

**Tentative Rulings for November 15, 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).)

11CECG03076      *Elly Lee v. Rogelio Ibarra* (Dept. 402)

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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.

15CECG03720      *Porter v. CRMC* is continued to Tuesday, December 6, 2016 at 3:30 p.m. in Department 503

15CECG01448      *2012-1 CRE Venture, LLC v. Linmar-Shaw, LLC* is continued to Wednesday, November 30, 2016 at 3:30 p.m. in Department 502

13CECG00867      *Rio Mesa Holdings, LLC v. Fidelity National Title Ins. Co.* [Dept. 502]  
[Hearing on motion to tax costs is continued to November 22, 2016, at 3:30 p.m. in Dept. 502]

11CECG04395      *Switzer v. Flournoy Management*, is continued to Thursday, December 8, 2016 at 3:30 p.m. in Department 501

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(Tentative Rulings begin at the next page)

# **Tentative Rulings for Department 402**

(29)

## **Tentative Ruling**

Re: ***Lillian Hanevichit v. Chan's Property, LLC, et al.***  
Superior Court Case No. 14CECG00725

Hearing Date: November 15, 2016 (Dept. 402)

Motion: Petition to Compromise a Minor's Claim

### **Tentative Ruling:**

To deny. The instant petition is not appropriate in light of the entry of judgment after trial, 8/24/2016. (See Cal. Rules of Court, rule 3.1700(a)(1); Prob. Code §3601(a).) Counsel to file a memorandum of costs and fees.

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:     **JYH**     on **11/14/16**  
                    (Judge's initials)      (Date)

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**Tentative Ruling**

Re: **Alfredo Hernandez, Jr. v. Theresa Gerarda Mendoza**  
Superior Court Case No. 12 CECG 01836

Hearing Date: November 15, 2016 **(Dept. 402)**

Motion: Re-open Discovery

**Tentative Ruling:**

To grant the motion pursuant to CCP § 2024.050(b).

**Explanation:**

Background

On June 11, **2012**, Plaintiff filed an action for negligence seeking damages for injuries sustained when a vehicle driven by the Defendant struck him while he was riding his bicycle. Defendant filed an answer on May 2, 2013. On or about the summer of 2014, a settlement was reached between Defendant's insurance adjuster, Karlyn Palazzo, and plaintiff's attorney, Jerry Childs of the Law Offices of Jeffrey D. Bohn. Defendant agreed to pay \$6,500 in exchange for a dismissal with prejudice. On August 13, 2014, Plaintiff's counsel filed a Notice of Settlement of the Entire Case listing the date of settlement as August 8, 2014.

On September 4, **2014**, Defendant's counsel requested that Plaintiff's counsel provide information regarding Plaintiff's liens, so separate checks could be issued to each. Plaintiff's counsel never provided the information. Four dismissal hearings were later held. Each time, Plaintiff's counsel requested a continuance.

Finally, on September 7, 2015, Plaintiff's counsel informed Defendant's counsel that Plaintiff was no longer willing to settle for the amount originally agreed upon. This was confirmed at the case status review hearing on October 8, 2015. Defendant's counsel indicates that he was advised to file a motion to enforce the settlement. The motion was heard on December 15, 2015. It was denied on the grounds that the requirements of CCP § 664.6 were not met. There was no written agreement signed by the Plaintiff nor an agreement placed on the record.

As a result, on February 22, 2016, Defendant filed a request for a jury trial. On October 17, 2016, Defendant filed a motion to re-open discovery. It is unopposed.



# **Tentative Rulings for Department 403**

03

## **Tentative Ruling**

Re: **Alvarez v. California Mentor Family Home Agency, LLC**  
Case No. 15 CE CG 00128

Hearing Date: November 15<sup>th</sup>, 2016 (Dept. 403)

Motion: Defendant Post's Motion to File Petition, and Any Order  
Thereon, Under Seal

### **Tentative Ruling:**

To deny the defendant's motion to file the petition to compromise Adrian Alvarez, Sr.'s petition to compromise dependent adult claim, and any order thereon, under seal. (Cal. Rules of Court, Rules 2.550, 2551.)

### **Explanation:**

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

Here, defendant Post moves to seal the entire petition to compromise the claim of Adrian Alvarez, Sr., as well as the documents attached to the petition and any order thereon, based solely on the fact that the parties agreed in the settlement that the terms of the settlement would be confidential. However, under Rule of Court 2.551, subdivision (a), the court must not grant an order sealing court documents based solely on the agreement of the parties.

Also, the motion to seal must contain facts sufficient to show an overriding interest in sealing the records that outweighs the public interest in keeping court records open. (Cal. Rules of Court, Rule 2.550, subd. (e)(1)(A).) In the present case, the defendant cites no facts to justify sealing the documents, other than the fact that parties agreed to keep the settlement confidential to support the request to seal the documents. While defendant claims that there is a strong public interest in allowing parties to settle, and that the parties have expressed a desire to keep the settlement terms confidential, this does not equate to an overriding interest that would overcome the public interest in keeping court records open. Defendant never explains why it is so important for the settlement terms to remain confidential, or why the parties' interest in confidentiality outweighs the public interest in openness in court records. Simply adding a confidentiality clause into a settlement agreement is not enough to justify granting an order sealing the petition and order; otherwise, parties could always an order sealing court records relating to a settlement simply by adding a confidentiality clause to the settlement. Again, this would violate the language of Rule 2.551, subdivision (a).



