

Tentative Rulings for November 22, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

15CECG00198 *FFA Farm Labor Services v. DL Insurance et al. and related cross-actions (Dept. 502)*

16CECG01716 *Robinson-Diaz v. Fresno Unified School District (Dept. 402)*

15CECG00405 *Rivas v. Rivas (Dept. 402)*

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

15CECG03847 *Efrain Garcia v. CCS Companies* is continued to Wednesday, November 23, 2016 at 3:30 p.m. in Department 502.

15CECG01554 *State of Ca. v. Derrel's Mini Storage* is continued to Wednesday, November 23, 2016 at 3:30 p.m. in Department 501.

16CECG00418 *Garcia v. Suburban Propane, L.P.* is continued to Tuesday, November 29, 2016 at 3:30 p.m. in Department 502.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(24)

Tentative Ruling

Re: ***Gill v. Fresno Community Regional Medical Center***
Court Case No. 14CECG01472

Hearing Date: **November 22, 2016 (Dept. 402)**

Motion: 1) Demurrer of Defendants Pervaiz A. Chaudhry, M.D., Valley Cardiac Surgery Medical Group, and Chaudhry Medical, Inc. ("Chaudhry Defendants") to the Third Amended Complaint
2) Chaudhry Defendants' Motion to Strike Portions of the Third Amended Complaint

Tentative Ruling:

To sustain the general demurrers to the First, Sixth, Seventh, and Eighth causes of action, without leave to amend, ordering the demurrers for uncertainty off calendar as moot in light of this ruling. To grant the motion to strike, without leave to amend.

Explanation:

Demurrer

- *First Cause of Action (Corporate Negligence/Elam):*

The court declines to "consider" the hospital's corporate bylaws in ruling on this motion, as that is not appropriate on demurrer. Defendants appear to recognize this, since they did not actually request judicial notice of the bylaws. That does not make its request for "consideration" of them any more proper.

Even so, this cause of action has only been applied to hospitals, and plaintiffs' new allegations fail to provide any basis to find that the contracts the Chaudhry defendants have or had with the hospital to fill various roles somehow morphs them into becoming a hospital. While plaintiffs point out that the *Elam* opinion "did not preclude the possibility that a physician or medical group could be liable" under an *Elam* theory, the more accurate observation is that the *Elam* court did not discuss or deal with this at all; there was simply no consideration of it. The court merely considered a *hospital's* duty of care. (*Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, 345.) Plaintiff cited no authority for extending this theory of liability to non-hospital defendants such as moving defendants. Furthermore, the court in *Elam* expressly observed this claim was not based on vicarious liability, but on the violation of its own duty "owed directly to the patient which resulted in injury." (*Id.* at p. 338, *fn* 5, emphasis added.) At best, plaintiffs' new allegations simply describe duties the Chaudhry defendants contractually owed to the hospital. That this in part involved some quality-assurance duties does not change

this fact. As the demurrer is sustained without leave to amend, the demurrer for uncertainty need not be addressed.

- *Sixth and Eighth Causes of Action (Fraud/Intentional and Negligent Misrepresentation):*

The allegations concerning fraud and misrepresentation are regarding Dr. Chaudhry's meeting with plaintiffs to discuss Mr. Gill's surgery, and the collective defendants' "representations" to plaintiffs that Dr. Chaudhry would provide "safe medical care without inappropriately jeopardizing Plaintiffs health and safety." Even if these statements might be considered sufficient to constitute more than just opinion, due to the collective defendants' specialized knowledge and expertise regarding the medical care Mr. Gill needed (*Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells* (2000) 86 Cal.App.4th 303, 307 ("*Neu-Visions*")), these cannot be regarded as representations about past or existing facts, but rather as predictions about future events, which cannot be regarded as actionable fraud. (*Neu-Visions* at p. 309-310; *Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1469.)

The allegation that Dr. Chaudhry "did not discuss any risks of surgery at the meeting," is not alleging fraud or misrepresentation, but rather negligence in his duties as a physician and surgeon to adequately inform his patient and obtain informed consent to the surgery. And the allegations regarding his (and the other defendants') failure to disclose his "history of misconduct" cannot be regarded as fraudulent as no California court has ever held that the physician's duty when obtaining informed consent also requires him/her to disclose hazards relating to the provider's person or character that might create an unreasonable risk (e.g., to disclose that they are an alcoholic). (See, e.g., 1 Cal. Med. Malprac. L. & Prac. § 2:11 (2016 ed.) making this observation.)

