

**Tentative Rulings for September 20, 2016**  
**Departments 402, 403, 501, 502, 503**

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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).)

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

16CECG02140      *Kong v. Kings View* is continued to Thursday, September 29, 2016 at 3:30 p.m. in Dept. 503.

16CECG00791      *Riddle v. Community Medical Centers* is continued to Thursday, October 6, 2016 at 3:30 p.m. in Dept. 403.

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(Tentative Rulings begin at the next page)

# **Tentative Rulings for Department 402**

(20)

## **Tentative Ruling**

Re:

***Lekaj v. Simonian et al.***  
Superior Court Case No. 15CECG02874

Hearing Date

**September 20, 2016 (Dept. 402)**

Motion:

Defendants Peter Simonian and Simonian Sports Medicine Clinic's Motion for Summary Judgment

### **Tentative Ruling:**

To grant. (Code Civ. Proc. § 437c(p)(2).) Moving parties are directed to submit to this court, within 5 days of service of the minute order, a proposed judgment consistent with the court's summary judgment order.

### **Explanation:**

As the moving party, defendant bears the initial burden of proof to show that plaintiff cannot establish one or more elements of her causes of action or to show that there is a complete defense. (Code Civ. Proc. § 437c(p)(2).) Only after the moving party has carried this burden of proof does the burden of proof shift to the other party to show that a triable issue of one or more material facts exists – and this must be shown via specific facts and not mere allegations. (*Id.*)

“California courts have incorporated the expert evidence requirement into their standard for summary judgment in medical malpractice cases. When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence.”

(*Munro v. Regents of Univ. Of Calif.* (1989) 215 Cal.App.3d 977, 984-85.)

Defendants rely on the declarations of Emilie Cheung, M.D., Associate Professor and Chief of Shoulder and Elbow Service in the Department of Orthopaedic Surgery at Stanford University. Having reviewed plaintiff's claims, the discovery in this case, and plaintiff's medical records, Dr. Cheung concluded that defendants complied with the standard of care at all times in treating plaintiff.

This is sufficient to negate plaintiff's medical negligence claims (see *Munro, supra*). The burden therefore shifts to plaintiff to show the existence of a triable issue of material fact. (Code Civ. Proc. § 437c(p)(2).) Plaintiff has not filed any opposition, nor submitted any expert evidence contradicting the expert declaration presented by



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**Tentative Ruling**

Re: **Victoriano Hernandez v. Sunshine Raisin Corporation, et al.**  
Superior Court Case No. 16CECG00865

Hearing Date: September 20, 2016 (Dept. 402)

Motion: Joinder

**Tentative Ruling:**

To deny. (Code Civ. Proc. §§ 379, 389.)

**Explanation:**

A party may be joined as a defendant where the complaint asserts against him or her a right to relief arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all defendants will arise in the action. (Code Civ. Proc. §379.) A party must be joined to an action where that party's interests are so directly involved in the matter that complete relief cannot be afforded in their absence. (Id. at §389.)

Generally speaking, joint tortfeasors are not considered necessary parties to an action; a plaintiff is allowed to choose which tortfeasor(s) to sue. (*Countrywide Home Loans, Inc. v. Superior Court* (1999) 69 Cal.App.4th 785, 796.) A party against whom no relief is sought does not need to be joined as a defendant: “[i]t is fundamental that a person should not be compelled to defend [himself] in a lawsuit when no relief is sought against [him].” (*Pinnacle Holdings, Inc. v. Simon* (1995) 31 Cal.App.4th 1430, 1437.)

Labor Code section 2810.3 defines “client employer” as “a business entity...that obtains or is provided workers to perform labor within its usual course of business from a labor contractor,” and “labor contractor” as “an individual or entity that supplies workers...to a client employer ...[.]” The co- or joint employer status generally arising from the client employer and labor contractor relationship does not necessarily result in joint liability. (See *Noe v. Superior Court* (2015) 237 Cal.App.4th 316, 332 [“We are aware of no authority suggesting that, under California law, joint employers are generally treated ‘as if they were each other’s agents’ or that joint employers are normally held jointly liable for Labor Code violations committed by a co-employer.”]; *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 728 [if client employer failed to comply with its own meal and rest period requirements, liability still may be imposed regardless of whether laborer was coemployed by staffing company that had adopted its own lawful meal and rest break policy].)

In the case at bar, Defendant, as the client employer, is the entity that directed Plaintiff's work activities, including Plaintiff's meal and rest breaks, not Select Staffing. It is unclear to the Court how Plaintiff's allegations regarding Defendant's practices and policies dictating when Plaintiff's meal or rest breaks were taken, and how Plaintiff's



# **Tentative Rulings for Department 403**

(19)

## **Tentative Ruling**

Re: **Capriola v. Express Services, Inc.**  
Court Case No. 15CECG02741

Hearing Date: September 20, 2016 (Department 403)

Motion: Plaintiff's Motion to Compel Further Responses to Interrogatories,  
Set No. One.

