hearing Date: September 13, 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).

Tentative Rulings for Department 403

03

Tentative Ruling

Re: ***Baldwin v. Aon Risk Services Companies, Inc.***
Case No. 14 CE CG 00572

Hearing Date: September 13th, 2016 (Dept. 403)

Motion: Aon's Motion to File Records under Seal in Support of
Opposition to Cross-Defendants' Motion for Summary
Judgment

Tentative Ruling:

To deny Aon's motion to file its opposition to summary judgment under seal.
(Cal. Rules of Court, Rule 2.550, 2.551.)

Explanation:

"Unless confidentiality is required by law, court records are presumed to be open." (Cal. Rules of Court, Rule 2.550, subd. (c).)

"A record must not be filed under seal without a court order. The court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties." (Cal. Rules of Court, Rule 2.551, subd. (a).)

The court must make certain express findings in order to seal records. Specifically, the court must find that the facts establish:

(1) There exists an overriding interest that overcomes the right of public access to the record;

(2) The overriding interest supports sealing the record;

(3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;

(4) The proposed sealing is narrowly tailored; and

(5) No less restrictive means exist to achieve the overriding interest. (Cal. Rules of Court, Rule 2.550, subd. (d).)

Also, "[a]n order sealing the record must: (A) Specifically state the facts that support the findings; and (B) Direct the sealing of only those documents and pages, or, if reasonably practicable, portions of those documents and pages, that contain the material that needs to be placed under seal. All other portions of each document or

(5)

Tentative Ruling

Re: **Thomas Rocha and Jimmy Rocha v. U-Haul Co. of California and Don Sandusky**
Superior Court Case No. 15 CECG 03393

Hearing Date: September 13, 2016 **(Dept. 501)**

Motion: By Plaintiffs seeking leave to file a Second Amended Complaint

Tentative Ruling:

To deny.

Explanation:

Leave to Amend in General

The court may grant leave to amend the pleadings at any stage of the action. A party may discover the need to amend after all pleadings are completed (the case is "at issue") and new information requires a *change in the nature of the claims or defenses* previously pleaded. Such changes cannot be made on ex parte procedure. Rather, a formal motion to amend must be served and filed. [*Dye v. Caterpillar, Inc.* (2011) 195 Cal.App.4th 1366, 1380]

Motions for leave to amend the pleadings are directed to the sound discretion of the judge. "The court *may*, in *furtherance of justice*, and *on any terms as may be proper*, allow a party to amend any pleading ..." [CCP § 473(a)(1); and see CCP § 576] Ordinarily, the court will *not* consider the validity of the proposed amended pleading in deciding whether to grant leave to amend. Grounds for demurrer or motion to strike are ordinarily premature. After the amended pleading is filed, the opposing party will have the opportunity to attack its validity. [See *Kittredge Sports Co. v. Sup.Ct. (Marker, U.S.A.)* (1989) 213 Cal.App.3d 1045, 1048]

But, the court undoubtedly has discretion to deny leave to amend where a proposed amendment fails to state a valid cause of action or defense. [See *California Casualty General Ins. Co. v. Sup.Ct. (Gorgei)* (1985) 173 Cal.App.3d 274, 280-281 (disapproved on other grounds in *Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 407, fn. 11)] Such denial is "most appropriate" where the pleading is deficient as a matter of law *and the defect could not be cured by further appropriate amendment*. [*California Casualty General Ins. Co. v. Sup.Ct. (Gorgei)*, *supra*, 173 Cal.App.3d at 281; *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 230—proposed amendment barred by statute of limitations and no basis for "relation back"]

See also *Yee v. Mobilehome Park Rental Review Bd.* (1998) 62 Cal.App.4th 1409, 1429 and *Aroa Marketing, Inc. v. Hartford Ins. Co. of Midwest* (2011) 198 Cal.App.4th 781, 789.

PAGA Claims in General

Under specified circumstances, an aggrieved employee may bring a representative action under PAGA "on behalf of himself or herself **and other** current and former employees against whom one or more of the alleged violations was committed" to recover civil penalties for Labor Code violations (so called "bounty hunter lawsuits"), **without** meeting class action requirements. [See Lab.C. § 2699(g)(1); *Arias v. Sup.Ct. (Angelo Dairy)* (2009) 46 Cal.4th 969, 981-982] "Aggrieved employee" means anyone who was employed by the alleged violator **and** against whom one or more of the alleged violations was committed. [Lab.C. § 2699(c); see *Amalgamated Transit Union, Local 1756, AFL-CIO v. Sup.Ct. (First Transit, Inc.)* (2009) 46 Cal.4th 993, 1004-1005—labor unions lack standing to sue under PAGA even if their members are "aggrieved employees"] Any suit under PAGA is a representative action. Plaintiff **must** sue "on behalf of himself or herself **and other** current or former employees" injured by the employer's violations. [Lab.C. § 2699(g)(1)]