**Tentative Ruling**

Re: **County of Fresno v. Andrade**  
Case No. 16 CE CG 02431

Hearing Date: November 15<sup>th</sup>, 2016 (Dept. 403)

Motion: Plaintiff's Motion for Order of Possession

**Tentative Ruling:**

To deny the plaintiff's motion for an order of possession, without prejudice, for failure to show proper service of the motion on all named defendants. (Code Civ. Proc. § 415.20, subd. (b); 1255.410, subd. (b).)

**Explanation:**

Under Code of Civil Procedure section 1255.410, subdivision (b), "The plaintiff shall serve a copy of the motion on the record owner of the property and on the occupants, if any." (Code Civ. Proc. § 1255.410, subd. (b).)

Here, plaintiff has not shown that it has served all of the named defendants with the motion for order of prejudgment possession before the hearing. The plaintiff has filed proofs of service as to all three defendants, but only Vince Andrade was served by personal delivery. The proofs of service for defendants Tina Andrade and Frances Andrade state that they were served by substitution by serving a person over the age of 18 who was a competent member of the household. (Code Civ. Proc. § 415.20, subd. (b).) However, the declaration of diligence attached to the proofs of service indicates that service was not made directly on any person at the household, but rather the papers were left at the door, allegedly because Tina and Vince Andrade were inside and refused to answer the door. (April Robinson decl., ¶ 4.) The process server states that there was a camera installed at the house that can verify the service. (*Ibid.*)

Yet substituted service requires service on an *actual person* over the age of 18 who is a competent member of the household. (Code Civ. Proc., § 415.20, subd. (b).) Service must be made upon a person whose relationship with the person to be served makes it more likely than not that they will deliver process to the named party. (*Ellard v. Conway* (2001) 114 Cal.Rptr.2d 399; *Bein v. Brechtel-Jochim Group, Inc.* (1992) 6 Cal.App.4th 1387, 1393–1394.) Thus, simply leaving a copy of the summons and complaint at the front door of a home, even when the person to be served is believed to be home and will not answer the door, is not sufficient to show substituted service.

Here, plaintiff's process server claims that Tina and Vince Andrade were at home, but refused to come to the door to accept service. Yet she does not explain how she knew they were at home. In any event, even assuming the defendants were home, this would not make the attempted service valid, since the documents were not personally delivered to any person, but instead were simply left at the door. Also, while





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**Tentative Ruling**

Re: **Boyd v. J.H. Boyd Enterprises, Inc.**  
Court Case No. 15CECG02521

Hearing Date: **November 15, 2016 (Dept. 403)**

Motion: 1) Defendant Martha Marsh's Motion for Judgment on the Pleadings  
2) Defendant Martha Marsh's Motion to Appoint Receiver

**Tentative Ruling:**

To grant the Motion for Judgment on the Pleadings, with leave to amend. To deny the Motion to Appoint Receiver. To deny plaintiff's request for monetary sanctions pursuant to Code of Civil Procedure section 128.5.

**Explanation:**

Motion for Judgment on the Pleadings

A motion for judgment on the pleadings "performs the same function as a general demurrer, and hence attacks only defects disclosed on the face of the pleadings or by matters that can be judicially noticed." (*Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1064.) The court grants defendant's request for judicial notice.

Specific performance is an equitable remedy; the cause of action itself is for breach of contract. (See *Tamarind Lithography Workshop, Inc. v. Sanders* (1983) 143 Cal.App.3d 571, 575.) The required elements for pleading a cause of action for breach of contract that will be specifically enforceable are: 1) a specifically enforceable contract which is sufficiently certain in its terms; 2) adequate consideration, and a just and reasonable contract; 3) plaintiff's performance, tender, or excuse from nonperformance; 4) the defendant's breach; and 5) inadequacy of the remedy at law. (Witkin, Cal. Proc. 5th (2008) Plead, § 785.)

It is presumed that a breach of an agreement to transfer real estate is one that cannot be adequately satisfied by monetary damages (i.e., inadequacy of remedy at law is presumed). (Civ. Code § 3387.) The requirement for the contract to be sufficiently certain has been found to be particularly important with regard to alleged contracts for the sale or transfer of real property. A complaint defective in this regard is not merely subject to a demurrer for uncertainty, but rather to general demurrer for failure to state facts sufficient to constitute this cause of action. (*Eaton v. Wilkins* (1912) 163 Cal. 742, 746; *Beal v. United Properties Co. of California* (1920) 46 Cal.App. 287, 293.)

Defendant's arguments are persuasive if the agreement sought to be specifically enforced is the Partnership Agreement. It appears this was the intent of the pleading. However, from the complaint and the judicially noticed recorded documents, taken

together, the court must regard as true that the subject real property was not a Partnership asset once Mr. Boyd transferred his interest in it to the Boyd Trust, and thus specific enforcement of the Partnership Agreement cannot result in an order requiring defendant to sell the property to plaintiff pursuant to the terms of that Agreement, as the property is no longer owned by the Partnership and has not been owned by it for over 25 years.

However, the complaint's allegations actually can be read to allege a *different* agreement between plaintiff and Mr. Boyd which *incorporated some of the terms of the Partnership Agreement*. Plaintiff's argument refers only tangentially to the "amended terms of the Partnership Agreement" (Opp'n., pp. 3:27, 4:1-2.), which appears to be a reference to the new agreement Kenco and Mr. Boyd entered into upon Mr. Boyd's retirement.

