Tentative Rulings for May 10, 2022
Department 501

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).)

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

21CECG01880 ***Oscar Porras v. General Motors, LLC*** **is continued to Thursday, May 12, 2022 at 3:30 p.m. in Department 501.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 501

Begin at the next page

(35)

Tentative Ruling

Re: ***Adamo, et al. v. Clark Pest Control, Inc., et al.***
Superior Court Case No. 20CECG00418

Hearing Date: May 10, 2022 (Dept. 501)

Motion: by Plaintiffs for Order Approving PAGA Settlement

Tentative Ruling:

To grant plaintiffs' motion to approve PAGA settlement, appointment of settlement administrator, and award of attorney's fees.

In the event of a timely request for oral argument, such argument will be conducted on May 12, 2022, at 3:30 p.m. in Department 501.

Explanation:

1. Introduction

"The superior court shall review and approve any settlement of any civil action filed pursuant to [PAGA]. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court." (Lab. Code, § 2699, subd. (i)(2).)

There are very few cases discussing section 2699, and none discuss the standards under which a court is to assess a settlement. Nor has the legislature provided any structure or standards for making the assessment. Published California case law has not done so either. However, the common practice when ruling on PAGA settlements seems to be to follow existing law on class action settlements.

2. Notice to LWDA

Labor Code section 2699, subdivision (l)(2), states: "The superior court shall review and approve any settlement of any civil action filed pursuant to this part. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court."

Here, plaintiffs' counsel states that notice of the settlement was given to the LWDA on March 15, 2022. (Migliazzo Decl., ¶ 96, and Exhibit 8.) Therefore, plaintiffs has complied with the requirement to give notice of the settlement to the LWDA.

3. Is the Settlement Fair and Reasonable?

As discussed above, there is no authority regarding what constitutes a fair and reasonable settlement under PAGA. However, the same standards appear to apply to PAGA settlements as to settlements of class actions.

"[A court must be] provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.) In *Clark v. American Residential Services, LLC*, (2009) 175 Cal.App.4th 785, the Court of Appeal stated that, "[the] court [must] receive and consider sufficient information on a core legal issue, affecting the strength of the case for plaintiffs on the merits, to make the requisite independent assessment of the reasonableness of the terms of the settlement." (*Id*. at p. 798.)

"The well-recognized factors that the trial court should consider in evaluating the reasonableness of a class action settlement agreement include 'the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.' This list 'is not exhaustive and should be tailored to each case.' Relying on an earlier edition of Newberg on Class Actions, the court in *Dunk* asserted that 'a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.'" (*Kullar, supra*, 168 Cal.App.4th at p. 128, internal citations omitted.)

"'"The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement."' The court 'must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case,' but nonetheless it 'must eschew any rubber stamp approval in favor of an independent evaluation.'" (*Id*. at p. 130, internal citations omitted.)

Here, plaintiffs are settling the PAGA claims for a gross payment of $150,000, with $50,000 deducted for attorney's fees, $4,000 in litigation costs, and $3,000 for administration costs. 75 percent of the net settlement will be paid to the LWDA as required by statute, and the aggrieved employees will receive the remaining 25 percent, apportioned among them based on how many pay periods they worked during the subject time period. There are only approximately 148 aggrieved employees, and the average payment to each employee is estimated to be $157.09.

It does appear that the amount of the settlement is fair and reasonable under the circumstances. Plaintiffs' counsel states that the maximum amount that plaintiff could have obtained for PAGA penalties under his various causes of action would have been $546,800. However, plaintiffs' counsel believes that settling the claims for $150,000 is fair, adequate, and reasonable under the circumstances given the strength of the defenses raised by defendants, the risks of litigation, and the uncertainty of the law regarding some of plaintiffs' claims.

Also, plaintiffs' counsel notes that the number of aggrieved employees here is relatively small, and therefore subject to a smaller initial violation rate. In addition, plaintiffs' counsel points out that courts rarely award the full amount of penalties that are

potentially available under PAGA, as such penalties are often seen as unduly punitive, and often reduce the penalties. Thus, plaintiffs' counsel has adequately shown that the gross amount of the settlement is reasonable given the risks and uncertainties of litigation, even though the total amount potentially available to the aggrieved employees is considerably more than $150,000.

