Tentative Rulings for May 2, 2024
Department 501

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

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

23CECG01568 ***Jose Del Pinal v. Century Investments, LLC* is continued to Wednesday, May 22, 2024, at 3:30 p.m. in Department 501**

23CECG03598 ***Natasha Smith v. California Department of Transportation* is continued to Thursday, July 11, 2024, 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

(46)

Tentative Ruling

Re: ***Shelly Roberts v. Kevin Polidario***
Superior Court Case No. 24CECG00007

Hearing Date: May 2, 2024 (Dept. 501)

Motion: Petition to Approve Compromise of Disputed Claim of Minor

Tentative Ruling:

To deny without prejudice. In the event that oral argument is requested, the minor is excused from appearing.

Explanation:

The Petition does not fully comply with California Rules of Court, rule 7.955, which states that "A petition requesting court approval and allowance of an attorney's fee … **must** include a declaration from the attorney that addresses the factors listed in (b) [allowing the court to determine a reasonable attorney's fee] that are applicable to the matter before the court." (Cal. Rules of Court, rule 7.955(c), emphasis added.) No declaration was attached to the Petition.

Petitioner needs to make the following changes to the Petition for Approval of Compromise of Claim (MC-350): (1) the claimant's full address must be provided in #2(a), (2) the decedent's name is incorrect and needs revision in #5 and #6, (3) petitioner's attorney must sign at #23, and (4) the declaration complying with CRC 7.955 needs to be attached.

Petitioner needs to make the following changes to the Order Approving Compromise of Claim (MC-351): (1) specify who fees are "payable to" in #8(a)(1), (2) move costs from #8(a)(3) to #8(a)(2), (3) mark and complete #9(a), (4) uncheck #9(c)(1), and (5) select only one option in #10.

Petitioner did not file an Order to Deposit Funds in Blocked Account (MC-355) for the court's review and signature. This must be lodged with the court when petitioner refiles the Petition.

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 4/29/2024 .
(Judge's initials) (Date)

(20)

Tentative Ruling

Re: ***Fresno Community Hospital and Medical Center v. Wells, et al.***
Superior Court Case No. 21CECG02879

Hearing Date: May 2, 2024 (Dept. 501)

Motion: by Defendant Scott Wells for Summary Judgment or, Alternatively, for Summary Adjudication of Third and Fourth Causes of Action

to Modify Protective Order

Tentative Ruling:

To grant summary judgment in favor of Scott Wells. (Code Civ. Proc., § 437c, subd, (c).) Scott Wells is directed to submit to this court, within five days of service of the minute order, a proposed judgment consistent with the court's summary judgment order.

The motion to modify a protective order is off calendar, as no papers have been filed.

Explanation:

Summary judgment is properly granted when no triable issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) In moving for summary judgment, a "defendant … has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action … cannot be established, or that there is a complete defense to the cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).)

Plaintiff Fresno Community Hospital and Medical Center, d/b/a Community Health System ("CMC") alleges two causes of action against Scott Wells, the third for Intentional Interference with Contract and fourth for Inducing Breach of Contract. The claims are based on allegations that Wells, Executive Director of Santé Health System, Inc. and dba Advantek Billing Services, caused or induced Community Regional Medical Staff Medical Group ("CRMSMG") to breach its contractual obligation to provide on-call coverage for neurosurgery at CMC's trauma center. CRMSMG breached this contractual obligation when Central California Faculty Medical Group ("CCFMG") carried out a planned neurosurgeon walk-out from 9/2/2020 to 9/15/2020.

Wells' motion is based primarily on new evidence obtained since denial of his previous motion for summary judgment – an audio recording and transcript of the 8/31/2020 meeting of the board of directors of CCFMG. Wells contends that this audio recording irrefutably shows that the decision to have CCFMG neurosurgeons walk out was solely the decision of the CCFMG board, and not Wells.

The elements for a cause of action for intentional interference with contract are as follows:

1. That there was a contract between the plaintiff and a third party;
2. That the defendant knew of the contract;
3. *That the defendant's conduct prevented performance or made performance more expensive or difficult*;
4. That the defendant intended to disrupt the performance of the contract or knew that disruption of the performance of the contract was certain or substantially certain to occur;
5. That the plaintiff was harmed; and
6. *That the defendant's conduct was a substantial factor in causing the plaintiff's harm*.

(CACI 2201, emphasis added.)

Wells attacks elements 3 and 6.