The general demurrers to the Sixth and Eighth causes of action are sustained, without leave to amend; therefore, the demurrers for uncertainty need not be addressed.

- *Seventh Cause of Action (Concealment):*

Plaintiff's Seventh cause of action alleges that defendants "concealed information Dr. Chaudhry's substance abuse, routine intrasurgical abandonment of patients, unavailability during postoperative stabilization efforts, and other matters impairing his competency from Plaintiffs." They therefore concealed that Dr. Chaudhry "was not able to provide, and/or would not provide, Plaintiff with safe medical care without inappropriately jeopardizing Plaintiff's health and safety." This led to plaintiffs relying on what they were told and to proceed with the surgery, which they would not have done had they known the true facts.

As already noted, there is no requirement under California law for a physician or a hospital to disclose the information plaintiffs contend was withheld. Furthermore, to the extent plaintiffs are contending the information they were given were insufficient to disclose risks inherent in the surgery Dr. Chaudhry recommended, this sounds in

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Tentative Ruling

Re: ***Esequiel Garcia v. Estate of Javier Sevilla, et al.***
Superior Court Case No. 14CECG03415

Hearing Date: November 22, 2016 (Dept. 402)

Motion: State Compensation Insurance Fund's motion to intervene

Tentative Ruling:

To grant. Order signed. Complaint in intervention filed.

Explanation:

Code of Civil Procedure section 387, subdivision (b), provides that the court shall grant a timely application for intervention based on an unconditional right to intervene. Intervention as a matter of right pursuant to section 387, subdivision (b), requires a nonparty to show it claims an interest in the property or transaction involved in the litigation, and is so situated that any judgment rendered in its absence "may as a practical matter impair or impede that person's ability to protect that interest." Labor Code section 3853 provides that an employer or employee may intervene at any time before trial; this has been held to be an unconditional right as contemplated by section 387(b). (See *Jordan v. Superior Court* (1981) 116 Cal.App.3d 202, 207.) An application pursuant to Labor Code section 3853 is timely made as long as it is before trial. (*Mar v. Sakti International Corp.* (1992) 9 Cal.App.4th 1780, 1783-1786.) Where an employer carries workers' compensation insurance, the workers' compensation insurer is subrogated to the rights of the employer to recover payments made to an injured employee. (Ins. Code §11662.) Because the employer is subrogated to the injured worker's claim against the third party, the employer's workers' compensation insurer is also so subrogated when it stands in the shoes of the employer; the insurer is further subrogated to the employer's additional rights and liabilities against the third party. (Id.; *Fremont Compensation Ins. Co. v. Sierra Pine, Ltd.* (2004) 121 Cal.App.4th 389, 395.)

In the case at bar, moving party has paid workers' compensation benefits to Plaintiff Esquiel Garcia, and the instant motion was timely filed. Moving party has sufficiently established its unconditional right to intervene, and the motion is unopposed. Accordingly, the motion is granted.

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** 11/21/16
(Judge's initials) (Date)

Tentative Rulings for Department 403

Tentative Rulings for Department 501

(24)

Tentative Ruling

Re: ***Flanigan v. Western Milling, LLC***
Court Case No. 16CECG01874

Hearing Date: **November 22, 2016 (Dept. 501)**

Motion: 1) Western Milling, LLC's Demurrer to Complaint
2) Western Milling, LLC's Motion to Strike

Tentative Ruling:

To sustain the demurrer to the Fourth cause of action, without leave to amend. To overrule the demurrers to the Fifth and Sixth causes of action. To deny the motion to strike in its entirety. Defendant is granted 10 days' leave to file its answer to the complaint. The time in which the answer can be filed will run from service by the clerk of the minute order.

Explanation:

Demurrer:

- *Fourth Cause of Action (Negligent Infliction of Emotional Distress)*

With a stand-alone claim of Negligent Infliction of Emotional Distress ("NIED"), plaintiff must allege the traditional elements of a negligence claim: duty, breach, causation and damages. There are two types of NIED plaintiffs: those bringing claims as a *bystander*, and those claiming to be *direct victim*. The distinction between these two is "the source of the duty owed by the defendant to the plaintiff." (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1072.)