The settlement was also reached after discovery and arm's length negotiations between the parties, which suggests that it is fair and reached without collusion. (*Anderson v. Nextel Retail Stores, LLC* (C.D. Cal. 2010) 2010 U.S. Dist. LEXIS 43377, 44.) In addition, the settlement will not bar the aggrieved employees from bringing their own individual Labor Code claims in the future, as it simply disposes of the PAGA claim brought by the named plaintiffs here. Therefore, it appears that the gross settlement amount is fair, adequate, and reasonable.

4. Attorney's Fees and Costs:

Plaintiff's counsel has requested an award of $50,000 in attorney's fees, which is 33 percent of the gross settlement. Courts have approved awards of fees in class actions that are based on a percentage of the total common fund recovery. (*Laffitte v. Robert Half Int'l.* (2016) 1 Cal.5th 480, 503.) It appears that the same reasoning would apply to PAGA settlements, which bear similarities to class actions. Thus, plaintiff's counsel's request for an award equal to 1/3 of the total gross settlement is not necessarily unreasonable. However, the court may also perform a lodestar calculation to double check the reasonableness of the fee request. (*Id.* at pp. 504-506.)

Here, the request for $50,000 in fees appears to be reasonable, especially in light of the fact that counsel incurred over 277 hours of attorney time in working on the case billed at $100 to $650 per hour, which resulted in total fees of over $115,000. (Migliazzo Decl., ¶ 91.) Under the Laffey Matrix, the lodestar would be $189,054. (*Ibid.*) The requested fees are thus far less than the total fees incurred in the case by counsel. Even if the court takes into account the fact that a portion of the fees were likely incurred in litigating the individual claims of the named plaintiffs, it still appears that the amount of fees is reasonable. The court notes that counsel will also receive a separate fee payment from the settlement of the individual plaintiff's claims, in the amount of $116,667.67. When taking into account this additional payment, counsel will be receiving $166,667.67 in fees, which does not exceed the lodestar of $189,054. (*Ibid.*) Therefore, the court intends to approve the award of attorney's fees.

5. Payment to Named Plaintiffs:

The individual plaintiffs are not receiving an enhancement award from the gross settlement. Instead, they are receiving a separate payment of $350,000 for settling their individual claims for wrongful termination and retaliation. They are not seeking any enhancement award from the PAGA settlement to increase the recovery of the other aggrieved employees. Therefore, there is no need to analyze the reasonableness of the payment to plaintiffs.

6. Administration Costs:

Simpluris will receive a maximum of $3,000 to administer the settlement. Simpluris estimates that the costs to administer will exceed the fee, at $3,340. The amount of administration costs appear to be reasonable as outlined by Simpluris's prepared statement. (Springer Decl., ¶ 9, and Exh. C.) Therefore, the court intends to find that the administration costs are reasonable, and it will approve the appointment of Simpluris as the settlement administrator.

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: DTT on 5/4/2022.
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Reich v. Srabian, et al.***
Superior Court Case No. 21CECG02078

Hearing Date: May 10, 2022 (Dept. 501)

Motion: Defendants Morris S. Srabian, Lucille Srabian, individually and as Trustee of Morris S. Srabian and Lucille L. Srabian Revocable Living Trust Agreement Dated August 20, 2009, as Amended and Restated on May 14, 2019's (collectively, "Defendants") Demurrer to the Complaint and Motion to Strike Portions of the Complaint

Tentative Ruling:

To continue the demurrer to Thursday, June 9, 2022, at 3:30 p.m., in order to allow the parties to meet and confer *in person or by telephone*, as required. If this resolves the issues, Defendants' counsel shall call the court to take the motion off calendar. If it does not resolve the issues, Defendants' counsel shall file a declaration, on or before Thursday, June 2, 2022, at 5:00 p.m., stating the efforts made.

To take the motion to strike off calendar, since no moving papers were filed.

In the event of a timely request for oral argument, such argument will be conducted on May 12, 2022, at 3:30 p.m. in Department 501.

Explanation:

Defendants did not satisfy their requirement to meet and confer prior to filing the demurrer. Code of Civil Procedure section 430.41 makes it very clear that meet and confer must be conducted "in person or by telephone" and that the purpose for this is to determine "whether an agreement can be reached that would resolve the objections to be raised in the demurrer." (*Id.*, subd. (a).) While the moving parties have presented a declaration stating that attempts were made to meet and confer on or about August 25, 2021 and on or about September 1, 2021, the declaration was executed on September 27, 2019, *prior to* when the attempts made. Moreover, notwithstanding the execution date defect, the declaration fails to identify how the meet and confer was conducted, i.e., in person or by telephone.