A demurrer may be sustained (i.e., judgment on the pleadings granted) only if the complaint lacks any sufficient allegations to entitle the plaintiff to relief (*Chazen v. Centennial Bank* (1998) 61 Cal.App.4th 532, 542.) If on consideration of all the facts stated it appears that the plaintiff is entitled to any relief, the complaint will be held good. (*Salimi v. State Comp. Ins. Fund* (1997) 54 Cal.App.4th 216, 219.) A complaint withstands a general demurrer or a motion for judgment on the pleadings, if, on consideration of all the facts stated, it appears that the plaintiff is entitled to some relief, even if the facts are inartfully stated or intermingled with irrelevant facts or the complaint demands relief to which plaintiff is not entitled under the facts alleged (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal. 3d 110, 123.)

The allegations of this new agreement, distinct from the Partnership Agreement, are sufficiently discernible. Plaintiff alleges that at the time Mr. Boyd retired, Kenco had the right under paragraph 4.04 of the Partnership Agreement to buy out Mr. Boyd's share of the Partnership. (Compl., ¶15.) However, Mr. Boyd expressed his desire to not sell his interest in the building owned by the Partnership. (*Id.*, ¶16.) Thus in exchange for Kenco not enforcing its rights under the Partnership Agreement (i.e., paragraph 4.04), "Kenco and J.H. Boyd agreed to continue operation of the Boyd Professional Center pursuant to the terms of the Partnership Agreement." (*Id.*, ¶17, emphasis added.) These are operative words of contract: a new agreement made for valuable consideration. Plaintiff further alleges this meant Kenco and Mr. Boyd would continue to operate the subject property "as partners" and Kenco would have the right to purchase Mr. Boyd's interest in the property (not "Mr. Boyd's partnership interest") pursuant to the terms of the Partnership Agreement. (*Id.*, ¶18.)

These allegations sufficiently imply that Kenco and Mr. Boyd ceased operation of the Partnership in favor of this new arrangement, albeit one where they still operated "as partners." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517—on demurrer the complaint must be construed liberally by drawing reasonable inferences from the facts pleaded.) Thus, allegations regarding purchasing the office building "pursuant to the Partnership Agreement" (see, e.g., Paragraphs 17, 18, 23, 36 and 34) can reasonably be read to mean "in the manner provided" in that Agreement. In other words, the mechanics of that sale would be governed by the terms of the Partnership Agreement. This was an agreement separate from the Partnership Agreement, but still having

reference to that Agreement for crucial, and specific, terms of the sale. On the strength of this agreement, Kenco gave up its right to purchase the Partnership assets at that time, and allowed title to the real property to be changed. But it was not a requirement under this new agreement for the real property to be a Partnership asset, since it was a direct agreement to purchase *the property*. The fact that Mr. Boyd sought Kenco's permission to place title to his interest in the building into his living trust sufficiently alleges Mr. Boyd's assent to being bound by this new agreement even in his role as Trustee of his Trust. As the agreement by its own terms provided that the sale would not take place until after Mr. Boyd's death, he necessarily intended that his Successor Trustee would be bound by the agreement. This sufficiently addresses the issue of privity between Kenco and the Successor Trustee.

Even if this sufficiently alleges a contract sufficiently specific in its terms, it is not clear whether these new terms were oral or in writing, or if the only written terms were those incorporated from the Partnership Agreement. Generally, contracts regarding the sale of real property must be in writing. (Code Civ. Proc. § 1971.) However, the doctrine of promissory estoppel is a substitute for consideration in an oral agreement that would otherwise be within the statute:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise....

(*Munoz v. Kaiser Steel Corp.* (1984) 156 Cal.App.3d 965, 974.)

Here, the allegations provide that Mr. Boyd's promise to give Kenco the opportunity to purchase the property after his death induced Kenco to forbear from exercising its rights to an immediate sale under paragraph 4.05 of the Partnership Agreement, and to allow Mr. Boyd's one-half property interest to be transferred into the Boyd Trust. On balance, this is sufficient to allege promissory estoppel.

The only defect in the pleading, which is easily cured by amendment, is the allegation at Paragraph 35 that defendant breached *the Partnership Agreement*. The agreement breached was the new arrangement the parties agreed to upon Mr. Boyd's retirement, and not the Partnership Agreement. Plaintiff is given leave to amend.

#### Motion for Appointment of Receiver

On balance, defendant has failed to show that plaintiff's management of the property constitutes a risk of harm to defendant's ownership interest. It appears Kenco is not moving forward with the roof repair, since it states the choice of roofing company should await determination by the ultimate owner of the property. As this comment appears to indicate the roof replacement is not immediately necessary, this appears to be the best course of action. As for the parking lot repaving project, it is unclear how defendant's initial permission for this was somehow "abrogated," and it is also unclear how this project threatens any harm to her interest. It appears the project is necessary and prudent, and enhances the value and safety of the property. As for the monthly



# Tentative Rulings for Department 501

(30)

## Tentative Ruling

Re: **Barbara Beckerley v. Elnora Reed**  
Superior Court No. 16CECG00863

Hearing Date: Tuesday, November 15, 2016 (Dept. 501)

Motion: Defendant's Motion to Enforce Settlement

### **Tentative Ruling:**

To Order motion off calendar.