With a bystander claim, the plaintiff seeks to recover damages as a percipient witness to the injury of another, and liability is premised on defendant's violation of "a duty not to negligently cause emotional distress to people who observe conduct which causes harm to another." (*Burgess, supra*, 2 Cal.4th at p. 1072.) Limitations have been placed on imposition of this type of liability: a bystander plaintiff can only recover if she is 1) closely related to the injury victim; 2) present at the scene at the time the injury occurred and is then aware it is causing injury to the victim; and 3) as a result suffers emotional distress beyond what would be anticipated in a disinterested witness. (*Id.*) In contrast, in direct victim cases, the plaintiff alleges defendant owed plaintiff a direct duty of care arising either out of a preexisting relationship, or based on a duty assumed by or imposed on defendant as a matter of law. (*Id.* at p. 1073.)

Plaintiffs' allegations have mixed the two types of NIED claims, or they are attempting to allege NIED based on both. Namely, they allege defendant owed plaintiffs a *direct* duty based on state and federal laws and regulations not to sell horse

feed containing monensin and they breached that duty, causing them emotional distress, but they also include a paragraph aimed at alleging *bystander* status. (See Compl., ¶42, alleging they were close to their horses while they were being fed and personally witnessed their illness and injuries from eating defendant's feed.)

But more important to the analysis here, the allegations of breach are framed in negligent, and not intentional, conduct (necessarily so, since it is for negligent infliction of emotional distress). However, in *McMahon v. Craig* (2009) 176 Cal.App.4th 1502, 1511, as modified on denial of reh'g (Aug. 31, 2009), the court established that a pet owner could not recover emotional distress damages based on defendant's negligent conduct (there, veterinary malpractice). In fact, that same court reinforced this in *Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, where it agreed with defendant that to the extent plaintiffs' recovery of emotional distress damages was on the negligence count, "we agree this court's decision in [*McMahon*] supports reversal." (*Id.* at p. 1605.) Simply put, under *McMahon* as reinforced by *Plotnik*, negligent conduct will not support an owner's emotional distress damages for injuries to a pet. Therefore, a standalone NIED claim based on injuries to a pet does not lie, whether the plaintiffs allege they are direct victims or bystanders. Demurrer to this cause of action must be sustained, without leave to amend.

Even so, the court in *Plotnik* clearly held that parasitic emotional distress damages were available on a trespass to chattels claim (an intentional tort), and plaintiffs have alleged this cause of action. The discussion in *Plotnik* of emotional distress damages for injuries to plaintiffs' dog (pp. 1605-1608) dealt with damages parasitic to plaintiffs' trespass to chattels count and their negligence count (and not their NIED count). (*Plotnik, supra*, 208 Cal.App.4th at p. 1608—upholding emotional distress damages on the trespass to personal property claim.) The court expressly held that the negligence count would not support parasitic emotional distress damages, but the trespass to chattels claim would. (*Id.* at p. 1608—"[W]e uphold both the economic and emotional distress damages plaintiffs recovered for trespass to personal property arising from Meihaus's act of intentionally striking Romeo with a bat.") Thus, even though the demurrer to this count must be sustained, the general damages alleged in the Second cause of action (at ¶ 31) can be read to include parasitic emotional distress damages.

- *Fifth Cause of Action (Intentional Infliction of Emotional Distress)*

The elements of the tort of intentional infliction of emotional distress are: 1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiffs suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. (*Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 593.) Defendant's conduct must be directed primarily at the plaintiff or occur in the presence of a plaintiff of whom the defendant was aware. (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903; *Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 875; *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1002.)

Defendant argues plaintiffs cannot allege IIED for four reasons. First, there are no allegations supporting plaintiffs' contention that defendant intended to cause, or had reckless disregard for causing, plaintiffs harm. Second, there are no facts supporting their conclusory allegation that defendant's acts were outrageous. Third, defendant's acts were directed at the animals, and not the animals' owners. Fourth, no act of defendant was committed in plaintiffs' presence. Its alleged intentional act – manufacturing horse feed that contained monensin – occurred at its factory, outside plaintiffs' presence.