Similarly, the elements of inducing a breach of contract are: (1) The plaintiff had a valid and existing contract with a third party; (2) The defendant had knowledge of the contract and intended to induce its breach; (3) The contract was in fact breached by the contracting party; (4) The breach was caused by defendant's unjustified or wrongful conduct; and (5) Damages were suffered as result. (*Little v. Amber Hotel Co.* (2011) 202 Cal.App.4th, 280, 291.)

The defendant's conduct must be a substantial factor in causing the breach. Causation exists where the plaintiff can show the contract would have been performed in the absence of the defendant's alleged inducements. (See *Jenni Rivera Enterprises. LLC. v. Latin World Entertainment Holdings, Inc.* (2019) 36 Cal. App. 5th 766, 792.) "Though normally a question of fact, causation may be decided as a question of law if the undisputed facts permit only one reasonable conclusion." (*Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 1528.) "[A] force which plays only an infinitesimal or theoretical part in bringing about injury, damage, or loss is not a substantial factor." (*Jenni Rivera Enterprises, LLC v. Latin World Entertainment Holdings, Inc.* (2019) 36 Cal.App.5th 766, 792.) In the context of tortious interference with contract, "some courts have stated that causation exists where the plaintiff can show the contract would have been performed in the absence of the defendant's alleged inducements." (*Id.*)

The motion is primarily based on the fact that Wells did not attend the board of directors meeting at which the walk-out decision was made, and Wells' statements that he did not communicate with the board members or neurosurgeons about the walkout, or encourage the neurosurgeons. (See Wells Exh. 1, Wells Decl.) Wells also declares that he did not tell the CCFMG board members, CCFMG executives, CCFMG staff, the neurosurgeons or anyone else that the neurosurgeons should walk out. (*ibid*., ¶ 10.)

CMC contends that the neurosurgeons were directed to stop performing the on-call services by Wells, Joyce Fields-Keene, CEO of CCFMG, and CCFMG pursuant to their conspiracy to stop neurosurgery call services. (AMF 66-71.)

Disputing UMF 7, CMC contends that on 8/30/2020 Wells provided edits to Fields-Keene on a "write up" for the 8/31/2020 CCFMG board meeting. The "write up" addressed the question, "Should DDFMG stop performing services which it does NOT get paid for by CMC?" According to CMC, Wells' additions include adding the statement that "CMC's new leadership does not value it's over 25 year historical relationship with Santé." The "write up" was discussed at the 8/31/20 CCFMG board meeting at which the board voted to go forward with the walkout. (AMF 66-70.)

CMC further contends that on 9/1/2020 Wells provided written edits to a draft email from Fields-Keene to the CCFMG Board regarding "CMC's Response" to the neurosurgeon walk-out, adding two sentences "IN CAPS:" "IT IS IMPORTANT TO NOTE THAT IN THE PAST THEY [CMC] HAVE COME ON STRONG ONLY TO BACK OFF A STRONG POSITION WITH TIME. ONLY TIME WILL TELL IF THERE POSITION SOFENS [sic] IN THE NEXT FEW DAYS." Fields-Keene then sent this email to members of the CCFMG Board, including a revised version of Wells' addition: "It is important to note that in the past they have come on strong only to back off a strong position in time. WE [sic] need to give it a few days or weeks." (AMF 76-79.)

CMC further contends that Wells and Fields-Keene regularly communicated regarding their negotiations against CMC (AMF 38-39, 41-53, 56-57.) When Fields-Keene purportedly notified CRMSMG that the neurosurgeons would no longer provide call coverage, Wells did not share that information with CMC. (AMF 58-65.) CMC contends that Wells was aware that his edits to the 8/30/2020 "write up" edit and 9/1/2020 email would be provided to key decision makers at CCFMG when assessing whether to institute and continue the walk out.

The court finds this evidence insufficient to even raise a triable issue of fact as to whether Wells interfered with the contract or induced the breach. Wells' contributions to the 8/30/2020 "write up" and the 9/1/2020 email were *de minimus* and/or insignificant, and there is no indication that they Having read the transcript of the board meeting at which the walk out decision was made, it is undisputable that, as Wells contends, "1) Joyce Fields-Keene left it entirely up to the CCFMG board to make its own decision; 2) there was a very free-flowing discussion about what to do among all of the participants at the meeting; and 3) Wells was not present at the meeting nor was his name even mentioned by any of the CCFMG board members as a person who supported, recommended, or advocated for the walkout." (Reply 2:18-22.) Even more, there is no indication that Wells' contributions were relied upon by the doctors and board members who voted in favor of the walk-out.