### **Explanation:**

*Code of Civil Procedure section 664.6*

The court may, if requested by the parties before dismissal of the suit, retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement. (Code Civ. Proc., § 664.6.) The request must be made orally before the court or in a signed writing, and it must be made by the parties, not by their attorneys or agents. (*Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 433.) Merely including the request in the settlement agreement without directly asking the court to retain jurisdiction is insufficient. (*Hagan Eng'g, Inc. v. Mills* (2003) 115 Cal.App.4th 1004, 1010-1011.) If the parties do not request continuing jurisdiction, the court has no subject matter jurisdiction over the matter once the suit has been dismissed. (*Wackeen, supra*, 97 Cal. App. 4th at 433.) Thereafter, it has no power to enforce a settlement agreement. (*Viejo Bancorp, Inc. v. Wood* (1989) 217 Cal.App.3d 200, 206; *Hagan, supra*, 115 Cal.App.4th at 1009.)

Here, on May 14, 2015 Plaintiff filed a dismissal of *entire* case 13CECG01843, with prejudice *in lieu of settlement*. The settlement agreement contains a provision making it enforceable under Code of Civil Procedure section 664.6. (Blane Dec filed 9/7/16, Ex. B.) However, it is not enough simply to provide for such retention in the settlement agreement; a request must be made directly to The Court. In an attempt to satisfy *Hagan*, moving party submits a 'notice of conditional settlement' signed by attorney Randolph Krbechek. (Smith Dec, filed 11/7/16 Ex.1.) Moving party argues that this document evidences retention because it says that settlement was conditional upon the "satisfactory completion" of the terms of the settlement agreement. (Reply, filed 11/7/16 pp1-2.) But, moving party fails to acknowledge that the document *also* says that the dismissal would be filed by May 15, 2015, implying that Court jurisdiction would end *with dismissal*. Nonetheless, moving party still fails to satisfy *Wackeen*, which requires requests to retain jurisdiction be made by the parties themselves, *not their attorneys*. Therefore, This Court declines to rule. Motion ordered off calendar.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order



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**Tentative Ruling**

Re: ***Insul-Flow, Inc. v. Westchester Surplus Lines Insurance Co., et al.***  
Superior Court Case No. 16CECG01834

Hearing Date: November 15, 2016 (Dept. 501)

Motion: Demurrer

**Tentative Ruling:**

To sustain Defendant Westchester Surplus Lines Insurance Company's demurrer to Plaintiff's first and second causes of action, with leave to amend. (Code Civ. Proc. §430.040(e), (f).)

**Explanation:**

“An ‘insurance broker’ is one who acts as a middleman between the insured and the insurer, soliciting insurance from the public under no employment from any special company, and, upon securing an order, placing it with a company selected by the insured or with a company selected by [the broker]; whereas an ‘insurance agent’ is one who represents an insurer under an employment by it. A broker is, in essence, employed in each instance as a special agent for a single purpose, while the very definition of agent indicates an ongoing and continuous relationship.... [B]rokers and insureds are ordinarily involved in what can be viewed as a series of discrete transactions, while agents and insureds tend to be under some duty to each other during the entire length of the relationship.”(*American Way Cellular, Inc. v. Travelers Property Casualty Company of America* (2013) 216 Cal.App.4th 1040, 1052, internal quotations and citations omitted; see also Ins. Code §1623; *Krumme v. Mercury Ins. Co.* (2004) 123 Cal.App.4th 924, 928–929; *Carlton v. St Paul Mercury Ins. Co.* (1994) 30 Cal.App.4th 1450, 1457.) Generally, any erroneous representation about the scope of coverage made to a plaintiff by an insurance broker is not imputed to the insurer. (*Rios v. Scottsdale Ins. Co.* (2004) 119 Cal.App.4th 1020, 1023; see also *Marsh & McLennan of Cal., Inc. v. City of Los Angeles* (1976) 62 Cal.App.3d 108, 118 [“Put quite simply, insurance brokers...are not agents of insurance companies[.]”].)

In the case at bar, Plaintiff alleges that the policy at issue required claims be reported during the coverage period, and that the coverage period of Plaintiff's policy was May 17, 2013, to May 17, 2014. Plaintiff alleges that Scott Barsotti, Defendant Foster's representative and agent, failed to report the claim regarding mold at the Canoga Park project to Defendant Westchester Surplus Lines Insurance Company (“Defendant Westchester”) and/or to inform Plaintiff that Plaintiff needed to report the claim to Defendant Westchester, during the coverage period. Plaintiff alleges that Defendant Foster reported the claim to Defendant Westchester on November 18, 2014.

Plaintiff attempts to argue an agency theory, alleging that “Defendants, and each of them, were acting as the agents, servants, employees, partners and joint



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## **Tentative Ruling**

Re: ***Munoz v. Tarlton & Sons, Inc.***  
Court Case No. 13CECG03503

Hearing Date: November 15, 2016 (Department 501)

Motion: by parties for class certification and preliminary approval of class action settlement

### **Tentative Ruling:**

To deem the case complex and order that the complex case fees be paid by December 1, 2016. To restore the case to the active civil list and set a case management conference for 3:30 p.m. on December 15, 2016 in this Department.