### **Tentative Ruling:**

To order that each party make a motion to seal the declarations it filed containing exhibits which include social security numbers, and submit a substitute declaration and exhibits from which such numbers are redacted, in compliance with California Rules of Court, Rule 1.20(b). Such motions need be filed by October 5, 2016 and will be heard at 3:30 p.m. on October 19, 2016.

To deny the motion as to Interrogatory No. 3, without prejudice to seeking such information via a deposition.

To grant as to Interrogatory Nos. 1 and 2, overruling all objections, but striking the definition of "worked." "Worked" shall be understood in its common sense, without reference to legal definitions of "employment." "You" shall also include California franchisees of responding party. The parties shall submit a proposed *Belaire* notice to the Court by October 5, 2016. Plaintiff shall pay for mailing of such notice and shall chose a third party administrator to mail the notice and receive any objections. Plaintiff shall advise the Court by October 5 of the identity of the administrator. A further response will be ordered 30 days after notice is completed.

### **Explanation:**

A discovery motion is not the device by which the issue of joint employment status can be determined, nor is a class certification motion. *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal. App. 4th 908, 914; *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 443. The change in definition of "work" and "you" are designed to avoid the concern by defendant of an admission of employer status. The Court does note that an objection that facts are not in evidence is not proper to written discovery. *West Pico v. Superior Court* (1961) 56 Cal. 2d 407, 421. The burden objection voiced by defendant is overruled. Such an objection requires a declaration from the responding party specifying the tasks required to be completed to answer, and the number of hours required to do those tasks. (*Id.* at 418.) See also *Coriell v. Superior Court* (1974) 39 Cal. App. 3d 487, 493 and *Perkins v. Superior Court* (1981) 118 Cal. App. 3d 761, 764. Such declaration is absent here.

"Whether the [interrogatory] is sufficient to inform [responding party] of that which is desired, presents a question merely of whether under the circumstances and situation generally, considered in the light of reason and common sense, he ought to recognize and be able to distinguish the particular thing that is required." *Pacific Automobile Ins. Co. v. Superior Court* (1969) 273 Cal. App. 2d 61, 68. The term "Staffing Consultant" appears several times in Express Services' own materials describing a certain "core" job in the business model developed by responding party. Limiting the questions to persons holding such position or like positions uses Express Services' own terminology as a means of limiting the discovery by limiting those alleged to be class members. The time frame is also properly limited for the discovery to holders of such position in the four years prior to the filing of this case.

Express Services stated it would provide only information "presently available and specifically known to Express at this time." That is a violation of its responsibilities in answering discovery. Interrogatory responses are required to include all information "reasonably available" to a party. That includes information available by "inquiry to other natural persons or organizations." Code of Civil Procedure section 2030.220(a) and (c). In short, investigation must be done when the interrogatory is received; it is not acceptable for a responding party to state they will only provide information in its current possession.

Express Services also asserted a blanket attorney/client and work product objection, as well as a specific objection on the basis the interrogatories called for a legal conclusion. None of the interrogatories call for an attorney/client communication; that objection is overruled. The fact that discovery calls for a legal conclusion is not a ground for refusing to answer an interrogatory, where the party's "attorney, as a professional, could apply the facts to his legal theory." *Rifkind v. Superior Court* (1994) 22 Cal. App. 4th 1255, 1259. See also, *Burke v. Superior Court* (1969) 71 Cal. 2d 276, 280. This objection is overruled for Interrogatories Nos. 1 and 2.

Interrogatory No. 2 does request several types of information about the individuals involved, but such information is discoverable and requiring multiple interrogatories about each class member would merely delay the discovery process. *Smith v. Superior Court* (1961) 189 Cal. App. 2d 6. Interrogatory No. 3 seeks a much broader array of information which the Court finds is better solicited via a deposition, such as of a person most knowledgeable.

It is proper to deal with the privacy concerns by sending a notice of the information sought and allowing potential class members to object in writing to disclosure. *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal. 4th 360, 373; *Belaire-West Landscape, Inc. v. Superior Court* (2007) 149 Cal. App. 4th 554, 562. However, no proposed such notice was included with the papers filed for this motion. The Court finds that such notice need be sent by a third party administrator, to whom responding party shall provide a list of names and addresses.

The parties are ordered to meet and confer and submit a joint notice on or before October 5, 2016, or if they cannot agree, separate proposed notices by that date. This issue will be further discussed at the October 19, 2016 hearing.



