Tentative Rulings for May 16, 2024
Department 502

For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)

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 above rule also applies to cases listed in this "must appear" section.

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

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(Tentative Rulings begin at the next page)

Tentative Rulings for Department 502

Begin at the next page

(46)

Tentative Ruling

Re: ***Magosh, LLC v. Suretec Insurance Company***
Superior Court Case No. 22CECG02267

Hearing Date: May 16, 2024 (Dept. 502)

Motion: Motions by Plaintiff Magosh, LLC (1) to Compel Verified Responses to Request for Production of Documents, Set Two, against Defendant Joshua O'Bannon; (2) for Terminating Sanctions against Defendant Joshua O'Bannon; and (3) for Terminating Sanctions against Defendant Trinity System Group, Inc.

Tentative Ruling:

To order the motions as to all defendants off calendar due to the automatic bankruptcy stay against indispensable party, Joshua O'Bannon.

Explanation:

A Notice of Stay Proceedings due to filing of bankruptcy was filed as to defendant Joshua O'Bannon. The case is stayed as to the bankrupting defendant. (11 U.S.C. § 362; *Wekell v. U.S.* (9th Cir. 1994) 14 F.3d 32, 33.)

Here, the Motion to Compel Initial Responses to Request for Production of Documents, Set Two, made against defendant O'Bannon is automatically stayed, as is the Motion for Terminating Sanctions brought against him.

However, the bankruptcy of one defendant in a multidefendant case does not stay the case as to the remaining defendants. (See *In re Miller* (9th Cir. BAP 2001) 262 BR 499, 503-504 & fn. 6.) The exception to this is where the debtor is an indispensable party to the pending litigation. In that event, the litigation may not proceed in the debtor's absence. (Fed. Rules Civ. Proc. 19(b).) In such cases, the court may issue an injunction staying the action against the codefendants as well. (*Matter of James Wilson Assocs.* (7th Cir. 1992) 965 F.2d 160, 170; *United States v. Dos Cabezas Corp.* (9th Cir. 1993) 995 F.2d 1486, 1491, fn. 3.)

Defendant O'Bannon was substituted in as the representative for defendant Trinity in this litigation.[1] O'Bannon is the owner, principal, CEO, CFO, and Responsible Managing Officer of Trinity. In his absence, complete relief cannot be accorded among the

[1] This is a separate issue for consideration at the time the merits of the motions are to be determined. "Under a long-standing common law rule of procedure, a corporation, unlike a natural person, cannot represent itself before courts of record in propria persona, nor can it represent itself through a corporate officer, director or other employee who is not an attorney. It must be represented by licensed counsel in proceedings before courts of record." (*CLD Construction, Inc. v. City of San Ramon* (2004) 120 Cal.App.4th 1141, 1145.)

remaining parties. Defendant O'Bannon claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may impair or impede his ability to protect that interest. A judgment rendered in his absence would be prejudicial to him and defendant Trinity. (See Code Civ. Proc., § 389.) Thus, defendant O'Bannon is an indispensable party and no action can be taken against Trinity (i.e. a determination of the motion for terminating sanctions) until the stay against defendant O'Bannon has been terminated.

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: KCK on 05/14/24.
(Judge's initials) (Date)

(37)

Tentative Ruling

Re: ***Kathleen Smith v. Ronnie Kennedy***
Superior Court Case No. 22CECG00615

Hearing Date: May 16, 2024 (Dept. 502)

Motion: By Plaintiffs to Substitute Successor in Interest for Deceased Defendant Ronnie Kennedy

Tentative Ruling:

To grant.

Explanation:

Pursuant to Code of Civil Procedure sections 377.11 and 377.31, David L. Hulme is the successor in interest to Ronnie Kennedy, aka Ronald Gene Kennedy, and takes his place as a defendant in this action.

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: KCK on 05/14/24.
(Judge's initials) (Date)

(20)

Tentative Ruling

Re: ***Left Mendota I, LLC v. Joesclub, LLC***
Superior Court Case No. 23CECG04160

Hearing Date: May 16, 2024 (Dept. 502)

Motion: By Joesclub, LLC for Reconsideration of March 18, 2024 Order Compelling Arbitration

Tentative Ruling:

To deny.

Explanation:

Joesclub seeks reconsideration of the 3/18/24 Order compelling this unlimited civil action to arbitration, and revoking the consolidation with two unlawful detainer actions.