### **Explanation:**

#### **1. Introduction**

There are no declarations of any kind from any class representative in this case; thus it is impossible to determine if they have the claims that are asserted for the class. Class counsel has attached some documents purportedly from class members, and some pages of what appear to be depositions, but they are not authenticated, and the depositions do not include the face page, any oath, or a reporter certification. The class is defined as all construction workers from November, 2009 to the time the parties sign the settlement agreement (which they have not yet done), but class members working after November of 2013 get nothing. The "claims released" continue to include arising out of or related to "the facts **and** allegations" of the lawsuit (emphasis added), and in the claim form, are broadened to include all claims "in any way related to the Released Claims." There is no admissible evidence of any particular policy alleged to apply to the entire class with regard to working hours, employee expenses, travel, meal periods, rest breaks, wage statement, or failure to pay all wages due. The settlement provides no compensation for the travel or other employee expense claims released, but no explanation for this appears.

There is no evidence to support class certification and none to support the settlement. The Court is given no idea of what the claims of three named representatives are, whether any of them are in the class of persons who get nothing, what their jobs are, etc. There is no information as to why the amount of settlement is fair, the basis for the potential maximum recovery, the means by which the settlement was calculated, etc.

The lack of evidence means that the motion fails to establish the legal prerequisites for approval, even preliminary approval, as well as for class certification for settlement. The conflict between class members, with some getting nothing, also tends to indicate that proposed class counsel should not be appointed as such.

Much of the same problems appear in the new, unexecuted settlement as appeared in the prior executed version, and the proof problems previously described in the Court's tentative for October 5, 2016 remain as well.

## 2. Class Certification for Settlement Purposes

A court is not allowed to approve a class settlement absent actual proof of a properly certified class. The only difference in proof for class certification for settlement and class certification generally is that the first does not require proof of manageability for trial. But other than that, the burden of proof is on plaintiff, and must be met, whether certification is sought on its own, or concurrently with settlement approval. The reason for this is to ensure that due process is provided. A class action is a procedural method for adjudicating, or settling, the claims of many via one case. However, the basis for permitting such adjudication or settlement is that the claims of the representatives are typical of the class, and that the representatives are scrutinized to ensure their interests and those of the class they seek to represent are sufficiently similar.

Proof of all class certification requirements but for manageability is required under the United States Constitution. "The Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 812. The "clause" spoken of is the 14<sup>th</sup> Amendment to the U.S. Constitution, the same one that is used to question punitive damage verdicts. See, e.g., *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 712.

The leading case on this issue is *Amchem Products v. Windsor* (1997) 521 U.S. 591. The Court refused to allow the class certification, and therefore the class settlement proposed there. The objectors to the settlement contended that the named plaintiffs and certain unnamed class members had conflicts of interest, and that counsel did as well in seeking to represent all. This was because the named class members all had manifested injuries from asbestos exposure, while the class certified included persons who did not.

"We granted review to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification." (*Id.* at 619.) "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems [citation omitted] for the proposal is that there will be no trial. But other specifications of the rule--those designed to protect absentees by blocking unwarranted or overbroad class definitions--demand undiluted, even heightened, attention in the settlement context." (*Id.* at 620.)"

It is not possible to stipulate to a class action. There must be an independent assessment by a neutral court of evidence showing that a class action is proper.

"[T]he point is that uncovering conflicts of interest between the named parties and the class they seek to represent is a critical purpose of the adequacy inquiry. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) - 'A class representative must be part of the class and 'possess the same interest and suffer the

same injury' as the class members.' [citations omitted.] An absence of material conflicts of interest between the named plaintiffs and their counsel with other class members is central to adequacy and, in turn, to due process for absent members of the class. *Hanlon v. Chrysler Corp.* 150 F. 3d 1011, 1020 (9<sup>th</sup> Cir. 1998)."

*Rodriguez v. West Publ'g Corp.* (9<sup>th</sup> Cir. 2009) 563 F.3d 948, 959.

"[B]ecause absent class members are conclusively bound by the judgment in any class action brought on their behalf, the court must be especially vigilant to ensure that the due process rights of all class members are safeguarded through adequate representation at all times. Differences between named plaintiffs and class members render the named plaintiffs inadequate representatives only where those differences create conflicts between the named plaintiffs' and the class members' interests."

*Berger v. Compaq Computer Corp.* (5<sup>th</sup> Cir. 2001) 257 F.3d 475, 480.

A California court cited *Amchem* in *Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal. App. 4th 836, 851 (all internal quotations and other citations omitted):

"In order to be deemed an adequate class representative, the class action proponent must show it has claims or defenses that are typical of the class, and it can adequately represent the class. This is part of the community of interest requirement. Where there is a conflict that goes to the very subject matter of the litigation, it will defeat a party's claim of class representative status. Thus, a finding of adequate representation will not be appropriate if the proposed class representative's interests are antagonistic to the remainder of the class. 'The adequacy inquiry ... serves to uncover conflicts of interest between named parties and the class they seek to represent.' *Amchem Products, Inc. v. Windsor* . . .)"

The conflict in *Amchem* was between class members with injuries who were to receive compensation and those whose injuries had not yet manifested, who received no compensation. The common factor was asbestos exposure.

Here, there is no evidence establishing any of the required elements for class certification for settlement. Further, the proposed class is all non-exempt employees who worked for defendants at construction jobsites in California from November 8, 2009 through some future date when the settlement stipulation might be signed, more than seven years of workers. However, the only persons receiving any money will be class members who worked from November 8, 2009 to November 7, 2013 – the first four years of the class period. So class members who worked from November 7, 2013 to December 12, 2016 are required to release all claims for nothing. No class

representative has provided a declaration, thus there is no showing that the class representatives have the claims asserted for the class.