(5)

**Tentative Ruling**

Re: **Brandon Lopez, a minor, by and through his  
Guardian Ad Litem, Blanca Lopez et al.**  
Superior Court Case No. 15 CECG 00126

Hearing Date: September 20, 2016 (**Dept. 403**)

Motion: Summary Judgment, or in the alternative, summary  
adjudication by Defendant Clovis Community  
Medical Center

**Tentative Ruling:**

To grant the motion filed by Clovis Community Medical Center. The Defendant has met its burden pursuant to CCP § 437c(p)(2). A proposed judgment consistent with the ruling is to be submitted within 5 days of notice of the ruling.

**Explanation:**

On May 2, 2016 Defendant Clovis Community Medical Center filed a motion for summary judgment, or in the alternative, summary adjudication. On September 6, 2016, Plaintiff filed a statement of non-opposition.

It has been held that the standard of care against which the acts of a physician and other health care providers are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proven by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of the layman. See *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001 and *Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 271-273. California courts have incorporated the expert evidence requirement into their standard for summary judgment in medical malpractice cases. When a defendant moves for summary judgment and supports its motion with expert declarations that its conduct fell **within** the standard of care, it is **entitled** to summary judgment unless the plaintiff comes forward with conflicting **expert** evidence. See *Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 984-985 and see *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493.

In the instant motion, Defendant CCMC submits the Declaration of Anne Taylor, R.N. as one of its expert witnesses. She is a registered nurse and licensed to practice nursing in the state of California. Since 1998. She has been a Clinical Educator/Consultant for the Labor & Delivery & Perinatal Special Care Unit for the Naval Medical Center, San Diego. She has significant experience pertaining to nursing labor and delivery care, including vaginal deliveries and VBACs (vaginal birth after Caesarean). She states that based on her "education, training, and experience", she is



# **Tentative Rulings for Department 501**

# **Tentative Rulings for Department 502**

03

## **Tentative Ruling**

Re: ***River Park Properties III v. Axa Equitable Life Insurance Company***  
Case No. 16 CE CG 01070

Hearing Date: September 20<sup>th</sup>, 2016 (Dept. 502)

Motion: Plaintiff's Motion for Judgment on the Pleadings against Answer of Defendant Axa Equitable Life Insurance Company

### **Tentative Ruling:**

To deny the motion for judgment on the pleadings against the answer of defendant Axa Equitable Life Insurance Company. (Code Civ. Proc. § 438, subd. (c)(1).)

### **Explanation:**

Under Code of Civil Procedure section 438, subdivision (c)(1), "The motion provided for in this section may only be made on one of the following grounds: (A) If the moving party is a plaintiff, that the complaint states facts sufficient to constitute a cause or causes of action against the defendant and the answer does not state facts sufficient to constitute a defense to the complaint." (Code Civ. Proc., § 438, subd. (c)(1)(A).)

"A motion by a plaintiff for judgment on the pleadings is in the nature of a general demurrer to the answer, and the motion must be denied if the answer raises a material issue or sets up affirmative matter constituting a defense. Such a motion does not operate as a special demurrer. Uncertainty and ambiguities must be specifically raised by proper procedure. Where the answer, fairly construed, suggests that the defendant may have a good defense, a motion for judgment on the pleadings should not be granted. The moving party admits the untruth of his own allegations insofar as they have been controverted, and all such averments must be disregarded whether there is a direct and specific denial or an indirect denial by virtue of affirmative allegations of a contrary state of facts. Every allegation affirmatively pleaded in the answer must be deemed true." (*Barasch v. Epstein* (1957) 147 Cal.App.2d 439, 442-443, internal citations omitted.)

"A plaintiff is not entitled to judgment on the pleadings if affirmative matter constituting any legal defense is presented by the answer." (*Patterson v. Pacific Indemnity Co.* (1931) 119 Cal.App. 203, 206.) Also, if defendant asserts a general denial, it will operate to controvert, and thus place in issue, all allegations essential to plaintiff's



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**Tentative Ruling**

Re: **Tonya MacDonald v. Daniel Ayers, et al.**  
Superior Court Case No. 14CECG03418

Hearing Date: September 20, 2016 (Dept. 502)

Motions: Compel responses to form interrogatories, set one; deem request for admissions, set one, admitted; sanctions

**Tentative Ruling:**

To grant Plaintiff's motion to compel Defendant Ayers to provide initial verified responses to Plaintiff's form interrogatories, set one. (Code Civ. Proc. §2030.290.) Defendant Ayers is ordered to serve verified responses to Plaintiff's form interrogatories, set one, without objection, within 10 days of the clerk's service of the minute order.

To grant Plaintiff's motion that the truth of the matters specified in the request for admissions, set one, be deemed admitted. (Code Civ. Proc. §§ 2033.210, 2033.220, 2033.240, 2033.280.)

To impose monetary sanctions in favor of Plaintiff, against Defendant Ayers. (Code Civ. Proc. §§ 2023.010(d), 2030.290(c), 2033.280(c).) Defendant Ayers is ordered to pay \$120 in sanctions to Plaintiff within 30 days of service of this order.