The parties must engage in good faith meet and confer, in person or by telephone, as set forth in the statute. The court's normal practice is to take such motions off calendar, subject to being re-calendared once the parties have met and conferred. Presently, however, court's calendar is extremely congested, so rather than take the motion off

calendar, the court will continue the hearing to allow the parties to meet and confer. Only if demonstrated efforts are unsuccessful will the court rule on the merits.

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: DTT on 5/5/2022.
(Judge's initials) (Date)

(20)

Tentative Ruling

Re: ***Tutelian & Company, Inc. v. Arias et al.***
Superior Court Case No. 21CECG02805

Hearing Date: May 10, 2022 (Dept. 501)

Motion: by Defendant Miguel Arias to Strike Complaint

Tentative Ruling:

To grant and strike the Complaint as to defendant Miguel Arias only. (Code Civ. Proc., § 425.16.) Arias is directed to submit to this court, within 5 days of service of the minute order, a proposed Judgment consistent with the court's order.

In the event of a timely request for oral argument, such argument will be conducted on May 12, 2022, at 3:30 p.m. in Department 501.

Explanation:

A special motion to strike provides a procedural remedy to dismiss nonmeritorious litigation meant to chill the valid exercise of the constitutional rights to petition or engage in free speech. (Code Civ. Proc., §425.16, subd. (a); see *Martinez v. Metabolife Intern., Inc*. (2003) 113 Cal.App.4th 181, 186.)

The court engages in a two-step process in determining whether an action is subject to the anti-SLAPP statute: first, the court decides whether defendant has made a threshold showing that the challenged cause of action is one arising from protected activity, by demonstrating that the facts underlying plaintiff's complaint fit one of the categories set forth in section 425.16, subdivision (e); if the court finds that such a showing has been made, it then determines whether plaintiff has demonstrated a probability of prevailing on the claim. (Code Civ. Proc., §425.16; *Cross v. Facebook, Inc*. (2017) 14 Cal.App.5th 190, 198.)

In this action plaintiff asserts two fraud causes of action against moving party Miguel Arias, Fresno City Council member: the second for false promise, and the third for intentional misrepresentation. The causes of action are based on implied or explicit promises by Arias, on behalf of the City of Fresno, to extend an Exclusive Negotiation Agreement (the ENA), or to negotiate in good faith to extend the ENA. This promise was allegedly made in exchange for plaintiff's relinquishment of a claim against the City relating to the City's alleged breach of a Leasing Agreement, leasing downtown parking spaces at a space known as "Lot 2." Though the ENA was in fact extended multiple times after these promises, plaintiff contends that it was done in a manner that ultimately sabotaged the redevelopment project, resulting in the termination of the ENA on 2/4/21 when it was not renewed again. Plaintiff contends that this was done in retaliation by Arias for plaintiff's rejection of Arias' alleged bribe solicitations.

Prong 1: Whether Plaintiff's Action Arises From Defendants' Constitutionally Protected Speech

The moving party first has the burden of showing that the action against it arises from the exercise of free speech rights and/or right to petition. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658.) A protected activity is "any act" that is completed "in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue." (Code Civ. Proc., § 425.16, subd. (b)(1).)

Plaintiff does not dispute that Arias establishes the first prong – that the causes of action alleged against him arise out of protected activity. Instead, plaintiff contends that he meets his burden on the second prong, and for that reason the motion should be denied.

Prong 2: Probability of Success

A plaintiff's complaint need only be shown to have "minimal merit". (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 279; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89, 95.) The plaintiff must show that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. (*Navellier*, *supra*, 29 Cal.4th at 88-89.) In considering this issue, the court looks at the " 'pleadings, and supporting and opposing affidavits … upon which the liability or defense is based.' " (*Soukup*, *supra*, 39 Cal.4th at p. 269.)

The plaintiff must show: (1) a legally sufficient claim (i.e., a claim which, if supported by facts, is sustainable as a matter of law); and (2) that the claim is supported by competent, admissible evidence within the declarant's personal knowledge. (See *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 654-655 and *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568.) It has been stated that this test is similar to the standard applied in summary judgment motions pursuant to Code Civ. Proc. § 437c; to wit, the plaintiff's burden is to demonstrate a prima facie case. (*Church of Scientology*, *supra* at 654, fn. 10.)