CMC relies on Wells' failure to notify CMC of the impending walkout or to take action to avoid the walkout. However, even though Wells took no action to give CMC a heads up about the walkout, that doesn't mean he induced or caused it. CMC does not show that Wells was a substantial factor causing in CRMSMG'S breach by CCFMG's walk out.

In the opposition CMC relies on the SAC's allegations that Wells and the CCFMG defendants, in particular Fields-Keene, conspired to cause CRMSMG's breach of contract. (SAC ¶¶ 56, 65.)

> A tort action 'will lie for the intentional interference by a third person with a contractual relationship either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification. [Citations.]' (*Herron v. State Farm Mutual Ins. Co.* (1961) 56 Cal.2d 202, 205, 14 Cal.Rptr. 294, 296, 363 P.2d 310, 312.) A tort action will also lie against third persons who pursuant to a conspiracy have wrongfully induced or procured the breach of a contract resulting in damages. (*California Auto Court Ass'n v. Cohn, supra*, 98 Cal.App.2d 145, 219 P.2d 511; James v. Herbert, supra, 149 Cal.App.2d 741, 309 P.2d 91; 15 C.J.S. Conspiracy § 13, p. 1020; 11 Am.Jur., Conspiracy, § 50, p. 582; 84 A.L.R. 98; 26 A.L.R.2d 1284.) As already pointed out, the nucleus of the action is not the conspiracy but the civil wrong producing damage to the plaintiff.

(*Wise v. Southern Pac. Co.* (1963) 223 Cal.App.2d 50, 65, fn omitted.)

However, liability for civil conspiracy requires wrongful acts done pursuant to the conspiracy and damages resulting therefrom. (See authorities, ante.) Here, there is no evidence of any wrongful acts on the part of Wells in aid of the alleged conspiracy. "Mere knowledge, acquiescence, or approval of an act, without cooperation or agreement to cooperate is insufficient to establish liability" for civil conspiracy. (*Michael R. v. Jeffrey B.* (1984) 158 Cal.App.3d 1059, 1069.)

Objections

CMC's objections to Wells' evidence

The court intends to sustain objections 1 and 3, and overrule objections 2, 4 and 5 and the objection to the request for judicial notice.

Wells' Objections to CMC's evidence

A significant basis for Wells' objections is that many of the documentary exhibits are without foundation. Most of the documents are admissible, as documents can be authenticated by circumstantial evidence. (*People v. Wilson* 11 Cal. 5th 259, 304.) *Hooked Media Group v. Apple Inc.* (2020) 55 Cal.App.5th 323, 338, which held that counsel can authenticate e-mails produced by opposing counsel in discovery that bear "clear indicia" that they are what they purport to be. (*Ibid*.)

The exhibits at issue were produced by parties to this action, CRMSMG, CCFMG and Fields-Keene. In accordance with *Hooked Media*, since there is no dispute about the fact that these exhibits were produced by parties to this action, as long as the documents themselves bear indicia that they were written or generated by the person claimed, the objections should be overruled.

Accordingly, the court intends to rule as follows on Wells' objections to CMC's evidence[1]:

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[1] The court notes that in the future it would be helpful if CMC consecutively number all of its objections as required by Cal. Rules of Court, rule 3.1354(b), as opposed to restarting the numbering for each document at issue.

1. Objections to Robertson Declaration: Sustain objections 1, 2 (as to the 8/26/20 meeting only because it was not served with the opposition papers), 3, 4 and 5.

2. Objections to Exhibits: sustain objection 3; overrule objections 1, 2 and 4-38.

3. Objections to Kudzi Muchaka Declaration: Overrule.

4. Objections to Wagoner Declaration: overrule objection 1; sustain objection 2.

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 4/29/2024 .
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Hiatt v. McCoy, et al.***
Superior Court Case No. 21CECG00818

Hearing Date: May 2, 2024 (Dept. 501)

Motion: by Plaintiff to Strike Answer to First Amended Complaint

Tentative Ruling:

To grant plaintiff's requests for judicial notice.

To grant and strike the Answer filed October 10, 2022, as to defendant Praise Church of God in Christ of California only.

Explanation:

Plaintiff moves to strike the Answer filed by defendant Praise Church of God in Christ of California on the basis that the defendant non-profit corporation is a suspended corporation. (RJN, Exh. 2.) Defendants Praise Church of God in Christ of California and defendant Kevin Person filed an Answer to the First Amended Complaint jointly on October 10, 2022.