**Explanation:**

The discovery at issue was served on Defendant Ayers on October 30, 2015. Despite being granted an extension by Plaintiff, making Defendant's responses due by January 14, 2016, Defendant Ayers still has not served his responses. Accordingly, Plaintiff's motion to compel and to deem admissions admitted are granted. (Code Civ. Proc. § 2030.290(a), 2031.300(a).)

A monetary discovery sanction may be awarded to a litigant appearing *in propria persona* for reasonable expenses actually incurred by that party in attempting to obtain the opposing party's compliance with the discovery rules. (*Kravitz v. Superior Court* (2001) 91 Cal.App.4th 1015, 1020; see also *Argaman v. Ratan* (1999) 73 Cal.App.4th 1173, 1180.) Here, the only evidence before the Court regarding Plaintiff's actual costs in bringing the instant motions is the filing fees, i.e., no declaration or receipts have been provided showing costs incurred by Plaintiff for allowable expenses such as photocopying, postage or legal research, incurred because of Defendant's failure to comply with the discovery rules. (See *Kravitz*, *supra*, 91 Cal.App.4th at p. 1017.) Accordingly, sanctions in the amount of \$120 are imposed against Defendant Ayers. (Code Civ. Proc. §§ 2023.010(d), 2023.030(a).)



# **Tentative Rulings for Department 503**

(30)

## **Tentative Ruling**

Re: **CA Freight Xpress, Inc. v. ABM Transportation, Inc**  
Case No. 15CECG01640

Hearing Date: **Tuesday September 20, 2016 (dept. 503)**

Motion: Defendant ASA Trucking Inc.'s motion to set aside default

### **Tentative Ruling:**

To grant Defendant ASA Trucking Inc.'s motion to set aside its default.

### **Explanation:**

Relief under Code Civil Procedure section 473(b) may be based on an "attorney affidavit of fault," in which event, relief is *mandatory*. "(W)henever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's *sworn affidavit* attesting to his or her mistake, inadvertence, surprise or neglect, (the court shall) vacate any (1) resulting *default* entered by the clerk ... or (2) resulting *default judgment or dismissal* entered against his or her client ..." (Code Civ. Proc., § 473(b) [emphasis and parentheses added]). The purpose is "to alleviate the hardship on parties who *lose their day in court* due solely to an inexcusable failure to act on the part of their attorneys." (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257 [emphasis in original; internal quotes omitted].) Ordinarily, a declaration under penalty of perjury may be used whenever an affidavit is required. (Code Civ. Proc., § 2015.5). An application for mandatory relief based on an attorney affidavit of fault must be made "*no more than six months after entry of judgment.*" (Code Civ. Proc., § 473(b) [emphasis added]). The wording of the statute makes clear that the 6-month period runs from entry of the default judgment, not the original default. (*Sugasawara v. Newland* (1994) 27 Cal.App.4th 294, 297.) A motion made within that period is timely although the attorney neglect *predated* the entry of default. (*Sugasawara, supra*, 27 Cal.App.4th at 296.)

Here, Defendant ASA requests relief under Code of Civil Procedure section 473(b), attorney fault. Attorney Topchyan submits a declaration under penalty of perjury, accepting fault and admitting that he failed to timely file an answer (Topchyan Dec. filed 8/10/16, ¶ 6). Since no default judgment has been entered, this motion is timely. Therefore, Code of Civil Procedure section 473(b) relief is *mandatory* under the attorney affidavit provisions. Defendant ASA Trucking Inc.'s motion to set aside its default is granted.

Pursuant to California Rules of Court, rule 391(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order

adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

**Issued By:** A.M. Simpson **on** 9/13/16 .  
(Judge's initials) (Date)

**Tentative Ruling**

Re: **Vang v. Vang**  
Case No. 14 CE CG 03392

Hearing Date: September 20<sup>th</sup>, 2016 (Dept. 503)

Motion: Plaintiffs' Motion to Strike Memorandum of Costs and to Tax  
Costs Sought by Defendant Bee Pha

**Tentative Ruling:**

To grant plaintiffs' motion to strike the entire memorandum of costs filed on behalf of defendant Bee Pha. (Cal. Rule of Court 3.1700.) To deny plaintiffs' request for sanctions against defendants and their counsel. (Code Civ. Proc. § 128.5.)

**Explanation:**

"Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (Code Civ. Proc., § 1032, subd. (b).)

"'Prevailing party' includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant." (Code Civ. Proc., § 1032, subd. (a)(4).)

Here, defendant Bee Pha would qualify as a "prevailing party", since she was dismissed by plaintiffs on May 2<sup>nd</sup>, 2016. However, plaintiffs contend that defendant's memo of costs was untimely because it was filed more than 15 days after the dismissal was entered.

Under California Rules of Court, Rule 3.1700, subdivision (a)(1), "A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of service of the notice of entry of judgment or dismissal by the clerk under Code of Civil Procedure section 664.5 or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first." (Cal. Rules of Court, Rule 3.1700, subd. (a)(1).)