Initially the court notes that all objections to the Cliff Tutelian declaration are sustained. Many parts of the declaration lack foundation or personal knowledge, or consist of bare conclusions or argument. Not all of the objections are damaging to plaintiff's case, but many go to Arias' alleged retaliatory actions and motivation behind those actions (i.e., evidence of not negotiating in good faith) and the elements of the two fraud causes of action. This severely diminishes the effectiveness of the opposition in showing that the causes of action against Arias have minimal merit.

Second Cause of Action – Fraud (False Promise)

CACI 1902 sets forth the elements of the cause of action:

> [*Name of plaintiff*] claims [he/she/*nonbinary pronoun*] was harmed because [*name of defendant*] made a false promise. To establish this claim, [*name of plaintiff*] must prove all of the following:
> 1. That [*name of defendant*] **made a promise** to [*name of plaintiff*];
> 2. That [*name of defendant*] did not intend to perform this promise when [he/she/*nonbinary pronoun*] made it;
> 3. That [*name of defendant*] intended that [*name of plaintiff*] rely on this promise;
> 4. That [*name of plaintiff*] reasonably relied on [*name of defendant*]'s promise;
> 5. That [*name of defendant*] did not perform the promised act;
> 6. That [*name of plaintiff*] was harmed; and
> 7. That [*name of plaintiff*]'s reliance on [*name of defendant*]'s promise was a substantial factor in causing [his/her/*nonbinary pronoun*/its] harm.

(Bold emphasis added.)

As a threshold matter the cause of action is problematic because it is based on an implied promise. Paragraph 53 of the Complaint contains the allegations regarding the "promise." First it alleges that "the City induced Plaintiff to withdraw his 1st Claim by refusing to perform on the terms of the ENA related to extensions unless and until Plaintiff withdrew his 1st Claim." There is no promise alleged in this sentence, whether to perform or do anything else. The next sentence contains the *implied* promise: "Implied in the City's promise to perform was that the City would act in good faith regarding the Plaintiff s acquisition of Lot 2 — one of the purposes of the ENA." (Complaint ¶ 53; see also Tutelian Decl.) Accordingly, the cause of action is premised on what plaintiff believes Arias implied through its conduct.

Plaintiff cites to no authority providing that a promissory fraud cause of action can be based on an implied promise to do something. "[I]n a promissory fraud action, to sufficiently alleges defendant made a misrepresentation, the complaint must allege (1) the defendant **made a representation** of intent to perform some future action, i.e., the defendant made a promise, and (2) the defendant did not really have that intent at the time that the promise was made, i.e., the promise was false." (*Beckwith* v. *Dahl* (2012) 205 Cal.App.4th 1039, 1060, emphasis added.)

Plaintiff in the opposition points to ¶¶ 17 and 53 of the Complaint as allegations of promise to perform. (Oppo. 14:18-25.) Paragraph 53, as discussed above, does not contain any explicit promise. In ¶ 17, plaintiff alleges, "Although the City had rejected the 1st Claim on August 30, 2019, the City and Plaintiff mediated the 1st Claim on September 5, 2019, with an agreement reached wherein the City would extend the ENA if Plaintiff agreed to withdraw his 1st Claim." If this is the promise on which the cause of action is based, this promise was fulfilled. The City extended the ENA twice. (See Complaint ¶¶ 20, 27.) Plaintiff does not allege or submit proof of any particular parameters of the promise to extend the ENA. There was no promise to extend it any particular number of times, or for any specific amount of time per extension. It cannot be shown that the "promise to

extend the ENA" was in bad faith when it was in fact extended twice after the implied promise was made. To the extent that plaintiff contends that the promise was to act in good faith in extending the ENA, that is not only very vague, but it is implied and not explicit at all.

Plaintiff has not shown that the second cause of action has minimal merit.