First, as to allegations of intent or reckless disregard, plaintiffs' allegations are sufficient and are not conclusory. They allege defendant knew monensin was toxic and lethal to horses, and knew it had sold contaminated feed in the past which caused sickness and death to horses, and that defendant willfully and deliberately failed to take corrective action and thus it continued to manufacture horse feed contaminated with monensin. This adequately alleges either intent to manufacture tainted feed, or reckless disregard of this: it had to know or recklessly disregard that the feed was contaminated since it deliberately failed to take measures to ensure it would not be. Then, plaintiffs allege that defendant acted with specific intent to cause, or with a knowing and reckless disregard for causing, severe emotional distress to their customers, including plaintiffs. On demurrer, these allegations are accepted as true. (*Gervase v. Superior Court* (1995) 31 Cal.App.4th 1218, 1224.) Defendant is demanding plaintiffs allege evidentiary facts rather than ultimate facts, which is not required at the pleading stage. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550.)

Second, as for extreme and outrageous conduct, the type of conduct that will support an IIED claim “must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.” (*McMahon, supra*, 176 Cal.App.4th at p. 1515.) “[T]he court determines whether severe emotional distress can be found; the jury determines whether on the evidence it has, in fact, existed.” (*Plotnik, supra*, 208 Cal.App.4th at p. 1614.) Knowingly or recklessly allowing contamination of horse feed, and then putting that product into the stream of commerce, knowing other animals had previously died from defendant's contaminated feed, and that more animals would likely die due to the failure to take measures to prevent cross-contamination of the feed could be considered extreme and outrageous conduct sufficient to result in liability for the emotional distress this would cause horse owners.

The third and fourth points are considered together. The rule is that the outrageous conduct must *either* be directed at plaintiff *or* occur in the presence of a plaintiff of whom the defendant is aware. (*McMahon, supra*, 176 Cal.App.4th at p. 1516.) However, as the California Supreme Court recognized in both *Christensen* and *Potter*, if reckless conduct is the basis for alleging this tort, plaintiff must be present at the time of the conduct. (*Christensen, supra* at p. 905—“Where reckless disregard of the plaintiff's interests is the theory of recovery, the presence of the plaintiff at the time the outrageous conduct occurs is recognized as the element establishing a higher degree of culpability which, in turn, justifies recovery of greater damages by a broader group of plaintiffs than allowed on a negligent infliction of emotional distress theory.” *Potter, supra*, 6 Cal.4th at pp. 1001-1002, quoting this language from *Christensen*.) Plaintiffs' argument misapprehends this point, as they concede they were not present at the time

of the outrageous conduct, but rely on alleging defendant's conduct was "directed at" them with reckless disregard. But if *reckless disregard* is alleged, *presence must* be alleged. (See, e.g., *Catsouras v. Department of California Highway Patrol, supra*, 181 Cal.App.4th 856, 875—finding plaintiffs' reliance on reckless disregard insufficient because they had not alleged they were present when the outrageous conduct took place.)

Even so, the allegations are sufficient to withstand demurrer, since plaintiffs have also alleged that defendant's conduct was directed at them *with the specific intent to cause severe emotional distress and mental anguish*. In *Catsouras*, the court found that plaintiffs' IIED cause of action survived demurrer because they had alleged defendants acted "with the intention of causing' emotional distress to decedent's close family members." (*Catsouras, supra*, 181 Cal.App.4th at p. 875.) In ruling on demurrer the allegations of the complaint are to be liberally construed. (*Id.*) Defendant's argument that its conduct was directed at the animals that would consume the feed is not well taken, as its marketing and selling efforts were necessarily directed at the horse owners, and not the horses themselves.

- *Sixth Cause of Action (Fraud)*

In order to state a cause of action for fraud, Plaintiffs must allege: (1) a representation; (2) that is false; (3) made by defendant with knowledge of its falsity, or made with reckless disregard for its truth (*scienter*); (4) with the intent that the plaintiff rely on the representation; (5) plaintiff reasonably relied on the representation; (6) harm suffered by the plaintiff; (7) which was caused by plaintiffs reliance on the misrepresentation. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974-977, *as modified* (July 30, 1997).)