Pursuant to Code of Civil Procedure section 1008, a party may bring a motion to reconsider, and a different order may be entered, if, subject to the following conditions, the motion is: 1. brought before the same judge that made the order; 2. made within 10 days after service upon the party of notice of the entry of the order; 3. based on new or different facts, circumstances, or law; and 4. made and decided before entry of judgment.

"[F]acts of which the party seeking reconsideration was aware at the time of the original ruling are not 'new or different.'" (*In re Marriage of Herr* (2009) 174 Cal.App.4th 1463, 1468.) The burden under section 1008 "is comparable to that of a party seeking a new trial on the ground of newly discovered evidence: the information must be such that the moving party could not, with reasonable diligence, have discovered or produced it at the trial." (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212–213.)

A motion for reconsideration does not lie where the moving party disagrees with the court's analysis and conclusion. (*Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500.)

This motion is not based on any new or different facts or law. Joesclub seeks reconsideration of the order based on arguments going to waiver and prejudice. However, the positions advanced in support of the motion for reconsideration, as grounds for revoking the 3/18/24 Order were made in the written opposition and/or at oral argument, considered by the court, and rejected. Joesclub is essentially arguing that the court committed error in its order, which is not a solid basis for reconsidering an order. (See *David S. Karton, a Law Corp. v. Musick, Peeler Garrett LLP* (2022) 83 Cal.App.5th 1027, 1049.)

Even considering those arguments now as articulated in the moving papers, the court does not find them convincing.

Joesclub already argued, and the court disagreed and continues to disagree, that LMI waived the right to arbitrate. (See Opposition to Motion to Compel Arbitration, p. 4.) The arguments advanced in support of the motion for reconsideration were already advanced and rejected in the context of the motion to compel arbitration. The court finds no waiver by LMI. (See *Saint Agnes Med. Ctr. v. PacifiCare of Calif.* (2003) 31 Cal.4th 1187, 1203.)

Joesclub seeks to brief "the issue of prejudice to JOES in expending costs to litigate in a forum selected by LMI only to be compelled to arbitration, as well as prejudice in JOES being denied the contractual rights afforded under the Lease to seek provisional relief such as the relief to deposit rent and remain possession of the subject premises." (MPA 5:10-13.)

The court finds no prejudice in allowing the parties to litigate their claims in different forums. The controlling lease includes a dispute resolution provision that contemplates separate proceedings brought by the parties: unlawful detainer and eviction proceedings; mediation or binding arbitration; and provisional relief to preserve the rights of the parties pending resolution of the dispute. Joesclub may seek applicable provisional relief in the context of the unlawful detainer action. The 3/18/24 Order implements the parties' intention as expressed in the lease agreement by requiring the parties to arbitrate their claims that are not in the nature of "unlawful detainer" proceedings, which are pending before another department of this court. Accordingly, there is no prejudice to Joesclub's rights in order the parties' respective non-UD claims to arbitration, which the parties expressly contracted to do.

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: KCK on 05/14/24.
(Judge's initials) (Date)

(46)

Tentative Ruling

Re: ***Nations Roof West, LLC v. WSD Engineering, Inc.***
Superior Court Case No. 23CECG03776

Hearing Date: May 16, 2024 (Dept. 502)

Motion: Default Prove-Up Hearing

Tentative Ruling:

To deny.

Explanation:

When seeking a default judgment, the requesting party must include a dismissal of all parties against whom judgment is not sought. (Cal. Rules of Court, rule 3.1800(a)(7).) Here, dismissal of DOES 1-10 was entered May 02, 2024. However, plaintiff brought this action against WSD Engineering, Inc. and DOES 1 through 100. Only DOES 1 through 10 were dismissed from the action. Plaintiff must dismiss all DOES before entry of judgment can be considered against WSD Engineering, Inc.

If plaintiff calls for a hearing and brings in the dismissal or proof of filing the dismissal, the court will grant the request for judgment and sign the proposed judgment.

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: KCK on 05/15/24.
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***California Attorneys, Administrative Law Judges and Hearing Officers in State Employment v. Eraina Ortega***
Superior Court Case No. 22CECG03306

Hearing Date: May 16, 2024 (Dept. 502)

Motion: For Leave to File Amended Complaint

Tentative Ruling:

To grant. Plaintiff is directed to file its proposed pleading within 10 days of service of the order by the clerk. Plaintiff is directed to file an Amended Civil Case Cover Sheet consistent with the proposed pleading.