The compensation/no compensation conflict exists in this case. Counsel therefore has a conflict and cannot be appointed to represent all, which renders the adequacy factor for class certification impossible to establish. "The adequacy inquiry should focus on the abilities of the class representative's counsel and the existence of conflicts between the representative and other class members." *Caro v. Procter & Gamble Co.* (1993) 18 Cal. App. 4th 644, 669. "Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." *McGee v. Bank of America* (1976) 60 Cal. App. 3d 442, 487.

### **3. Settlement Assessment Impossible**

See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 129: "[I]n the final analysis it is the Court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing litigation. The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement." "[T]o protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished . . . [therefore] the factual record before the . . . court must be sufficiently developed." (*Id.* at 130.)

In *Clark v. American Residential Services, LLC* (2009) 175 Cal. App. 4th 785, proposed class counsel decreed that the overtime class' claims had "absolutely no value," and that was accepted at face value by the trial court. The Court of Appeal reversed: "While the court need not determine the ultimate legal merit of a claim, it is obliged to determine, at a minimum, whether a legitimate controversy exists on a legal point, so that it has some basis for assessing whether the parties' evaluation of the case is within the 'ballpark' of reasonableness." (*Id.* at 789.)

"While the court must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case, it must eschew any rubber stamp approval in favor of an independent evaluation." (*Id.* at 799, internal citations omitted.) The lack of evidence required denial:

"Two weeks before the final fairness hearing, class counsel finally provided an evaluation of plaintiffs' case, which described the overtime claim as having 'absolutely no' value. No data was included to support counsel's evaluation and the only data anywhere in the record was a copy of ARS's overtime policy, stating it paid overtime at one and a half times the employee's regular rate, along with a couple of pay stubs and time sheets showing some overtime payments to Clark and Gaines). Instead, counsel stated that ARS had 'a legally compliant overtime

policy and they actually paid overtime premium pay pursuant to their compensation policy.’ “

(*Id.* at 801-802.) Here, there is not only no data, there is no evaluation by anyone. That is true although the settlement requires defendants to provide the names, addresses, last four of the social security number, and number of hours worked for each class member as part of the administration process.

The provision for compliance monitoring continues to be unexplained and unsupported, although it will cost the class up to \$20,000 to provide a report to class counsel after this case is finished, a report completed by an unnamed person. This provision appears to be an injunction against further violations of any kind of labor law, without specification, but then attempts to shift enforcement of the injunctive relief to an arbitral forum. It is not appropriate to assign judicial functions for an uncertified class to a person outside of the judiciary. *Luckey v. Superior Court* (2014) 228 Cal. App. 4th 81 (*rev. denied*). As an injunction which is part of a class settlement to be entered as judgment, enforcement is for this Court.

Should injunctive relief issue, any violation and enforcement action would be part of enforcement of the settlement and judgment on the settlement in this case. To the extent that the compliance monitoring process discloses new claims, there may well be persons who are not class members, and it is not possible for class counsel and defense counsel to stipulate to remove such matters from judicial oversight via a private agreement on behalf of persons not presented with claims not yet in existence. Any report should be filed with the Court.

#### **4. Overbroad Release**

“The Court may approve a settlement which releases claims not specifically alleged in the complaint as long as they are based on the same factual predicate as those claims litigated and contemplated by the settlement.” *Strube v. Am. Equity Inv. Life Ins. Co.* (M.D. Fla. 2005) 226 F.R.D. 688, 700. “A federal court may release not only those claims alleged in the complaint, but also a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented . . .” *Class Plaintiffs v. Seattle* (9<sup>th</sup> Cir. 1992) 955 F.2d 1268, 1287.

“[t]he law is well established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the ‘identical factual predicate’ as the settled conduct.” *In re American Exp. Financial Advisors Securities Litigation* (2<sup>nd</sup> Cir. 2011) 672 F. 3d 113. See also *Matsushita Elec. Indus. Co., Ltd. v. Epstein* (1996) 516 U.S. 367, 376-377:

“[I]n order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the

claim was not presented and might not have been presentable in the class action."

The release here includes claims of those who receive no compensation, and for years for which no one receives compensation. It is not limited to the identical factual predicate to add claims arising from or related to "allegations" made in the complaint, which could include all legal claims mentioned, whether based on the same facts or not. The claim form requires release of all claims "in any way related to the Released Claims." The release is not of the type that the Court will approve for a class action settlement.

## **5. Clear Sailing and Reverter Clauses**

The settlement provides for an unopposed fee request of \$200,000, along with \$15,000 in costs. There is no cap on administration costs. It also provides that any funds not awarded through the claim process will revert to defendant. The claim form is stated to be a means of assuring that only class members can collect funds. But the notice of the class and the amount each class member will receive rely solely on defendants' own records of its employees. The form itself and the settlement state that defendants' records are presumed correct absent contrary evidence. The settlement includes no minimum amount to be paid to class members. Class members are required to attest under penalty of perjury that they worked for defendant and did not sign a release, both facts that defendant should already know.

There are cases where claim forms might be needed, to weed out those subject to a defense (like ERISA for example). But the requirement of a claim form must be viewed with a critical eye. It is being used to gain necessary information? Or is it being used as a means to discourage class members from seeking part of the settlement. Here, the claim form is directly tied to defendant getting back part or all of the proposed settlement for class members. The less the class is willing to go through the claim form process, the less defendant has to pay. Here, the class members are required to verify under oath that defendants' records of their work hours are correct, even though the complaint alleges that such hours are not correct and resulted in denial of wages due.