Merits

Plaintiffs seek leave to file a Second Amended Complaint to add causes of action under the Private Attorney General Act set forth at Labor Code § 2698. See Plaintiffs Memorandum of Points and Authorities at page 2 lines 3-14. Plaintiffs admit that they seek to add these claims to avoid arbitration. *Id.*

According to the proposed Second Amended Complaint, Plaintiffs seek to add claims based upon "handyman" type work that they did at the personal residence of Defendant Don Sandusky, their supervisor at U-Haul Co. See proposed Second Amended Complaint at page 3 lines 1-28, page 4 lines 1-6, and ¶ 22 at lines 16-25. Apparently, based upon these allegations, Plaintiffs seek to add an eighth cause of action against Sandusky for failure to pay the minimum wage. [In the reply, Plaintiffs state that they have **abandoned** the proposed ninth cause of action against Sandusky for failure to provide wage statements due to the exemption provided by Labor Code § 226. See Reply Memorandum of Points and Authorities at page 8 lines 7-11.]

Lab. Code, § 2699 (g)(1) states:

Except as provided in paragraph (2), an **aggrieved employee** may recover the civil penalty described in subdivision (f) in a civil action pursuant to the procedures specified in Section 2699.3 **filed on behalf of himself or herself and other current or former employees** against whom one or more of the alleged violations was committed. Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs, including any filing fee paid pursuant to subparagraph (B) of paragraph (1) of subdivision (a) or subparagraph (B) of paragraph (1) of subdivision (c) of Section 2699.3. Nothing in this part shall operate to limit an employee's right to pursue or recover other

Tentative Rulings for Department 502

03

Tentative Ruling

Re: **Ramirez de Flynn v. Sunwest Fruit Co., Inc.**
Case No. 14 CE CG 02557

Hearing Date: September 13th, 2016 (Dept. 502)

Motion: Application of Sima Sasseen to Appear *Pro Hac Vice*

Tentative Ruling:

To grant the application of Sima Sasseen to appear as counsel pro hac vice for plaintiff. (Cal. Rules of Court, Rule 9.40.)

Explanation:

It appears that the applicant has complied with all the requirements of California Rules of Court, Rule 9.40, including stating her residence and office address, the courts to which she has been admitted to practice and the dates of admission, that she is a member in good standing in these courts, and that she is not currently suspended or disbarred in any court. She also states that she has only been admitted in one other court and case in the State of California in the past two years, the date of the *pro hac vice* application in that case, and that it was granted. Since there has been only one other appearance by the applicant in this state in the past two years, it does not appear that there is any reason to deny the application on the ground of multiple appearance in California courts.

In addition, the application includes the name, address and phone number of the active member of the California Bar who is the attorney of record. Furthermore, Sasseen states that she paid the \$50 fee to the State Bar, and a copy of the application has been served on the Bar and opposing counsel. Therefore, the court intends to grant the application to allow her to appear as counsel *pro hac vice* for plaintiff in the case.

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: DSB on 09/06/16
(Judge's initials) (Date)

(19)

Tentative Ruling

Re: **Memovich v Mendoza**
Court Case No. 15CECG03117

Hearing Date: September 13, 2016 (Department 502)

Motions:

1. Motion by defendants to compel further responses to Special Interrogatories, Set No. One, by plaintiff
2. Motion by defendant to compel further responses to Document Requests, Set No. One, by plaintiff.
3. Motion by defendant to compel further responses to Form Interrogatories, Set No. One, by plaintiff.

Tentative Ruling:

To order that defendants pay \$120 in motion fees for the two motions which were not paid for, and that defendants file discovery motions separately in the future. To order that such \$120.00 be paid on or before the close of business on September 16, 2016.

To grant each motion, to order that that plaintiff provide further responses without objection to the discovery and that plaintiff provide a verification executed by plaintiff personally and which complies with Code of Civil Procedure section 2015.5, by October 4, 2016. To grant sanctions in the amount of \$1100.00 as sought, payable by plaintiff and his counsel of record.

Explanation:

Plaintiff provided responses to form interrogatories that omitted requested information. Plaintiff also attempted to refer defendants to a mass of documents for medical information, despite the fact his treatment is ongoing and within his personal knowledge. "A broad statement that the information is available from a mass of documents is insufficient." *Deyo v. Kilbourne* (1978) 84 Cal. App. 3d 771, 784. "Thus, it is not proper to answer by stating, "See my deposition," "See my pleading," or "See the financial statement." (*Id.* at 784-785.) Further responses which supply all information sought are required.