Third Cause of Action – Intentional Misrepresentation

> [*Name of plaintiff*] claims that [*name of defendant*] made a false representation that harmed [him/her/*nonbinary pronoun*/it]. To establish this claim, [*name of plaintiff*] must prove all of the following:
> 1. That *[name of defendant*] represented to [*name of plaintiff*] that a fact was true;
> 2. That [*name of defendant*]'s representation was false;
> 3. That [*name of defendant*] knew that the representation was false when [he/she/*nonbinary pronoun*] made it, or that [he/she/*nonbinary pronoun*] made the representation recklessly and without regard for its truth;
> 4. That [*name of defendant*] intended that [*name of plaintiff*] rely on the representation;
> 5. That [*name of plaintiff*] reasonably relied on [*name of defendant*]'s representation;
> 6. That [*name of plaintiff*] was harmed; and
> 7. That [*name of plaintiff*]'s reliance on [*name of defendant*]'s representation was a substantial factor in causing [his/her/*nonbinary pronoun*/its] harm.

(CACI 1900.)

This cause of action is based on the following representation: "in the first week of September 2019, the City, through Defendant Arias, represented to Plaintiff that they would negotiate in good faith in the ENA, if Plaintiff withdrew the 1st Claim." (Complaint ¶ 63.)

The moving papers make a good point in asserting that Arias, as a Councilmember, did not have the authority or power to perform the promise, or to make binding representations on behalf of the City, as an individual councilmember. Plaintiff offers no authority in the opposition to show the contrary.

The evidence presented demonstrates that actions related to the extension of the ENA was taken collectively by the City Council by way of motion, resolution, or ordinance, by a majority of its members. The record reflects the ENA and subsequent amendments were before the City Council for consideration, deliberation, and vote. (RFJN, nos. 1-6.) Despite plaintiff's contention, after Arias removed the next amendment extending the ENA from the 2/4/21 agenda, Councilmember Bredefeld made a motion to keep the item on the agenda, but the motion failed by 4-3 vote, and consistent with the Rules of Procedure, the City Council voted to approve the amended agenda by a 6-1 vote. (RJN Exs. 5, 6; Arias Decl., ¶ 7.) The allegation in paragraph 63 of the Complaint is that *the City* made the representation that it would act in good faith, and that the representation was made through Arias. This underscores the fact that it was the City,

through the City Council, that had the power to take action on the issues raised in the pleadings, not Arias individually.

Much of the proffered support for the opposition is whittled away by the objections made by Arias. Much of the Tutelian declaration is inadmissible, either lacking in foundation or consisting of argument and legal conclusions. "In opposing an anti-SLAPP motion, the plaintiff cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial." (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th, 204, 212.) In seeking to establish the elements of the fraud claims, defendant relies in large part on the allegations of the Complaint and the conclusory, argumentative statements by Mr. Tutelian in his declaration. There is inadequate evidence that Arias lied when he represented that the City would negotiate in good faith with regards to the ENA extensions. Plaintiff relies largely on innuendo and supposition to support his claims that the City Council's actions in regards to the ENA were motivated by revenge for Tutelian spurning Arias' demands for bribes.

And as noted above, plaintiff does not shows that Arias intended not to perform the promise to act in good faith in negotiating to extend the ENA. As noted above, it was in fact extended multiple times, and the promise alleged lacked any specifics or details as to how many times or for how long the ENA would be extended. And the final decision not to consider the last extension of the ENA was confirmed by a 6-1 vote of the City Council.

Moreover, as noted above, an element of both the second and third causes of action are that plaintiff was harmed. Tutelian merely concludes, without submitting supporting evidence, that "Plaintiff has been harmed herein by incurring fees and costs which would not have been incurred but for Defendants' promises." (Tutelian Decl., ¶ 48.) In his declaration Tutelian merely parrots the elements of the causes of action as set forth in CACI. This is not competent, admissible evidence. It is a bare legal conclusion.

The court finds that plaintiff has not submitted admissible evidence establishing the elements of the two fraud claims. For that reason the motion to strike the Complaint as against Arias should be 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: DTT on 5/9/2022 .
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Benavides v. Gudino Hauling and Transport, Inc.***
Superior Court Case No. 20CECG02790

Hearing Date: May 10, 2022 (Dept. 501)

Motion: by Insurance Company of the West to Intervene (Unopposed)

Tentative Ruling:

To grant.

In the event of a timely request for oral argument, such argument will be conducted on May 12, 2022, at 3:30 p.m. in Department 501.

Explanation:

An insurer which has paid benefits to its insured for losses caused by a third party generally has the right of subrogation against the party responsible for the loss. The insurer may sue in its own name or intervene in any action by the insured against the responsible party. (*Hodge v. Kirkpatrick Development, Inc.* (2005) 130 Cal.App.4th 540, 548.)