Thus, if the memo of costs is not filed within 15 days after service of the notice of entry of dismissal, the memo of costs is untimely and the court should not award costs to the defendant. (*Sanabria v. Embrey* (2001) 92 Cal.App.4th 422, 425–426.) "If notice of entry of dismissal is served, a dismissed defendant claiming costs must serve and file a memorandum of costs within 15 days after 'the date of service of written notice of entry of ... dismissal.'" [Citation.] 'The time provisions relating to the filing of a memorandum of costs, while not jurisdictional, are mandatory.' [Citation.]" (*Ibid.*) However, it is the

date of service of the notice of dismissal, not the date of filing of the dismissal itself, which triggers the time period for filing a memo of costs. (*Ibid.*)

Here, plaintiffs filed their request to dismiss defendant Bee Pha on April 26<sup>th</sup>, 2016, and the clerk entered the dismissal on May 2<sup>nd</sup>, 2016. However, there is no indication in the file that plaintiffs ever filed or served a notice of the dismissal on defendants. Nor has any judgment or notice of entry of judgment ever been served or filed in the case. Therefore, the time period for filing a memo of costs never started to run, and defendant's memo is not untimely. Consequently, the court will not strike the entire memo of costs for untimeliness.

Nevertheless, the court intends to grant the motion to strike the entire memo of costs, since all of the costs sought in the memo of costs were either incurred after defendant Bee Pha's death, or were otherwise not recoverable by her. For example, defendant seeks to recover court filing fees of \$555 under Item 1 of the cost bill, but defendant applied for and was granted a fee waiver when she filed her demurrer to the complaint. (See court's order granting fee waiver dated December 15<sup>th</sup>, 2014.) Therefore, she cannot recover for any filing fees, as she did not pay any such fees. To the extent that the other defendants paid fees, they cannot recover them from plaintiffs by claiming they were incurred by Bee Pha.

Also, all of the other costs sought by defendant were incurred after her death on March 5<sup>th</sup>, 2015. In fact, one of the costs sought by defendant is for the expense of obtaining a copy of her own death certificate. (See Worksheet attached to Memo of Costs, Item 13.) All of the invoices attached to the memo of costs are also for expenses incurred after March 5<sup>th</sup>, 2016. These include all of the deposition costs, all of the service of process costs, and all of the items listed under Item 13 as "other costs."

Clearly, costs incurred after the defendant's death could not have been incurred for her benefit, or to defend her interests. While these expenses may have been beneficial to the other defendants, they cannot be recovered by those defendants by claiming that they were incurred by Bee Pha after her death. Also, the other defendants have waived their right to recover their costs from plaintiffs as part of their settlement agreement. Therefore, the court intends to strike the entire memo of costs filed on behalf of Bee Pha.

Finally, while plaintiffs have mentioned in their motion that they wish to seek sanctions against defendants or their counsel for filing a frivolous cost bill, there is no evidence that they have complied with the "safe harbor" requirements of Code of Civil Procedure section 128.7, which are incorporated into Code of Civil Procedure section 128.5. (Code Civ. Proc. § 128.5, subd. (f).) Section 128.7 requires service of a separate motion for sanctions on the party against whom the sanctions will be sought 21 days before the motion is filed with the court in order to give the other party a chance to withdraw the offending pleading. (Code Civ. Proc. § 128.7, subd. (c)(1).)

Here, plaintiffs have not offered any evidence that they served their motion on defense counsel 21 days before filing it, and they have not filed a separate motion for sanctions. Nor have they presented any evidence of the amount of fees incurred to



### **Tentative Ruling**

(17)

Re: **Bardsley v. Burns et al.**  
Superior Court Case No. 15 CECG 03190

Hearing Date: September 20, 2016 (Dept. 503)

Motion: Motion to Compel Plaintiff's Initial Responses to Defendant Linda Burn's Form Interrogatories, Set One  
Motion to Compel Plaintiff's Initial Responses to Defendant Linda Burn's Special Interrogatories, Set One  
Motion to Compel Plaintiff's Initial Responses to Defendant Linda Burn's Requests for Production, Set One  
Motion to Compel Plaintiff's Initial Responses to Defendant Linda Burn's Special Interrogatories, Set Two  
Motion to Compel Plaintiff's Initial Responses to Defendant Linda Burn's Requests for Production, Set Two

#### **Tentative Ruling:**

To grant the Motions to Compel Initial Responses to defendant Linda Burn's Form Interrogatories, Set One, defendant Linda Burn's Special Interrogatories, Set One, defendant Linda Burn's Requests for Production, Set One, defendant Linda Burn's Special Interrogatories, Set Two, defendant Linda Burn's Requests for Production, Set Two, as to plaintiff Matthew D. Bardsley. Plaintiff Matthew D. Bardlsey will provide verified responses to the Form Interrogatories, Set One; Special Interrogatories, Set One, Requests for Production, Set One, Special Interrogatories, Set Two, and Requests for Production, Set Two served by defendant Linda Burns without objection within 20 days after the clerk's service of this order.