An exception to the strict pleading standard for fraud has been recognized when it appears that the facts lie more within defendant's knowledge than plaintiff's; less specificity is required where "defendant must necessarily possess full information concerning the facts of the controversy." (*Committee On Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216.) Furthermore, where the alleged misrepresentations are numerous and are made to many different people (as in public advertisements), plaintiff may set forth a representative selection thereof. (*Id.*—noting this represented a reasonable accommodation between defendant's right to specific pleading and the importance of "avoiding pleading requirements so burdensome as to preclude relief.")

Motion to Strike:

Defendant moves to strike all emotional distress allegations, all punitive damage allegations, all fraud allegations, and all allegations regarding "irrelevant prior events."

- *Allegations Regarding Prior Events*

The court considers this request first, as these allegations form a substantive part of plaintiffs' allegations. Defendant's citation to *Holdgrafer v. Unocal Corp.* (2008) 160

Cal.App.4th 907, 928 is not persuasive. First, it was not a pleading case, but was discussing what evidence should and should not have been admitted at trial. Second, the alleged conduct here is similar to the past conduct. These allegations are relevant to supporting plaintiffs' allegations that defendant had actual knowledge its horse feed was contaminated, and that it willfully, intentionally, and deliberately continued to manufacture and sell that contaminated feed. The admissibility of evidence is not considered on demurrer and motion to strike. Furthermore, to the extent plaintiffs do not use evidence of past events to prove their present conduct (i.e., to the extent it is used to establish defendant knew its processes needed to be revised and corrected in order to avoid further contamination, and that it knew the dire consequences of not doing so), it may be admissible. Circumstantial evidence is admissible to establish motive, knowledge or state of mind since direct evidence on such facts is rarely available. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 786.)

- *Emotional Distress Allegations*

Based on the ruling on demurrer, the motion to strike regarding this issue is moot.

- *Punitive Damage Allegations*

Plaintiffs have alleged sufficient facts to support their claims for punitive damages. They have alleged defendant had "actual knowledge that its horse feed was contaminated with monensin," and yet "deliberately continued to manufacture and sell contaminated feed, specifically intending that it would be sold to consumers . . . and fed to horses." (Compl., ¶¶ 8, 15, and 46.) They allege this caused the sudden violent death and/or illness of their horses. Moreover, conscious disregard of safety (i.e., short of deliberate intention) is sufficient to support a claim for punitive damages in products liability cases. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 808.) Also, Civil Code section 3340, which provides that wrongful injury to animals which are subjects of property if "committed willfully or by gross negligence, in disregard of humanity," will support punitive damages. Plaintiffs have expressly alleged defendant acted "willfully or with gross negligence to cause injury to horses consuming contaminated and toxic feed, including plaintiffs' horses, in disregard of humanity" (Compl. ¶¶ 32, 37, 49, 57, 76, 84, 92, 101), and have alleged facts sufficient to support that allegation.

- *Fraud Allegations*

Alleging fraud requires an intentional representation, deceit or concealment of material facts known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury. (Civ. Code § 3294, subd. (c)(3).) As discussed above, plaintiffs have alleged intentional conduct, and with sufficient specificity at the pleading stage. Allegations of the elements of knowledge and intent are facts which are sufficiently alleged by general averment:

[Fraudulent intent] is a fact which ought to be averred...[but]...[n]o amount of circumlocution or amplification can

Tentative Rulings for Department 502

(6)

Tentative Ruling

Re: **Rio Mesa Holdings, LLC v. Fidelity National Title Insurance Company**
Superior Court Case No.: 13CECG00867

Hearing Date: November 22, 2016 (**Dept. 502**)

Motion: By Defendant Fidelity National Title Insurance Company to tax costs

Tentative Ruling:

To deny, without prejudice, as premature. Fidelity may refile the motion after the issuance of a remittitur from the Court of Appeal or entry of a new judgment following a retrial, as appropriate.

Explanation:

Plaintiff Rio Mesa Holdings, LLC, has appealed from the Court's order conditionally granting a new trial and, at this point at least, has not accepted the Court's remittitur. Defendant Fidelity National Title Insurance Company has appealed from the judgment as well as the Court's orders denying its motion for judgment notwithstanding the verdict its motion for new trial.