Explanation:

On November 2, 2023, plaintiff California Attorneys, Administrative Law Judges and Hearing Officers in State Employment ("Plaintiff") filed the operative Third Amended Complaint ("TAC"). The TAC states three causes of action: (1) preliminary and permanent injunctive relief; (2) petition for writ of mandamus as to defendants California Department of Human Resources and Eraina Ortega (collectively "Defendants"); and (3) petition for writ of mandamus as to defendant State Personnel Board ("SPB"). Defendants filed, among other things, a demurrer in response.

On March 26, 2024, Defendants' demurrer to the TAC was sustained. On the issue of leave to amend, the court considered the issues raised on demurrer, and authorized supplemental briefing as to why a final leave to amend should not be granted for Plaintiff to state a claim. In response, the parties submitted additional briefing.

This court previously recognized that judicial policy favors resolution of all disputed matters between the parties in the same lawsuit. Thus, the court's discretion will usually be exercised liberally to permit amendment of the pleadings. (*Nestle v. Santa Monica (1972)* 6 Cal.3d 920, 939; *Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 596.) The policy favoring amendment is so strong that it is a rare case in which denial of leave to amend can 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. Superior Court* (1959) 172 Cal.App.2d 527, 530; *Mabie v. Hyatt, supra,* 61 Cal.App.4th at 596.)

If the party seeking the amendment has been dilatory, and the delay has *prejudiced* the opposing party, the judge has discretion to deny leave to amend. (*Hirsa v. Superior Court* (1981) 118 Cal.App.3d 486, 490.) Prejudice exists where the amendment would require delaying the trial, resulting in loss of critical evidence or added costs of preparation, increased burden of discovery, etc. (See *Magpali v. Farmers Group, Inc.*

(1996) 48 Cal.App.4th 471, 486-488 ["*Magpali*"]; *see also P & D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1345.) But, the fact that the amendment involves a change in legal theory which would make admissible evidence damaging to the opposing party is *not* the kind of "prejudice" the court will consider. (*Hirsa v. Superior Court*, *supra*, 118 Cal.App.3d at p. 490.) "[G]reat liberality should be permitted in the filing of amendments when they do not prejudice the opposing party." (*Weinberg v. Dayton Storage Co.* (1942) 50 Cal.App.2d 750, 759.) As noted in the underlying ruling on demurrer, the issue to be resolved is the matter of prejudice to state new claims that are based on the facts alleged in the TAC.

Defendants submit they will be prejudiced due to added costs in preparation. Defendants rely on *Bidari v. Kelk* in support. ((2023) 90 Cal. App.5th 1152, 1173 ["*Bidari*"].) However, at issue in *Bidari* was whether there was a prejudice based on the plaintiffs having dismissed certain claims years prior to a motion for judgment on the pleadings. (*Ibid.*) The *Bidari* court found that because the plaintiffs had abandoned their claims in the years prior only to propose to reallege them at the last possible moment when the lawsuit might otherwise be concluded. (*Ibid.*) The *Bidari* court concluded that in the absence of explanation, the timing smacked of gamesmanship. (*Ibid.*) Nothing in the *Bidari* decision suggests that added costs in preparation is a basis for prejudice.[1]

Neither is *Miles v. City of Los Angeles* persuasive. ((2020) 56 Cal.App.5th 728, 739 ["*Miles*"].) There, the court found foremost that prejudice exists where the proposed amendment would require delaying trial. (*Ibid.*) The added costs of preparation and increased discovery burdens were a factor only to the extent that they are added as a result of delaying trial. (*Ibid.*) Nothing in *Miles* suggests that an increase to the general costs of preparation at large is a basis to find prejudice.

For similar reasons, Defendants' reliance on *Magpali* does not command a different result. (*Magpali*, *supra*, 48 Cal.App.4th 471.) *Magpali* held only that courts are bound to apply a policy of great liberality, which is to be applied only where no prejudice is shown to the adverse party. (*Id.* at p. 487.) Denial of leave may be appropriate where the proposed amendment opened up an entirely new field of inquiry without any satisfactory explanation as to why this major change in point of attack had not been made long before trial. (*Ibid.*) The *Magpali* court noted the strenuous circumstances of that case, affirming a denial of leave to amend: "[w]here the trial date is set, the jury is about to be impaneled, counsel, the parties, the trial court, and the witnesses have blocked the time, and the only way to avoid prejudice to the opposing party is to continue the trial date to allow further discovery". (*Id.* at p. 488.) Moreover, at its core, *Magpali* supports the finding made in *Miles*, that additional costs of preparation are prejudicial only when there is a corresponding delay in trial.[2]

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[1] The *Bidari* opinion does note that there was an argument by the plaintiffs against a finding of prejudice due solely to litigation costs. (*Bidari*, *supra*, 90 Cal.App.5th at p. 1173.) The *Bidari* court does not address the argument, except as to say that regardless, the plaintiffs' actions resulted in an inherently inefficient strategy.