To order defendant Linda Burns to pay additional filing fees of \$240.00 to be due and payable to the court clerk within 30 days of service of this order. (Gov. Code, § 70617, subd. (a).) Compelling responses to five sets of discovery documents constitutes five motions.

#### **Explanation:**

*Form & Special Interrogatories:*

Form and Special interrogatories, Set One were served by mail May 11, 2016. (Rodolfa Decl. ¶¶ 7-8; Ex. A.) Special Interrogatories, Set Two were served by mail June 2, 2016. (Rodolfa Decl. ¶¶ 16-18; Ex. C.) No responses have been received. (Rodolfa Decl. ¶ 26.) The motion to compel the initial responses to the form and special interrogatories is therefore granted. (Code Civ. Proc. §§2030.260, subd. (a), 2030.290, subd. (b).)

*Requests for Production:*

Requests for Production of Documents, Set One were likewise served by mail May 11, 2016. (Rodolfa Decl. ¶¶ 7-8; Ex. A.) Requests for Production of Documents, Set Two were served by mail June 2, 2016. (Rodolfa Decl. ¶¶ 16-18; Ex. C.) There is good cause for the production of the requested documents. No responses have been received. (Rodolfa Decl. ¶ 26.) The motion to compel the production of documents is therefore granted. (Code Civ. Proc. §2031.300, subd. (b).)

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

*Sanctions:*

Code of Civil Procedure section 2030.290, subdivision (c) provides, in relevant part: "The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a response to interrogatories, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (See also Code Civ. Proc. § 2031.300, subd. (c) relative to Requests for Production.) Code of Civil Procedure section 2023.030, subdivision (a) provides, in relevant part: "The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct."

Defendant Linda Burns seeks \$599 in sanctions. However, no monetary sanctions can be awarded because Linda Burn's Notice of Motion fails to comply with Code of Civil Procedure section 2023.040. That section provides, in relevant part: "[a] request for a sanction shall, in the notice of motion, identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought." Linda Burn's notice of motion states: "NOTICE IS HEREBY GIVEN that on September 20, 2016, at 3:30 p.m.; or as soon thereafter as the matter may be heard in Department 503 of the above—entitled court located at 1130 O Street, Fresno, California, Defendant LINDA BURNS (hereafter "Defendant") will move this Court for an order compelling responses to Form Interrogatories, Set One, Special Interrogatories, Set One and Set Two, and Requests for Production of Documents, Sets One and Two, as well as monetary sanctions in the amount of \$599." Thus, Ms. Burns' notice fails to identify the parties and/or attorneys against whom the sanction is sought.

**Tentative Ruling**

**Issued By:** A.M. Simpson **on** 9/19/16.  
(Judge's initials) (Date)

(28)

**Tentative Ruling**

Re: ***Dhillon, et al. v. Anheuser-Busch, LLC, et al.***

Case No. 14CECG03039

Hearing Date: September 20, 2016 (Dept. 503)

Motion: By Defendant Anheuser-Bush, LLC to compel production of documents from Valley Wide Beverage Company

**Tentative Ruling:**

To deny the motion.

**Explanation:**

Defendant Anheuser-Busch ("A-B") has moved to compel compliance with a business records subpoena served on non-party Valley Wide Beverage Company ("Valley Wide"). Defendant has not indicated in the notice of motion whether it is moving pursuant to Code of Civil Procedure §2025.480 (applicable to depositions generally) or §1987.1 (applicable to deposition subpoenas by Code of Civil Procedure §2020.030). Only in the Memorandum of Points and Authorities itself does state, however, that the motion is being made pursuant to Code of Civil Procedure §2025.480, subdivision (a).

*Documents Under Seal.*

Defendant filed the initial papers conditionally "under seal" and gave notice to opposing party regarding the potential for confidential information being involved pursuant to California Rule of Court 2.551, subdivision (b). To date, no motion or application to deem the moving documents as confidential and subject to seal has been filed and the Court will deem them public.

The respondent and moving party have filed their opposition and reply papers conditionally under seal and the Court has granted the respective applications to have them under seal.

*Merits of the Subpoena*

Defendant A-B initially served a subpoena seeking twelve categories of documents. During the meet and confer process, A-B limited the request to four categories.