A corporation whose powers have been suspended by the Secretary of State lacks capacity to sue in California courts, and if sued, lacks capacity to defend. (Rev. & Tax. Code § 23301, Corp. Code § 2205; see *Reed v. Norman* (1957) 48 Cal.2d 338, 342 and *Palm Valley Homeowners Ass'n, Inc. v. Design MTC* (2000) 85 Cal.App.4th 553, 560.)

"[I]f the corporation's status only comes to light during litigation, the normal practice is for the trial court to permit a short continuance to enable the suspended corporation to effect reinstatement (by paying back taxes, interest and penalties) to defend itself in court." (*Timberline, Inc. v. Jaisinghani* (1997) 54 Cal.App.4th 1361, 1366 [suspended corporation not permitted to renew judgment].) In *Schwartz v. Magyar House, Inc.* (1959) 168 Cal.App.2d 182, the trial court afforded defendant 2 weeks to effectuate revivor of the corporate status.

The court would allow defendant time for revivor, but no one on behalf of the corporation has responded to this motion or requested time to do so. There seems no point in delaying the striking of Praise Church of God in Christ of California's Answer.

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** ___**4/30/2024**___.
(Judge's initials) (Date)

(46)

Tentative Ruling

Re:	***CHS, Inc. v. Pacific Grain & Foods, LLC., et al.*** Superior Court Case No. 23CECG03228
Hearing Date:	May 2, 2024 (Dept. 501)
Motion:	Default Prove-Up Hearing

Tentative Ruling:

To grant judgment for plaintiff CHS, Inc., against defendants Pacific Grain & Foods, LLC. and Lee G. Perkins, with money damages in the amount of $464,849.00. The court will award damages pursuant to Civil Code section 1719, subdivision (a)(2), in the amount of $3,000.00. The court will also award costs in the amount of $1,164.40 and prejudgment interest in the amount of $38,389.48. The court will award attorney's fees in the amount of $9,398.49. Total judgment awarded in the amount of $516,801.37. The court will sign the proposed judgment as submitted.

To deny the request for additional pre-judgment interest.

Explanation:

Apart from the contracted rate of 18% per annum finance charges, plaintiff seeks further pre-judgment interest at the legal interest rate of 10% per annum on the principal balance of $464,849.00, running from 12/02/2023 to entry of judgment, the sum of which is sought to be added to the accrued finance charges. Civil Code section 3289, subdivision (b), states that "if a contract … does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach." Here, the signed contract does state the rate of 1.5% per month or 18% per annum for unpaid monthly balances. The court will not allow the additional interest.

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 4/30/2024 .
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***William Thomas v. State of California / Complex***
Superior Court Case No. 23CECG02658

Hearing Date: May 30, 2024 (Dept. 501)

Motion: Defendants' Demurrer to the Complaint

Tentative Ruling:

To take judicial notice of Government Code sections 8301 et seq. and to sustain the demurrer, without leave to amend. (Code Civ. Proc., § 430.10, subd. (e).) Defendants shall submit a judgment of dismissal within five days of the clerk's service of this minute order.

Explanation:

A demurrer challenges defects apparent from the face of the complaint and matters subject to judicial notice. (*Blank v. Kirwan* (1985) 30 Cal.3d 311, 318.) A general demurrer is sustained where the pleading is insufficient to state a cause of action or is incomplete. (Code Civ. Proc., § 430.10, subd. (e); *Estate of Moss* (2012) 204 Cal.App.4th 521, 535.)

Plaintiff's Complaint requests relief under Assembly Bill 3121. (See Complaint, caption heading.) Defendants assert that the task force established by Assembly Bill 3121 did not constitute a legislative right to collect reparations, and, at any rate, it was repealed by its own terms on July 1, 2023 pursuant to by Government Code section 8301.7 – a matter which the court must judicially notice. (Evid. Code, § 451, subd. (a).) In addition, plaintiff's complaint does not allege compliance with the Government Claims Act. (Gov. Code, § 900, et seq.) Plaintiff has not filed an opposition, and thus has not offered how the pleading defects can be cured through amendment. Accordingly, defendants' demurrer is sustained, without leave to amend.