[2] Each of Defendants' remaining citations in support suffer the same issue of relatability. In *Estate of Murphy*, the proposed amendment came after the completion of discovery and at the start of and during trial. (*Estate of Murphy* (1978) 82 Cal.App.3d 304, 310-311.) In *P&D Consultants, Inc. v. City of Carlsbad*, the proposed amendment came at the trial readiness conference, after the

For the above reasons, the court finds that Defendants will not be prejudiced by granting leave to amend.

Defendants alternatively argue that leave to amend may be denied due solely to unwarranted delay, which Defendants argued occurred here. Nothing in Defendants' cited authority deviates from the law listed above, the cases for which merely correlating "unwarranted delay" with "prejudice." All of Defendants' cases are progeny of *Roemer v. Retail Credit Company*, which found that "[t]he law is also clear that even if a good amendment is proposed in proper form, unwarranted delay in presenting it may – of itself – be a valid reason for denial [of leave]." (*Roemer v. Retail Credit Co.* (1975) 44 Cal.App.3d 926, 939-940 ["*Roemer*"].) At issue in *Roemer* was, among other things, whether denial of leave to amend was appropriate, made at the close of the defendant's case prior to the giving of jury instructions on a second trial of the issues. (*Id.* at p. 938.) The *Roemer* court considered that denial of leave may rest on the element of lack of diligence in offering the amendment after knowledge of the facts, or the effect of delay on the adverse party. (*Id.* at p. 940.) The *Roemer* court concluded that the moving party had knowledge of the facts of the proposed amendment after the entire case had been tried once, and it was a lack of due diligence to wait until jury instructions on the second trial to seek to amend. (*Ibid.*) This is, in effect, the same substantive test as to prejudice.

Roemer's progeny has similar outcomes. In *Record v. Reason*, the plaintiff sought to amend after an evidentiary and dispositive motion for summary judgment to add a claim qualifying the conduct alleged as intentional or reckless. (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486 ["*Record*"].) The *Record* court noted that the only facts supporting the amendment were conclusory statements that discovery revealed the basis for the amendment. (*Ibid.*) The *Record* court concluded that as a matter of a claim of intentional conduct, the plaintiff failed to demonstrate a meaningful amendment. (*Ibid.*) In *Doe v. Los Angeles County Department of Children and Family Services*, the court found that denial of leave was appropriate on a request made two days prior to resting on the moving party's case-in-chief at trial. (*Doe v. Los Angeles County Dept. of Children & Family Svcs.* (2019) 37 Cal.App.5th 675, 689.) In *Huff v. Wilkins*, the court found that denial of leave to amend imminently before hearing on a motion for summary judgment was appropriate where the moving party failed to identify any new facts on which to base the amendment. (*Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 764-765.)

All of these cases support denial of leave to amend where the request was made either in connection with an evidentiary motion for summary judgment, or at the beginning, middle or end of trial. In all scenarios, discovery was either mostly complete, or closed, forming the foundation for a finding of prejudice. None of these factors are evident here. No trial date is set. No party represents that discovery has concluded. Defendants do not submit that there will be a loss of critical evidence.

Based on the policy favoring resolution of all disputed matters between the parties, and because the court finds that Defendants have not sufficiently demonstrated

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close of discovery. (*P&D Consultants, Inc. v. City of Carlsbad*, *supra*, 190 Cal.App.4th 1332 at p. 1345.)

a prejudice to warrant otherwise, the court exercises discretion to grant leave to amend as to Defendants to petition for an administrative writ.

SPB separately opposes. SPB submits that leave to amend is futile to address the issues of the demurrer. SPB offers that the TAC untimely stated a cause of action as to it, which cannot be cured by any amendment. Plaintiff previously agreed with this conclusion in its opposition to the underlying demurrer, and the leave sought was to restate its basis for seeking an administrative writ of mandate. In its response, Plaintiff submits that the claim against SPB will be based on Code of Civil Procedure section 1085, rather than the previous invocation of section 1094.5. No other issues were raised by SPB in opposition. Leave to amend as to SPB to state the proposed petition and cause of action 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: KCK on 05/15/24.
(Judge's initials) (Date)