A-B has moved on the following categories of documents:

1. Records sufficient to establish what kind of coupons Valley Wide offered to off-premise retailers, what amounts, and during which time periods; specifically records sufficient to show (a) coupons Valley Wide received from each brewer, the number of coupons, and date received; and (b) the coupons (number and type) Valley Wide provided to each off-premise retailer and the dates such coupons were provided.
2. Communications with Manmohan Dhillon, Satnam Pabla, Serge Haitayan, Daljit Singh, Par Ventures LLC, or any members of the Neighborhood Market Association regarding coupons, the above-referenced lawsuit, or generally concerning Donaghy Sales, LLC and/or Anheuser-Busch, LLC.
3. Communications made or received by Valley Wide concerning the misuse of coupons, such as counterfeit coupons, over—redemption issues, or fraudulent redemptions, including communications/complaints made to or received from government agencies regarding coupons in Fresno and Madera counties.
4. Valley Wide's written policies regarding conditions for retailers to receive coupons, such as providing a certain amount of shelf space for Valley Wide's products.

There does not appear to be a limitation on the time frame for any of these categories. Valley Wide's responses were different for each category, but are summarized from both the objections and the meet and confer process thusly: (1) it did not see the relevance of the documents; (2) it did not have the documents; and, (3) the documents were subject to trade secret protection.

Defendant A-B argues that the documents are relevant because:

“This case is about the use of coupons for beer in Fresno and Madera counties. There are two major beer distributors that distributed coupons for beer to retailers in Fresno and Madera counties: defendant Donaghy Sales and third-party Valley Wide. One of the defenses asserted is that Donaghy Sales offered coupons to retailers to meet competition, i.e., match Valley Wide's couponing activity. The documents sought by Anheuser-Busch — records relating to Valley Wide's coupon programs, communications regarding coupons, and policies relating to coupons — are all central to the case.”

However, Defendant A-B cites to no pleading, deposition transcript or discovery that would support this contention. The operative complaint alleges a coupon scheme between A-B and Donaghy: Valley Wide is, as far as has been made aware to the Court, entirely unrelated to the litigation. The relevance of Valley Wide's coupons, policies and communications with plaintiffs is unclear. Nothing in the moving papers provided by Defendant A-B makes it clear what the relevance actually is. (*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 223-24 (requirement that a party seeking to compel production of documents to “set forth specific facts showing good cause justifying the discovery sought by the inspection demand” is applicable to subpoenas of third parties).)

In the reply brief, A-B argues for the first time that the documents are relevant because “[o]ne way to show, for example, that a particular coupon program by Donaghy Sales was run in response to a Valley Wide coupon program would be to have a document from Valley Wide’s files showing that Valley Wide ran a competing program during that particular period of time.” (Reply Brief at 2.) However, the Court will not consider arguments raised for the first time in a reply brief.

Even if the Court were to consider this argument, this explanation would only go to support first two items sought by Defendant. Even in that instance, there is nothing in the request to limit it to any time period for which Defendant Donaghy Sales was providing coupons. There is simply no explanation for the requests regarding any “misuse” of Valley Wide’s coupons or Valley Wide’s internal policies for its own coupons. The requests do appear to be fairly and overly broad given the potential relevance.

Suffice it to say that it appears that any relevance argument raised by Defendant appears tenuous at best. (*Calcor Space Facility, supra*, 53 Cal.App.4th at 223 (“Because of the potential for promiscuous discovery imposing great burdens, even though ultimately the probative value of the discovered material may be questionable, trial judges must carefully weigh the cost, time, expense and disruption of normal business resulting from an order compelling the discovery against the probative value of the material which might be disclosed if the discovery is ordered.”))

Defendant A-B then claims that Valley Wide’s “objection based on trade secret concerns is frivolous” on the grounds that the protective order entered into by the parties covers non-parties, and because Valley Wide has already availed itself of the protective order. On this ground, the Court could agree with A-B, and would militate in favor of granting the motion, but for the lack of showing of the relevance of the documents sought.

Defendant argues that the search by Valley Wide was “unreasonably limited.” However, in the separate statement, it did not cite to any documentation for support of its claims that “Valley Wide did not search the files of a single employee who actually handled coupons and distributed to retailers.” In the opposition, moreover, Valley Wide indicates that it searched the files of the vice president for finance and found no responsive documents.

A-B argues in its Reply Brief that Valley Wide, at one time, agreed to produce the documents at issue. However, this argument does not appear to be contained in the moving memorandum of points and authorities, and no citation to supporting documentation appears to be in either that document or in the reply brief.

Finally, however, Valley Wide’s response is that it has no such documents in its possession. A-B is correct that Valley Wide has not complied with California Code of Civil Procedure §2020.430, subdivision (a)(2) and Evidence Code §1561, A-B has simply not shown the relevance of the documents sufficiently to overcome the burden of any further search.