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 4/30/2024 .
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Aurelio Fuentes v. Israel Douglas / Lead Case***
Superior Court Case No. 22CECG03698

Hearing Date: May 2, 2024 (Dept. 502)

Motion: Defendant Amazon.com Services, LLC's Demurrer to the Complaint filed in 23CECG04246

Tentative Ruling:

To overrule. (Code Civ. Proc., 430.10, subd. (c).) Defendant shall file responsive pleadings within twenty (20) days from the date of this order.

Explanation:

A demurrer on the basis that another action is pending between the parties is a plea in abatement, but, as noted by the California Supreme Court, it is generally a "disfavored" remedy. (*Lord v. Garland* (1946) 27 Cal.2d 840, 848.) In particular, "[t]he reason for this rule is founded upon the theory that, if the first suit affords an ample remedy to the party claiming to be aggrieved, it would be not only unnecessary but vexatious to permit the prosecution of a second suit founded upon the same cause of action." (*Fresno Planing Mill Co. v. Manning* (1912) 20 Cal.App. 766, 769.)

In addition, a demurrer challenges only defects apparent from the face of the complaint, and matters subject to judicial notice. (*Blank v. Kirwan* (1985) 30 Cal.3d 311, 318; see also *Lord v. Garland, supra,* 27 Cal.2d at p. 848 ["Where, for all that appears in the complaint, the prior suit does not involve the entire cause of action presented by the complaint in the later litigation, the plea of abatement should be raised by answer rather than by demurrer."].)

Defendant contends the similarity of the cases shows the earlier filed action bars the second. (Points & Auth. at p. 6:20-26.) However, because each case requests *substantially different relief*, whether the first suit would provide an "ample" remedy cannot be determined from a facial reading of the complaint and matters subject to judicial notice. In other words, the substantial difference in remedies sought renders answer preferable to the disfavored remedy of abatement. Therefore, the demurrer is overruled.

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 4/30/2024 .
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Mendez v. IVNA Home Care Services, Inc.***
Superior Court Case No. 23CECG03507

Hearing Date: May 2, 2024 (Dept. 501)

Motion: by Defendant for an Order Compelling Plaintiff to Arbitrate Her Claims and Staying the Proceedings

Tentative Ruling:

To deny, without prejudice.

Explanation:

In moving to compel arbitration, defendants must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. The party opposing the motion must then prove by a preponderance of evidence that a ground for denial of the motion exists (e.g., fraud, unconscionability, etc.). (*Rosenthal v. Great Western Fin'l Securities Corp.* (1996) 14 Cal.4th 394, 413-414; *Hotels Nevada v. L.A. Pacific Ctr., Inc.* (2006) 144 Cal.App.4th 754, 758; *Villacreses v. Molinari* (2005) 132 Cal.App.4th 1223, 1230.) There is a strong policy in favor of arbitration. (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339.) Courts are to enforce valid arbitration agreements according to their terms. (*Ibid*.)

The moving party has not met its burden in showing that an agreement between *plaintiff and defendant* exists. In its moving papers, defendant attaches an arbitration agreement between plaintiff and another entity, DecisionHR, who is not a party to this action. (Garcia Decl., Exh. 1.) Nor does defendant make any attempt to show that it, as a non-party to this agreement, has standing to enforce the agreement against plaintiff. Therefore, the motion cannot be granted based on the agreement presented in the moving papers.

However, in a reply declaration filed by defense counsel, Elizabeth H. Murphy, counsel indicates that her office inadvertently attached the wrong arbitration agreement to the moving papers and attaches another arbitration agreement, which she purports to be the correct agreement at issue. (Murphy Decl., filed on Mar. 18, 2024, ¶ 5.)

"The general rule of motion practice … is that new evidence is not permitted with reply papers … [and] should only be allowed in the exceptional case …" (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1538.) However, if the court exercises its discretion to allow new evidence or argument in reply papers, the opposing party must be given an opportunity to respond. (*Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1307-1308 (new evidence).) Provided that the new evidence proffered is the core of the motion, the court does not exercise its discretion to consider the new evidence, i.e., the arbitration agreement itself, on reply.

In light of the court's ruling disallowing the new evidence on reply, plaintiff's evidentiary objections to Ms. Murphy's reply declaration are rendered moot.

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 4/30/2024 .
(Judge's initials) (Date)

(41)

Tentative Ruling

Re: ***Sophia Maldonado v. China Peak Mountain Resort, LLC***
Superior Court Case No. 21CECG03348

Hearing Date: May 2, 2024 (Dept. 501)

Motion: By Defendant China Peak Mountain Resort, LLC, for Summary Judgment or Summary Adjudication

Tentative Ruling:

To deny.