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: DTT on 5/9/2022.
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Martinez v. Cassio***
Superior Court Case No. 21CECG00917

Hearing Date: May 10, 2022 (Dept. 501)

Motion: by Defendant Cooper Tire & Rubber Company for Leave to File Cross-Complaint against Merle Allen Bradford, Individually and *dba* Central Tire

Tentative Ruling:

To grant, except that the court does not grant the request to deem the proposed Cross-Complaint attached to defense counsel's declaration as filed as of the date this motion is granted. Instead, cross-complainant must separately file the Cross-Complaint within 10 days of the clerk's service of the minute order.

In the event of a timely request for oral argument, such argument will be conducted on May 12, 2022, at 3:30 p.m. in Department 501.

Explanation:

No party has filed opposition to this request, and it appears that defendant's claims against the proposed cross-defendant arise from the "same transaction, occurrence, or series of transactions or occurrences" as the cause brought against it (Code Civ. Proc., § 428.10, subd. (b).) Therefore, it is in the interests of justice to allow the filing of the proposed Cross-Complaint.

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: DTT on 5/9/2022.
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Sandoval v. City of Fresno***
Superior Court Case No. 16CECG01159

Hearing Date: May 10, 2022 (Dept. 501)

Motion: Default Prove-Up

Tentative Ruling:

To deny. Plaintiffs will need to amend the Complaint and re-serve defendant Ruben Perez in order to proceed to judgment against him.

In the event of a timely request for oral argument, such argument will be conducted on May 12, 2022, at 3:30 p.m. in Department 501.

Explanation:

By defaulting, defendants admit liability for the debt or obligation only on all *well pleaded* causes of action (i.e., defendants admit all facts that are *well pleaded*). (*Morehouse v. Wanzo* (1968) 266 Cal.App.2d 846, 853.) Here, the original Complaint named only the City of Fresno, the County of Fresno, and the State of California as defendants. Doe defendants 1 through 50 were also named, but no specific acts or involvement in the accident on the part of the Doe defendants (or any of them) were alleged. The general allegations stated that on March 15, 2015, in Fresno County on Highway 180 and Cedar Avenue, employees from the Fresno Police Department, the Fresno Sheriff's Department, and the California Highway Patrol were chasing another vehicle, which caused the chased vehicle to collide with the car in which Robert and Mary Sandoval were driving, killing Mrs. Sandoval and injuring Mr. Sandoval. (Compl., ¶ 7.) The first cause of action is for wrongful death, against all defendants. The second cause of action is for negligence against all defendants.

The named defendants (City, County, and State) were all dismissed in 2017. On January 30, 2017, plaintiffs filed an "Amendment to Complaint," wherein they designated Ruben Perez as Doe 1. As noted above, the Complaint did not identify what the Doe defendants were alleged to have done, and there were no additional charging allegations made against Mr. Perez on the amendment.

The amendment was served, and the proof of service reflects that a Statement of Damages was served on Mr. Perez, and his default was entered on April 18, 2018. Plaintiff presented another round of Form CIV-100 forms, and checked the boxes to request both "Entry of Default" and "Court Judgment," when Entry of Default should not have been requested since default had already been entered. The clerk denied entry of default because plaintiff incorrectly presented separate CIV-100 forms for each plaintiff, when

the appropriate thing to do is to present <u>one</u> form for <u>all</u> defendants.[1] But the court will overlook the clerk's denial of entry of default, since Mr. Perez' default had already been entered and it has never been set aside.

Now plaintiffs seek entry of judgment, apparently only on the wrongful death cause of action, and not on Mr. Sandoval's negligence claim for his own injuries. However, no judgment can be entered because there simply were no charging allegations made against Doe 1, Ruben Perez. Therefore, he did not admit any allegation of the Complaint. As noted above, by defaulting defendants admit liability only on <u>well pleaded</u> causes of action. (*Morehouse v. Wanzo, supra,* 266 Cal.App.2d at p. 853.) At best, the only allegation against Mr. Perez is found at paragraph 13, which states, "Defendants' conduct resulted in the wrongful death of Mary Sandoval." But it is impossible to know what conduct this particular defendant is accused of doing. He is not alleged to have been the driver of the car being chased which struck Mr. and Mrs. Sandoval's vehicle, so he did not admit this by his default. He is not alleged to have been the owner of that car, so he did not admit this, either. Alternatively (since this is at least a possible contention plaintiffs may be making), he was not identified as being one of the law enforcement officers involved in the chase, so he did not admit this by his default, either. It is erroneous to grant a default judgment where the complaint fails to state a cause of action. (*Rose* v. *Lawton* (1963) 215 Cal.App.2d 18, 19-20; *Williams* v. *Foss* (1924) 69 Cal. App. 705, 707-708.) And here, unfortunately, the court must find that no cause of action is currently stated against Doe 1, Ruben Perez, since it is not stated what conduct of his caused Mary Sandoval's death.