*International Precious Metals Corp. v. Waters* (2000) 530 U.S. 1223 was a matter where the Court denied certiorari but Justice O'Connor was sufficiently disturbed to issue a written opinion decrying settlements where counsel's fees were divorced from the actual amount recovered for the class: "Arrangements such as that at issue here decouple class counsel's financial incentives from those of the class, increasing the risk that the actual distribution will be misallocated between attorney's fees and the plaintiffs' recovery. They potentially undermine the underlying purposes of class actions by providing defendants with a powerful means to enticing class counsel to settle lawsuits in a manner detrimental to the class."

See also *Sylvester v. CIGNA Corp.* (D. Mass 2005) 369 F. Supp. 2d 34, where only 10.8% of the class willing to put in claims. The judge ultimately found that the

settlement was not fair at the final fairness hearing. The coupling of a claims-made settlement with a significant reversion to the defendant, along with a “clear-sailing agreement” as to attorney fees, was noted to be particularly odious.<sup>1</sup>

The Court quoted from William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 Tul. L. Rev. 813, 835 (2003): “It is important to recognize that it would be relatively rare for a plaintiff’s attorney to agree to a reverter-fund settlement without also having the security of a clear sailing agreement to reduce the uncertainty in his fee award.” Further (*Id.* at 46):

“[T]he presence of both a reverter clause and a clear sailing clause should be viewed with even greater suspicion and not be presumed fair to the class. Because of the problems inherent in a class settlement agreement that includes both a reverter clause and a clear sailing clause, the Court believes that the presence of these two provisions in any settlement agreement should present a presumption of *unfairness* that must be overcome by the proponents of the settlement.”

Accord *International Precious Metals Corp. v. Waters* (2000) 530 U.S. 1223 (J. O’Connor’s statement on the denial of certiorari).

The use of a claim form in this case is not justified. The parties also attempt to stipulate that Code of Civil Procedure section 384 will not apply. The exceptions listed in subsection (c) are for class actions brought against a public employee or a public entity. Defendants here are neither. *Nelson v. Pearson Ford Co.* (2010) 186 Cal. App. 4<sup>th</sup> 983 states that the Court does not have discretion to ignore the statute. In *Cundiff v. Verizon California, Inc.* (2008) 167 Cal. App. 4<sup>th</sup> 718, the Court held that the statute applied to claims-made class settlements, and that it applied specifically to uncashed and returned settlement checks issued pursuant to such a settlement. “This ‘total amount ... payable to all class members’ was established when the settlement administrator determined the amount necessary to satisfy the filed claims.” (*Id.* at 727.)

In *Microsoft I-V* (2006) 135 Cal. App. 4<sup>th</sup> 706, the Court did find that section 384 could permit a settlement provision calling for a reversion to defendant where such provision was fair, adequate and reasonable. (*Id.* at 722.) Given the circumstances here, where the claim process serves no apparent purpose other than to reduce the amounts paid to defendants’ workers in settlement of the case, it does not appear fair, adequate, or reasonable.

## **6. Further Issues**

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<sup>1</sup> A “clear sailing agreement” is where the defendant agrees not to oppose class counsel’s request for fees and costs up to a certain amount.

The settlement purports to define admissible evidence, and to limit it. See same at 3:12, 5:25-27, and 6:2-3. The Court is not permitted to enter a settlement as judgment which purports to create new evidentiary privileges. The California Supreme Court has made clear that the judiciary is without power to create or recognize a new privilege not found in statutes. "Courts may not create nonstatutory privileges as a matter of judicial policy." *Schnabel v. Superior Court* (1993) 5 Cal. 4th 704, 720, nt. 4.

"It is clear that the privileges contained in the Evidence Code are exclusive and the courts are not free to create new privileges as a matter of judicial policy." *Valley Bank v. Superior Court* (1975) 15 Cal. 3d 652, 656. The restrictions on use of settlements to claim liability are set forth in Evidence Code section 1152. This Court is not in a position to make new privileges to be applied to other courts. Nor are the parties. See *Baker v. General Motors Corp.* (1998) 522 U.S. 222, holding that an agreement to bar testimony without permission of a party was unenforceable in another case.

The settlement deems first class notice to class members sufficient, but demands that those who wish to opt out send in their opt-out requests via certified mail. See Settlement at 21:3-4. It is not appropriate to impose a more expensive mail method on the workers than is found sufficient for the employer.

At 17:17-20, the Settlement Agreement purports to absolve defendants, defense counsel, class counsel, and the settlement administrator from liability based on "mailings, distributions, and payments made in accordance with or pursuant to this Agreement." Class counsel cannot be absolved of any liability. Class counsel are, just like any attorneys, potentially liable for malpractice, including in settling a class action. See, e.g., *Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal. App. 4th 930. See also Rules of Professional Conduct, Rule 3-400: A member shall not (A) Contract with a client prospectively limiting the member's liability to the client for the member's professional malpractice." The fact a payment is made in accordance with the agreement might not be enough to shield them from malpractice claims. And where the others are concerned, a payment made "pursuant" to the agreement might still not be in "accordance" with it. This entire paragraph need be removed.