A plaintiff is not the prevailing party when it does not accept a trial court's conditional new trial order. Until the matter is retried, it is not possible to determine who is the prevailing party. (*Dell'Oca v. Bank of New York Trust Co., N.A.* (2008) 159 Cal.App.4th 531, 559.)

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

Tentative Ruling

Issued By: DSB on 11/21/16
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: **AMP Trucking, Inc. v. Narvinder Singh dba Prince Transport**
Superior Court Case No. 15 CECG 01720

Hearing Date: November 22, 2016 (**Dept. 502**)

Motions: (1) By Plaintiff to amend his Answer;
(2) By Plaintiff to file a Cross-Complaint

Tentative Ruling:

To the grant the motions. The amended Answer and the Cross-Complaint must be filed within 3 days of notice of the ruling. Notice runs from service of the Minute Order plus 5 days for service via mail. [CCP § 1013]

Explanation:

Background

Defendant owns and operates a business known as Prince Transport. It is alleged that at some point in time, he offered to form a partnership with the Plaintiff. The Plaintiff alleges that it was to purchase an automobile, trucks, and trailers (hereinafter referred to as the "Property") and the Defendant was to use these vehicles in his business. The profits earned were to be split. The Property includes:

- a. 2012 Peterbilt Truck (VIN 126671);
- b. 2007 Freightliner Truck (VIN 67193);
- c. 2013 Great Dane Trailer (S/N 703661);
- d. 2010 Trailer (S/N 936027);
- e. 2005 Trailer (S/N 400346); and
- f. BMW Automobile.

The Plaintiff alleges that it advanced money and guaranteed loans in order to purchase the Property. Plaintiff also alleges that during the course of the venture, it paid for damage to approximately two loads as a result of the Defendant's actions. Plaintiff claims that between September of 2013 and April of 2015, it expended at least **\$459,997.44** pursuant to the venture. Plaintiff alleges that the Defendant absconded with the Property and converted it to his own use.

On June 1, 2015, Plaintiff filed a complaint alleging 9 causes of action:

- 1. Breach of Fiduciary Duties;
- 2. Violation of California's Unfair Business Practices Act;
- 3. Negligence;
- 4. Breach of Contract;
- 5. Breach of the Implied Covenant of Good Faith and Fair Dealing;

6. Unjust Enrichment;
7. "Constructive Trust/Equitable Lien & Accounting";
8. "Specific Recovery of Personal Property"; and
9. Conversion.

Defendant, representing himself, filed an Answer on July 6, 2015.

On August 16, 2016, a substitution of attorneys form was filed with the Court and Peter Sean Bradley substituted in as Defendant's counsel. On September 27, 2016, Defendant filed separate motions seeking leave to amend his Answer and seeking leave to file a Cross-Complaint. The proposed amended answer is attached to the Declaration of Bradley as required pursuant to CRC 3.1324(a)(1). The proposed Cross-Complaint is attached to the Declaration of Bradley filed in support of the motion seeking leave to file the Cross-Complaint. Opposition and a reply were filed.

Merits

Leave to file Amended Answer

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

Motions for leave to amend the pleadings are directed to the sound discretion of the judge. "The court *may*, in *furtherance of justice*, and on any terms as may be proper, allow a party to amend any pleading ..." [CCP § 473(a)(1)] Courts usually display great liberality in allowing amendments to answers because "a defendant denied leave to amend is permanently deprived of a defense." [*Hulsey v. Koehler* (1990) 218 CA3d 1150, 1159—but matter still discretionary]

The policy favoring amendment is so strong that denial of leave to amend can rarely be justified: "If the motion to amend is *timely* made and the granting of the motion will *not prejudice* the opposing party, it is *error to refuse* permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion." [*Morgan v. Sup.Ct.* (1959) 172 Cal.App.2d 527, 530; see *Mabie v. Hyatt*, supra, 61 Cal.App.4th at 596; *Bettencourt v. Hennessy Indus., Inc.* (2012) 205 Cal.App.4th 1103, 1111—abuse of discretion to deny leave to amend when there is a "reasonable possibility" that defect can be cured]