In responding to the special interrogatories, plaintiff both asserted a privacy privilege against disclosure of information and stated that there was no responsive information. "It is not enough that the objecting party merely state that something is protected by a particular privilege. The burden is upon him to prove the preliminary facts to show that the privilege applies." *Mahoney v. Superior Court* (1983) 142 Cal. App. 3d 937, 941. See also *Gonzalez v. Superior Court* (1995) 33 Cal. App. 4th 1539, 1548. "It is hornbook law that a person claiming a privilege bears the burden of proving he is entitled to the privilege." *Delany v. Superior Court* (1990) 50 Cal. 3d 785, 807.

Plaintiff's failure to oppose the motion and substantiate the claim of privilege, along with the contradictory statement information does not exist, requires a further

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Tentative Ruling

Re: ***Citimortgage, Inc. v. Rodriguez, et al.***

Case No. 15CECG02408

Hearing Date: September 13, 2016 (Dept. 502)

Motion: For Entry of Default Judgment.

Tentative Ruling:

To proceed with the hearing on the Request for Entry of Default Judgment provided that Plaintiff completes and submits a correctly completed Form CIV-100 at or before the hearing.

Explanation:

This case seeks to correct the filing of a Deed of Trust with the County of Fresno to the address by the parties to the mortgage transaction. Because such a request is in the nature of a quiet title action, oral testimony establishing title is required prior to the issuance of a default judgment. (*Chao Fu, Inc. v. Wen Ching Chen* (2012) 206 Cal.App.4th 48, 59; Code Civ.Proc. §764.010.)

This Court denied Plaintiff's earlier request for entry of judgment on June 8, 2016. In that order, the Court noted that Plaintiff had not properly filled out item 1 or checked the box at 1.d for mandatory form CIV-100. To date, a corrected form has not been submitted to the Court. Plaintiff must therefore submit a corrected and completed form CIV-100 at or prior to the hearing.

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: DSB on 09/09/16
(Judge's initials) (Date)

Tentative Rulings for Department 503

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Re: ***Tina Jackson v. State of California, Employment Development Dept.***
Superior Court No. 16CECG01569

Hearing Date: Tuesday September 13, 2016 (**Dept. 503**)

Motion: Defendants' Demurrer and Motion to Strike

Tentative Ruling:

To **Sustain** the Demurrer for uncertainty to Plaintiff's entire Complaint. *In all subsequent pleadings, Plaintiff must apply the material facts to each element of each cause of action, not merely reference preceding paragraphs. Plaintiff must also articulate the actual violation alleged and the defendants against whom the claims are directed.*

Motion to Strike is ordered off calendar.

Plaintiff is granted 10 days leave to amend. (Cal. Rules of Court, rule 3.1320(g).) The time in which an amended complaint may be filed will run from service by the clerk of the minute order. (Code Civ. Proc., § 472b.)

Explanation:

A complaint must allege facts and not conclusions, and the material facts must be alleged directly and not by way of recital. Furthermore, the essential facts upon which a determination of the controversy depends should be stated with clearness and precision so that nothing is left to surmise. Recitals, references to, or allegations of material facts that are left to surmise are subject to a special demurrer for uncertainty. (*Ankeny v. Lockheed Missiles and Space Co.* (1979) 88 Cal.App.3d 531, 537.) But a demurrer for uncertainty (Code Civ. Proc., § 430.10 (f)) will be sustained *only* where the complaint is so bad that defendant *cannot reasonably* respond—i.e., he or she cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him or her. (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.)

Chain Letter Pleading

The practice of incorporating all or most prior paragraphs within each cause of action is disfavored, as it tends to cause ambiguity and create redundancy. (*Uhrich v. State Farm Fire & Cas. Co.* (2003) 109 Cal.App.4th 598, 605; *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1179 [complaint employs the disfavored shotgun or "chain letter" style of pleading wherein each claim for relief incorporates by reference all preceding paragraphs, which often masks the true causes of action].)

Here, Plaintiff employs Chain Letter Pleading. For each cause of action, Plaintiff incorporates every preceding paragraph and then recites boilerplate law. The main problem is that Plaintiff's Complaint incorporates 77 pages into each cause of action (recounting years of discussions, telephone calls and emails with numerous Employment Development Dept. employees and customers). This creates ambiguity and redundancy and makes it impossible to determine which facts apply to which elements. Further, neither cause of action articulates against whom the claims are directed. Thus, not only are Defendants left to surmise what Plaintiff intends by her complaint, but they are unable to respond to the complaint as drafted. *It is impossible to prepare a defense when it is unclear what is to be asserted and against whom.* Accordingly, Defendants' demurrer for uncertainty is sustained.