The provisions for notifying class members are insufficiently specific (found at 19:1-18.) Normally they call for updating the addresses through a national postal data base and such. The language requiring the administrator to "reasonably research" an address is too mushy in this instance, where precision is needed as class members who do not opt out are bound by the settlement. The language at 19:16-18 that a class member who did not receive notice shall be bound is inappropriate, in that the Court has discretion to allow a late claim or correct notice, so long as done before final judgment is entered. See, e.g., *In re Crazy Eddie Securities Litigation* (E.D.N.Y. 1995) 906 F. Supp. 840, 846.

The judgment proposed calls for a dismissal with prejudice, which is prohibited by California law. California Rules of Court, Rule 3.796(h). See Exhibit B at 9:21-23. The settlement need also make a provision for dismissal without prejudice of the claims by union members, who are omitted from the new class defined in the settlement.

Such persons should also receive notice, as they were possible recipients of the notice sent pursuant to *Belaire-West Landscape, Inc. v. Superior Court* (2007) 149 Cal.App.4th 554 by the Court's prior order. It also appears that such persons may have been notified of this suit via the notice defendant was required to post due to the NLRB 363 NLRB No. 175, Cases Nos. 32-CA-19054 and 32-CA-126896. The Court takes judicial notice of same pursuant to Evidence Code sections 455(b) and 452(c).

"[E]ven if a class has not yet been certified, and that in deciding whether to allow dismissal or issue notice, the district court must consider, among other things, the possibility that potential members of the class would be prejudiced . . . notice of dismissal protects the class from prejudice it would otherwise suffer if class members have refrained from filing suit because of knowledge of the pending class action." *Doe v. Lexington-Fayette Urban County Gov't.* (6<sup>th</sup> Cir. 2005) 407 F.3d 755, 761 (internal citations omitted). See also California Rules of Court, Rule 3.770(c).

At 29:1-5 of the settlement, it calls for venue of any dispute over the meaning of the settlement in Fresno, and attempts to bind absent class members to this provision. We do not know what type of disputes might arise, and this venue provision could be used to impose burdens on class members who wanted to, for example, sue class counsel for malpractice. It is fine if named plaintiffs and defendants want to set venue for themselves, but there is no benefit to the class from such a provision, no payment to them for such a restriction, and they should not be bound by it. If class counsel's clients want to sue them in Alameda or Los Angeles counties, they should be able to do so via the usual venue rules.

The judgment includes the over-broad class (see Exhibit B at 2:156-17) and the restricted "settlement class" (see same at 2:21-22). Several parts of the judgment require that the Court certify the settlement meets all requirements of Federal Rules of Civil Procedure 23, and the Federal Rules in general. See Settlement at 6:22, 7:2, and 7:9. This Court follows California law here, and United States Supreme Court cases, but are not bound by the Federal Rules. Such references need be removed.

The proposed judgment also continues to reference "allegations" in addition to the facts pled as the basis for released claims. Released claims must, as noted above, be limited to the identical factual predicate found in the pleadings.

At 9:24-28, the settlement calls for this Court to have "exclusive" jurisdiction to determine whether or not anyone is prosecuting a claim premised on claims released by the settlement. That is not appropriate; it is up to defendant to raise the bar of res judicata in the other case. See *Harrison v. Lewis* (D.D.C. 1983) 559 F. Supp. 943, 947: "In general, the court conducting a class action cannot predetermine the res judicata effect of its judgment."

Pursuant to 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 Rulings for Department 502**

03

## **Tentative Ruling**

Re: ***State of California v. Thermo King Fresno, Inc.***  
Case No. 16 CE CG 03188

Hearing Date: November 15<sup>th</sup>, 2016 (Dept. 502)

Motion: Plaintiff's Motion for Order for Possession

### **Tentative Ruling:**

To grant the State of California's motion for an order for prejudgment possession of the subject property. (Code Civ. Proc. § 1255.410.)

### **Explanation:**

Under Code of Civil Procedure section 1255.410, subdivision (a), "At the time of filing the complaint or at any time after filing the complaint and prior to entry of judgment, the plaintiff may move the court for an order for possession under this article, demonstrating that the plaintiff is entitled to take the property by eminent domain and has deposited pursuant to Article 1 (commencing with Section 1255.010) an amount that satisfies the requirements of that article." (Code Civ. Proc. § 1255.410, subd. (a).)

"The plaintiff shall serve a copy of the motion on the record owner of the property and on the occupants, if any. The plaintiff shall set the court hearing on the motion not less than 60 days after service of the notice of motion on the record owner of unoccupied property. If the property is lawfully occupied by a person dwelling thereon or by a farm or business operation, service of the notice of motion shall be made not less than 90 days prior to the hearing on the motion." (Code Civ. Proc. § 1255.410, subd. (b).)

"Not later than 30 days after service of the plaintiff's motion seeking to take possession of the property, any defendant or occupant of the property may oppose the motion in writing by serving the plaintiff and filing with the court the opposition. If the written opposition asserts a hardship, it shall be supported by a declaration signed under penalty of perjury stating facts supporting the hardship. The plaintiff shall serve and file any reply to the opposition not less than 15 days before the hearing." (Code Civ. Proc. § 1255.410, subd. (c).)

"If the motion is not opposed within 30 days of service on each defendant and occupant of the property, the court shall make an order for possession of the property if the court finds each of the following: [¶] (A) The plaintiff is entitled to take the property by eminent domain. [¶] (B) The plaintiff has deposited pursuant to Article 1 (commencing with Section 1255.010) an amount that satisfies the requirements of that article." (Code Civ. Proc. § 1255.410, subd. (d)(1).)





# **Tentative Rulings for Department 503**