(24)

**Tentative Ruling**

Re: **Anderson v. The Bertelsman Living Trust**  
Court Case No. 15CECG02629

Hearing Date: **September 20, 2016 (Dept. 503)**

Motion: Defendants' Motion to Compel Discovery Responses and Request for Sanctions

**Tentative Ruling:**

To grant defendants' motion to compel further answers to the Special Interrogatories, but to deny the motion to compel further answers to Form Interrogatory No. 50.1(b). To grant monetary sanctions against Plaintiffs Marvin L. Anderson, Jodine Anderson, David Anderson and Kathy McCain and their attorney David. B. May, jointly and severally, in the amount of \$2,250. In the event a hearing is needed as to the Special Interrogatories, the court will consider increasing the sanctions awarded to include moving party's costs/fees for appearance, including court reporter's fees.

Plaintiffs shall serve responses, without objections, to Defendants Special Interrogatories (Set One), no later than 30 court days from the date of this order, with the time to run from the service of this minute order by the clerk.

**Explanation:**

While plaintiffs served timely objections to the Special Interrogatories, their objection that the "declaration of necessity" did not comply with Code of Civil Procedure sections 2030.040 and 2030.050 did not relieve them of the requirement to challenge that declaration by the proper method, namely seeking a protective order promptly. (*Catanese v. Superior Court* (1996) 46 Cal.App.4th 1159, 1165, *abrogated on other grounds by Lewis v. Superior Court* (1999) 19 Cal.4th 1232 ("*Catanese*")—"The statutory language thus appears to require a motion for a protective order to challenge the adequacy of a declaration served with more than 35 interrogatories, as opposed to allowing objection and later review on motion to compel.") Instead, they waited until defendants had filed their request for a Pretrial Discovery Conference under Local Rule 2.1.17 to file their own request related to the motion for protective order they desired to file. And while their objections also included a valid ground for objection, namely that the special interrogatories were oppressive and burdensome, when objecting on this basis something more than an excessive number of questions must be shown, and this was all plaintiffs objected to. Thus, it is arguable that plaintiffs' objection was insufficient.

But even if the court concludes plaintiffs have not waived the right to seek a protective order by their delay in seeking one, the court finds that the declaration of necessity defendants served along with the Special Interrogatories substantially complies with Code of Civil Procedure sections 2030.040 and 2030.050: it cited that the number of questions was warranted because of the complexity or quantity of the issues in this matter, and that this was the only method that would provide defendants the opportunity to ascertain the factual basis of the claims levied against them. Contention

interrogatories are a routine staple of written discovery, and asking these via written discovery is the preferred method as opposed to asking such interrogatories at depositions. (*Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255, 1259.)

Furthermore, the interrogatories are not oppressive or overly burdensome. Defendants have taken forty contentions plaintiffs have made in the complaint, by specific reference to each contention, and also with a reference to paragraph in the complaint where each contention is made, and for each one they ask plaintiffs to 1) identify the facts upon which that contention is based; 2) identify the individuals they believe have knowledge of these facts; and 3) identify each document that supports that contention. (Special Interrogatories 1 – 120). The court in *Catanese* did not condemn the practice of asking such “triplet” questions about each contention. Instead, it found that while plaintiff ostensibly asked only five interrogatories, they actually amounted to “upwards of 10,000 separate questions,” that they violated the rule of self-containment because they required reference to an outside source (the numerous volumes of plaintiff’s deposition) rather than each question being full and complete in itself, and also no “declaration of necessity” was served with the discovery. (*Catanese, supra*, 46 Cal.App.4th at 1165.) *Catanese* does not support the conclusion urged by plaintiffs.

In fact, the court in *Rifkind v. Superior Court, supra*, clearly found that what plaintiffs refer to as “triplet” questions are typical of contention interrogatories: such interrogatories call upon the party to “state all facts, list all witnesses and identify all documents that support” the contention. (*Rifkind v. Superior Court, supra*, 22 Cal.App.4th at p. 1256.) And while the court concluded it was improper to ask such interrogatories at a deposition, this “is clearly discoverable when sought by written interrogatory.” (*Id.* at pp. 1261.) “We conclude that contention questions of the kind at issue in this case, while entirely appropriate for interrogatories, are not proper in the deposition of a party who is represented by counsel” (*Id.* at p. 2363, emphasis added.)

Special Interrogatories 121-128 also ask plaintiffs self-contained questions clearly related to the complaint, namely, asking them: 1) to state in detail every real estate transaction between plaintiffs and Denny Bertelsman during the relevant period; 2) how they demanded redemption of each property (questions 122-124); 3) to state in detail all maintenance and expenses on each property (questions 125-127); and 4) to state in detail any payments of principal paid to Denny Bertelsman on the principal of the loans which are in defendants’ name (question 128). These are not improper, oppressive or burdensome.

Plaintiffs must answer all the Special Interrogatories.

As for Form Interrogatories No. 50.1(b), however, plaintiffs’ have answered this question completely by stating that the entire agreement was not in writing.

Sanctions:

The court has reduced the amount of sanctions to what it considers reasonable, and only as to the portion of the motion dealing with the Special Interrogatories, and