Ordinarily, the judge will *not* consider the validity of the proposed amended pleading in deciding whether to grant leave to amend. Grounds for demurrer or motion to strike are premature. After leave to amend is granted, the opposing party will have the opportunity to attack the validity of the amended pleading. [See *Kittredge Sports Co. v. Sup.Ct. (Marker, U.S.A.)* (1989) 213 Cal.App.3d 1045, 1048]

Here, the Plaintiff attacks the fourth affirmative defense of the proposed amended Answer. But, as stated *supra*, the Court will not consider the validity of a proposed amended pleading in its determination. See *Kittredge Sports Co.*, *supra*. To reiterate, a defendant is usually granted a great deal of deference vis a vis leave to amend an Answer. See *Hulsey*, *supra*. Therefore, the motion seeking leave to file an Amended Answer will be granted.

Leave to file a Cross-Complaint

If a defendant's cause of action against plaintiff is *related* to the subject matter of the complaint, then it *must* be raised by cross-complaint ... failure to plead it will *bar* defendant from asserting it in any later lawsuit. [CCP § 426.30; see *AL Holding Co. v. O'Brien & Hicks, Inc.* (1999) 75 CA4th 1310, 1313–1314] A defendant's cross-complaint is compulsory if the cause of action “arises out of the *same transaction, occurrence, or series of transactions or occurrences* as the cause of action ... in (the) complaint.” [CCP § 426.10(c) (emphasis and parentheses added)] Causes of action arise out of the “same transaction or occurrence” if the factual or legal issues are *logically related*. They need not be absolutely identical. The basic approach is to avoid duplication of time and effort. [*Currie Medical Specialties, Inc. v. Bowen* (1982) 136 CA3d 774, 777; *Align Tech., Inc. v. Bao Tran* (2009) 179 CA4th 949, 965]

At any time during the course of the lawsuit, the court retains power to permit defendant to file or amend a cross-complaint to avoid forfeiture of defendant's “related” claim. Indeed, the court “shall grant” leave as long as defendant is acting in good faith. [CCP § 426.50; see *Silver Organizations Ltd. v. Frank* (1990) 217 CA3d 94, 98–99—even on “eve of trial,” leave to file compulsory cross-complaint mandatory absent bad faith] As for “good faith”, one case holds that the court has a “modicum of discretion” in this regard. See *Sidney v. Sup. Ct. (Kinoshita)* (1988) 198 Cal.App.3d 710, 718. But, another case disagrees and holds that “absent findings of bad faith based upon **substantial** evidence”; the court has no discretion to refuse leave. See *Silver Organizations, Ltd. v. Frank*, *supra*.

In support of its opposition, Plaintiff requests judicial notice of Defendant Narvinder Singh's Labor Commissioner Complaint, filed on February 11, 2015 and the Business Entity printout for AMP Trucking from the Secretary of State website (sos.ca.gov) printed on October 28, 2016. See Exhibits 1 and 2 attached to the Request. The request will be granted pursuant to Evidence Code § 452(c); but **only** as to the fact that these documents were filed. “Judicial notice of the authenticity and contents of an official document does not establish the truth of all recitals therein, nor does it render inadmissible matter admissible. (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 C4th 1057, 1063.

More importantly, the proposed Cross-Complaint appears to be compulsory in that it arose out of the same series of transaction as the Complaint. See Complaint at ¶ 6 and ¶11 of the proposed Cross-Complaint. Notably, the opposing party mistakenly treats the motion as one to file an amended Cross-Complaint and attacks the validity of the causes of action. But, this is not the motion at bench. Instead, the **only** grounds for opposition to the filing of a compulsory cross-complaint are whether the Defendant

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Tentative Ruling

Re: **Andrew Warren v. Pam Ahlin, Cliff Allenby, Audrey King, Brandon Price and Jack Carter**
Superior Court Case No. 15 CECG 00978

Hearing Date: November 22, 2016 (**Dept. 502**)

Motion: Summary Judgment by Defendants

Tentative Ruling:

To treat the motion for summary judgment as a motion for judgment on the pleadings and grant with leave to amend. An amended complaint in **strict compliance** with the ruling is to be filed within 10 days of notice of the ruling. Notice runs from the date that the Clerk serves the Minute Order plus 5 days for service via mail. [CCP § 1013]

The trial date is vacated.