For plaintiffs to hold Mr. Perez liable for any of their damages, they will need to amend the Complaint, which will have the effect of "opening" the default. (*Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1744 [material amendment to a complaint opens the default].) Thus, they will need to serve him again with the Amended Summons and Complaint, and the Statement of Damages (note: this should be <u>one</u> Statement of Damages for <u>all</u> plaintiffs, not separate Statements of Damages for each), and he will have an opportunity to answer the amended Complaint. Then, if he defaults, plaintiffs can request entry of default and request court judgment and set the matter for prove-up hearing.

<u>Proper determination of wrongful death damages</u>:

If plaintiffs are once again at the stage for another prove-up hearing please note that the declarations currently presented by plaintiffs Robert Sandoval and Michelle Sandoval are insufficient to prove up their wrongful death damages. The court makes these remarks as an aid to their future attempt to prove up damages.

In a wrongful death action, each eligible claimant can recover damages for the support and other financial benefits they would have received from defendant, which includes not only "necessities of life" (food, clothing, shelter), but also any financial contributions decedent would have made to or for the claimant's benefit. (See *Corder*

[1]For future reference, plaintiffs can only obtain <u>one</u> judgment against defendant, and not separate judgments for each plaintiff. They may ask the court to apportion the total judgment amount between the wrongful death claimants, but they cannot obtain separate judgments.

v. Corder (2007) 41 Cal.4th 644, 661.) Each claimant may also be entitled to compensation for the services they could reasonably have expected to receive from decedent, for instance the loss of household services following the death of a spouse or parent. (*McKinney v. California Portland Cement Co.* (2002) 96 Cal.App.4th 1214, 1227-1229.) A child of the decedent can also recover the value of the parent's advice and services in their training and education. (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 423.) The wrongful death claimants can also recover the reasonable expenses incurred for the decedent's burial and funeral services. (*Adams v. Southern Pac. Co.* (1935) 4 Cal.2d 731, 743.)

Also, even if the decedent did not contribute greatly to the income of the family unit, the death may cause substantial injury to the family, regardless of whether a technical pecuniary loss can be shown. This is because they are entitled to damages for a proven loss of "love, comfort, companionship, society, affection, solace or moral support." (*Corder v. Corder, supra* at p. 661.) Each of the plaintiffs' declarations mention that they suffered severe emotional distress in losing Mrs. Sandoval, but wrongful death damages cannot be awarded for emotional distress, or for their personal grief, sorrow and anguish suffered because of her death. (*Krouse v. Graham* (1977) 19 Cal.3d 59, 69 [distinguishing between awarding damages for grief and sorrow "instead of limiting recovery to the properly compensable elements of support, society, comfort, care and protection."].) While there is clearly overlap between the concepts of grief, sorrow and anguish over a loved one's death and "compensable elements of support, society, comfort, care and protection," at this point, the declarations presented are insufficient, especially since the $1 million each suggests as the proper amount to award appears to be entirely speculative and not built around matrix showing this to be a reasonable estimate of their damages.

Furthermore, plaintiffs did not show the court what amount they put on the Statement of Damages served on defendant, which they must do in proving up damages as this "sets the ceiling" on damages. (*Connelly v. Castillo* (1987) 190 Cal.App.3d 1583, 1588 ["Section 425.11 was designed to give defendants 'one last clear chance' to respond to allegations of complaints by providing them with 'actual' notice of their exact potential liability."]; *Garamendi v. Golden Eagle Ins. Co.* (2004) 116 Cal.App.4th 694, 704.)

Finally, it is also important to note that the portion of the wrongful death award representing damages for future economic loss (which includes direct pecuniary loss, loss of services, and loss of love, comfort and society), must be discounted to present value. (*Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 569-570, disapproved on other grounds in *Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 518.) There was no attempt to do that here.

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: DTT on 5/9/2022.
(Judge's initials) (Date)