Explanation:

Plaintiff Sophia Maldonado was snowboarding on December 5, 2020, the opening day of the 2020-2021 season, at China Peak Mountain Resort, LLC ("China Peak"), when she collided with a snowmaking machine, resulting in injuries (the "Incident"). The court denies defendant China Peak's motion for summary judgment or summary adjudication for the reasons stated below.

Law Governing Summary Judgment

A trial court shall grant summary judgment if there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., §437c, subd. (c).) In determining a motion for summary judgment, the court views the evidence in the light most favorable to the opposing party, liberally construing the opposing party's evidence and strictly scrutinizing the moving party's evidence. The court does not weigh evidence or inferences. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 856.) The court shall consider all inferences reasonably deducible from the evidence unless it is controverted by other inferences or evidence. (Code Civ. Proc., § 437c, subd. (c).)

A defendant moving for summary judgment must show either that the plaintiff cannot establish one or more elements of a cause of action or that it has a complete defense. (*Aguilar v. Atlantic Richfield Co*., *supra*, 25 Cal.4th at p. 856; Code Civ. Proc., § 437c, subd. (p)(2).) If the defendant makes such a showing, the burden shifts to the plaintiff to present evidence to show there is a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).) There is a triable issue if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of plaintiff. (*Aguilar v. Atlantic Richfield Co*., *supra*, 25 Cal.4th at p. 850.) Doubts as to whether there is a triable issue of fact are resolved in favor of the opposing party. (*Ingham v. Luxor Cab Co.* (2001) 93 Cal.App.4th 1045, 1049.)

The Parties Agree the Primary Assumption of Risk Doctrine Applies

This case is governed by K*night v. Jewett* (1992) 3 Cal.4th 296, in which the California Supreme Court summarized the primary assumption of risk doctrine. In the sports setting, conduct that otherwise might be dangerous often is an integral part of the sport itself, which the participant accepts. For example, moguls on a ski run pose a risk to skiers, but the risk is "part of the sport of skiing, and a ski resort has no duty to eliminate them." (*Id.* at p. 315.) The plaintiff acknowledges that the inherent dangers of snowboarding include 'injuries which can result from . . . collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snow-making or snow grooming equipment." (Opp., p. 1:6-9, quoting *Souza v. Squaw Valley Ski Corp.* (2006) 138 Cal.App.4th 262, 266-267 ("*Souza*"), quotation marks, citations, and italics omitted by plaintiff.)

Thus, in the context of skiing or snowboarding, the parties agree the doctrine of assumption of risk provides that a ski resort has no duty to eliminate (or protect a plaintiff against) the inherent risks in the sport, but the resort does have a duty of due care not to increase those risks over and above the inherent risks. (K*night v. Jewett, supra,* 3 Cal.4th at pp. 315-316.) The parties disagree about whether China Peak's conduct increased the risks inherent to snowboarding.

China Peak Met Its Initial Burden to Show It Has a Complete Defense

Defendant China Peak cites several cases to show "California courts consistently hold that losing control, falling and sliding, as well as colliding with properly marked or plainly visible snowmaking equipment are inherent risks in the sport for which the resort operator owes no duty to warn or protect." (Memo., p. 15:18-20, see *Souza, supra,* 138 Cal.App.4th at pp. 266-270, and cases cited therein.)

China Peak submits 85 alleged undisputed material facts and supporting evidence to demonstrate that its conduct did not increase the risks inherent in snowboarding. Therefore, the burden shifts to plaintiff to present evidence to raise a triable issue of material fact.

Plaintiff Presents Evidence of at Least One Triable Issue of Material Fact

"'Material facts' are facts that relate to the cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion and that could make a difference in the disposition of the motion." (Cal. Rules of Court, rule 3.1350(a)(2).) The court must deny a summary judgment motion if there is a triable issue as to at least one material fact. (Code Civ. Proc., § 437c, subd. (g).) China Peak identifies 85 material facts in its separate statement. The plaintiff presents evidence to dispute at least one of those material facts, based on the evidence discussed below:

Fact No. 17 – parties disagree that lift ticket was refundable (see printed language on ticket set forth in Fact No. 26);

Fact No. 42 – parties disagree if subject run on day of Incident "was" and "is" rated blue square for intermediate or green circle for easiest (see Bailey Supp. Dec., ¶¶ 51-54

[run was rated intermediate for 2020-2021 season, then rating was changed to beginner for 2023-2024 season and remains beginner to date; no party presents evidence to show terrain or trail has been changed]);