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 09/12/16.
(Judge's initials) (Date)

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Tentative Ruling

Re: ***Dhaka Hoteliers, LLC v. Uddin and Ahmed***
Superior Court Case No. 15 CECG 00120

Hearing Date: September 13, 2016 (**Dept. 503**)

Motion: By Plaintiff seeking reconsideration of the ruling on Defendants' motion to vacate the entries of default and default judgments

Tentative Ruling:

To deny the motion.

Explanation:

First, the moving party did not submit a declaration from the staff person who called Dept. 503 and purportedly left a message. Instead, the Declaration of Jeff Reich states at ¶ 4 that "staff did make that call." The Declaration of Shane Reich states at ¶ 4 that he "is informed and believe[s]" that "staff med the call." But, this is not the equivalent of a declaration from the person who has actual knowledge of what happened when the call was placed. But, **most importantly**, lack of a chance for oral argument is "clearly collateral to the merits" and therefore not ground for reconsideration. [*Garcia v. Hejmadi*, (1997) 58 Cal.App.4th 674 at 691]

Second, the motion at bench is not based on "new or different facts or law" as required by CCP § 1008(a):

When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and **what new or different facts, circumstances, or law are claimed to be shown.**

The legislative intent was to *restrict* motions for reconsideration to circumstances where a party offers the court some fact or circumstance not previously considered, and *some valid reason* for not offering it earlier. [*Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500; *Mink v. Sup.Ct. (Arnel Develop. Co., Inc.)* (1992) 2 Cal.App.4th 1338, 1342; *Baldwin v. Home Sav. of America* (1997) 59 Cal.App.4th 1192, 1198] The burden under § 1008 "is comparable to that of a party seeking a new trial on the ground of newly

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Tentative Ruling

Re: ***Phillips v. Dang***

Case No. 15CECG03589

Hearing Date: September 13, 2016 (Dept. 503)

Motion: By Plaintiff for Attorney's Fees Pursuant to Code of Civil Procedure §1021.4.

Tentative Ruling:

To deny the motion without prejudice.

Explanation:

There appears to be no proof of service for any of the motion papers. Due process requires that parties be given notice where their rights might be at issue. (*E.g., Edward W. v. Lamkins* (2002) 99 Cal.App.4th 516, 529 ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.")) Absent such notice, the Court cannot grant the motion. Therefore, the motion is denied without prejudice unless the moving party can provide a proof of service at the hearing.

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 09/12/16.
(Judge's initials) (Date)

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Tentative Ruling

Re: ***Bradshaw v. Acqua Concepts, Inc. et al.***

Court Case No. 16 CECG 00949

Hearing Date: September 13, 2016 (Dept. 503)

Motion: Defendants' Demurrer to Plaintiff's First Amended Complaint
Defendants' Motion to Strike Portions of Plaintiff's First Amended Complaint
Plaintiff's Motion to Dismiss Derivative Action without Prejudice

Tentative Ruling:

To take the defendants' demurrer and motion to strike off calendar. To take the plaintiff's motion to dismiss, currently set of October 6, 2016, off calendar. To order plaintiff to post the \$50,000 bond ordered by the court on August 18, 2016, within 5 days of the clerk's service of this minute order. If the bond is not posted within this timeframe, defendants may request that the case be dismissed without prejudice on an ex parte basis. If the bond is posted, defendants may request, by ex parte application, that their demurrer and motion to strike be reset.

Explanation:

It is apparent that plaintiff desires to dismiss this action without prejudice. He filed a Judicial Council Form CIV-110 on or about August 26, 2016. It was rejected by the clerk on August 29, 2016, because no box was checked in item 1(b). However, the Form CIV-110 may not be used to dismiss derivative complaints. Plaintiff has also filed, on September 9, 2016, a motion for leave to dismiss this action without prejudice. This motion is currently set for October 6, 2016.

However, plaintiff has not posted the \$50,000 bond imposed by this Court by order dated August 18, 2016. Plaintiff's case is subject to dismissal if the bond is not posted. (Corp. Code, § 800, subd. (d).) Due to oversight, the Court failed to state a date for the bond's posting. It does so now: the bond must be posted within 5 days of the clerk's service of the instant minute order, extended five days for mailing pursuant to Code of Civil Procedure section 1013, subdivision (a).

Because plaintiff has not yet posted a bond, and seeks to dismiss the action instead, the court sees no reason to rule on the pending demurrer and motion to strike the First Amended Complaint. Should the plaintiff fail to post the required bond, the case will be dismissed without prejudice. Should plaintiff post the required bond, the defendants may request that their demurrer and motion to strike be restored to the court's 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: A.M. Simpson on 09/12/16.
(Judge's initials) (Date)