Oral argument on this motion will be continued to December 6, 2016 at 3:30 p.m. in Dept. 502 to allow time for the tentative ruling to be mailed to the Plaintiff. His address is:

Andrew Warren, CO-000143-8, Unit 11, Coalinga State Hospital, 24511 West Jayne Avenue, P. O. Box 5003, Coalinga, CA 93210-5004.

Explanation:

As Defendants acknowledge at page 4 lines 18-22 of their Memorandum of Points and Authorities filed in support of the motion, a summary judgment motion must show that the “*material facts*” are undisputed (CCP § 437c(b)(1)). The pleadings serve as the “outer measure of materiality” in a summary judgment motion, and the motion may not be granted or denied on issues not raised by the pleadings. [*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74—“the pleadings determine the scope of relevant issues on a summary judgment motion”; *Hutton v. Fidelity Nat’l Title Co.* (2013) 213 Cal.App.4th 486 at 493—summary judgment defendant need only “negate plaintiff’s theories of liability as *alleged in the complaint*; that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings” (emphasis in original)]

In the motion at bench, the Complaint filed on March 16, 2016 consists of a Judicial Form Complaint used for “personal injury, property damage and wrongful death”, a one-page cause of action alleging “Intentional Tort” and a **22-page** attachment consisting of a rambling narrative along with a series of exhibits. Only one fact is clear--on December 12, 2014, Plaintiff was an involuntary resident at Coalinga

State Hospital and was attacked by another involuntary resident. In support of their motion for summary judgment, Defendants submit:

“While the complaint and its single cause of action are for an **unspecified** ‘intentional tort’, it also contains **references** to rights under the State and Federal Constitutions. Plaintiff has **not** alleged any California constitutional provision that was violated and that would give rise to a private cause of action. As to any federal constitutional claims, the undisputed facts will show that no defendant was personally involved in any act that violated plaintiff’s constitutional rights.” [boldface added]

See Defendants’ Memorandum of Points and Authorities at page 1 lines 22-26. Accordingly, it strongly appears that the Defendants are uncertain as to the claims being brought.

Defendants move for summary judgment:

“...on the grounds that there is no evidence that supports plaintiff’s allegations that they intentionally caused harm to him or were involved in any act that gave rise to a cause of action for a violation of a federally protected right under 42 U.S.C. § 1983. *To the extent* that plaintiff raises issue Under the California Constitution, he cannot allege a provision that provides a private right of action. Finally, *to the extent* he raises statutory claims under state law, he has failed to allege causes of action and defendants are immune from liability.” [Italics added]

See Defendants’ Memorandum of Points and Authorities at page 5 lines 16-21. Again, these grounds indicate that the “material facts” are far less than clear.

A defendant’s motion for summary judgment or summary adjudication “necessarily includes a test of the sufficiency of the complaint” and its legal effect is the same as a demurrer or motion for judgment on the pleadings. [See *American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1118; *Prue v. Brady Co./San Diego, Inc.* (2015) 242 Cal.App.4th 1367, 1377] When a motion for summary judgment is used to test whether the complaint states a cause of action, the court must accept the allegations of the complaint as true. It cannot consider facts alleged in opposing declarations. [*American Airlines v. County of San Mateo*, *supra*, 12 Cal.4th at 1118; *Koehrer v. Sup.Ct. (Oak Riverside Jurupa, Ltd.)* (1986) 181 Cal.App.3d 1155, 1171 (disapproved on other grounds in *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654]

Given the confusing nature of the Complaint, the Court will treat the motion for summary judgment as a motion for judgment on the pleadings and grant with leave to amend. [*American Airlines, Inc.*, *supra*.] In amending his pleading, Plaintiff is advised, subject to limited exceptions, public entities **are immune from liability for injuries** caused by any prisoner or to any prisoner while an inmate of a “prison, jail or penal or correctional facility.” (A person under arrest becomes a “prisoner” upon his or her initial entry into a law enforcement facility for *booking*.) [Gov.C. §§ 844, 844.6; see *Teter v. City of Newport Beach* (2003) 30 Cal.4th 446, 451-454—person arrested and jailed for

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