Fact No. 55 – parties disagree if the plaintiff went straight all the way down or made turns as she worked her way down the hill (China Peak submits testimony of witness [ex-boyfriend] that plaintiff went straight all the way down [Ogle Depo., pp. 90:21-91:4] and that she was going straight at least 60 or 70 percent of the time [Ogle Depo., p. 138:1-7]; plaintiff submits her testimony that she was turning "a little bit" [Maldonado Depo., p. 129:14-20]);

Fact No. 56 – parties disagree that posted sign in middle of run was readable (China Peak's employees submit declarations, including a photo of sign in the middle of the run that appears to be hard to read [Morillo decl., pp. 50-51]; the plaintiff submits her deposition testimony that she does not recall seeing the sign and "[e]ven as of right now, I can't really read what that says" [Maldonado Depo., p. 151:15-28]).

Additional disputed facts include the following, which are based on the evidence cited in the parties' separate statements:

Fact No. 57 – parties disagree whether plaintiff was "out of control";

Fact No. 58 – parties admit machine was obvious, that is visible, but plaintiff contends due to the presence of an unreadable sign and the machine's location, it was too late to stop by the time it was seen;

Fact No. 59 – the parties agree the machine was stationary but disagree the machine was immobile;

Fact No. 68 – the parties disagree that plaintiff "did not turn, slow down or stop while snowboarding . . . in the moments preceding her collisions with the snowmaking machine";

Fact No. 70, 72 – the parties disagree that there were bamboo poles or orange tape surrounding the machine;

Fact No. 71 – the parties disagree that plaintiff "took out" the alleged bamboo poles or orange tape surrounding the machine;

Fact No. 74 - the parties disagree that there were bamboo poles or orange tape surrounding the machine that were consistent with generally accepted ski industry practices;

Fact No. 76 – the parties disagree that the width of the run adjacent to the machine was 64 feet because the run was bisected by an unreadable banner between a pair of bamboo poles;

Fact No. 85 – the parties disagree about the location of the machine.

Plaintiff distinguishes this case from *Souza,* because there none of the parties disputed that there was sufficient room on either side of the equipment for skiers to pass by it. (*Souza, supra,* 138 Cal.App.4th at p. 267.) Furthermore, in *Souza,* the plaintiff did not crash into the snowmaking hydrant due to its poor location, "but because she caught a ski edge, lost her balance and veered into the plainly visible and generally avoidable structure." (*Id.* at p. 269.) In contrast, here plaintiff claims she collided with the machine because China Peak's placement of a useless banner increased the risk inherent to the sport, and "created a triable issue of fact as to whether the sign was 'proper marking' as required by the *Souza* court, or instead the placement of an additional hazard." (Opp. 8:24-27; see also, *Van Dyke v. S.K.I. Ltd.* (1998) 67 Cal.App.4th 1310 [ski resort may have increased risk to skier by manner of placing signpost in ski run, precluding primary assumption of risk defense].)

In summary, the court denies China Peak's motion because plaintiff has raised at least one triable issue of material fact as to whether China Peak increased the risks inherent in the sport of snowboarding.

Evidentiary Objections

The court declines to rule on the parties' evidentiary objections because none are directed to evidence that is material to the disposition of China Peak's motion. (Code Civ. Proc., § 437c, subd. (q).)

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 4/30/2024 .
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Atilano v. Kia Motors America, Inc.***
Superior Court Case No. 19CECG03728

Hearing Date: May 2, 2024 (Dept. 501)

Motion: (1) by Plaintiff Lisa Atilano for an Award of Attorney Fees
(2) by Defendant Kia Motors America, Inc., to Tax Costs

Tentative Ruling:

To grant the motion for an award of attorney fees and award $319,652.00 in fees in favor of plaintiff Lisa Atilano.

To grant the motion to tax costs in part, and tax costs in the amount of $5,641.35.

Explanation:

Motion for Attorney's Fees:

A prevailing buyer in an action under the Song–Beverly Act "shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time expended, determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of such action." (Civ. Code, § 1794, subd. (d).) The statute "requires the trial court to make an initial determination of the actual time expended; and then to ascertain whether under all the circumstances of the case the amount of actual time expended and the monetary charge being made for the time expended are reasonable. These circumstances may include, but are not limited to, factors such as the complexity of the case and procedural demands, the skill exhibited and the results achieved. If the time expended or the monetary charge being made for the time expended are not reasonable under all the circumstances, then the court must take this into account and award attorney fees in a lesser amount. A prevailing buyer has the burden of 'showing that the fees incurred were "allowable," were "reasonably necessary to the conduct of the litigation," and were "reasonable in amount." ' " (*Nightingale v. Hyundai Motor America* (1994) 31 Cal.App.4th 99, 104.)

A court assessing attorney's fees begins with a touchstone or lodestar figure, based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case." (*Serrano v. Priest* (*Serrano III*) (1977) 20 Cal.3d 25, 48; *Robertson v. Fleetwood Travel Trailers of California, Inc*. (2006) 144 Cal.App.4th 785, 817 [lodestar applies to Song-Beverly litigation].) Here, plaintiff seeks a loadstar of $300,362.00. As our Supreme Court has repeatedly made clear, the lodestar consists of "the number of hours *reasonably expended* multiplied by the *reasonable* hourly rate. . . ." (*PLCM Group, Inc. v. Drexler*, (2000) 22 Cal.4th 1084, 1095, italics added; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1134.) The California Supreme Court has noted that anchoring the calculation of

attorney fees to the lodestar adjustment method '"is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.' " (*Serrano III*, *supra*, 20 Cal.3d at p. 48, fn. 23.)

Here, the Knight Law Group spent 722.2 hours through the preparation of the opposition to defendants' motion to tax costs, and anticipates spending 9 more to prepare for and attend the hearing on the motion for attorney's fees and motion to tax costs, anticipating a remote appearance at the hearing. The Declaration of Jacob Cutler submitted with the reply confirming a total of 6.2 hours spent on the opposition and anticipating 1.5 hours for the preparation and appearance at the hearing. The court will award the 7.5 hours anticipated for the reply and hearing. The lodestar amount is $300,362.00. The billing for the Knight Law Group is, overall, very efficient.

Plaintiff's counsel submits hourly rates ranging from $175 for a law clerk to $645 for its partner and lead trial counsel. The majority of associate rates range from $250 for a newer attorney to $400 for an associate with approximately 10 years of experience. The court finds that some of the hourly rates are high. The reasonable hourly rate is that prevailing in the community for similar work. (*PLCM Group v. Drexler*, *supra*, 22 Cal.4th at p. 1095.) The rate is measured in the market place, and reflects several factors: the level of skill necessary, time limitations, the amount to be obtained in the litigation, the attorney's reputation, and the undesirability of the case. (*Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993, 1002.) However, the court approves the rates as sought, and reviews time entries for congruency with the experience of counsel.

Defendant makes persuasive arguments for reductions to several categories of billing entries and after review of the challenged billing entries the court agrees that some discounts to the lodestar are appropriate.

Fees Charged for the Prosecution of Plaintiff's Fraud-based Causes of Action

On April 14, 2022 the court granted defendant's motion for summary adjudication of the fourth and fifth causes of action for fraudulent concealment and fraud. Defendant has identified those billing entries specifically related to the motion for summary adjudication of the fraud claims, which are not subject to the mandatory fee-shifting found in the Song-Beverly Act. (Suarez Decl., Exh. A.) The hours spent on the motion for summary adjudication of the fraud claims cannot be said to be inextricably intertwined with the work on the Song-Beverly claims and are appropriately discounted from the lodestar. This results in a $5,595.00 reduction of the total fee.

Allegations of Duplication and Overbilling

Defendant criticizes the Knight Law Group's use of 24 attorneys over the four years of litigating this action through trial. It is argued that a discount of a percentage of the total lodestar is warranted due to the inevitable billing for each new attorney familiarizing him or herself with the case. (See, *Morris v. Hyundai* (2019) 41 Cal.App.5th 24, 33.) However, defendant has not pointed to any specific instances of duplicated work or excessive time on a specific task. The court's review of those billing entries argued as vague tasks and/or duplicative billing in Exhibit D to the Declaration of Jeanette Suarez does not reveal any such entries. No discount is supported on this basis.

Defendant further criticizes the amount of billing entries for interoffice communications and discussions of the case. After a thorough review of the challenged billing entries in Exhibit E of the Declaration of Jeanette Suarez, the court agrees that the many entries billed for a minimum time block of 0.1 or 0.2 hours spend spent on meetings regarding seemingly every update and change in the case. The court finds some of the flagged entries are warranted discussions of trial strategy. This results in a $5,216.50 reduction of the total fee.

Over the course of the seven-day trial plaintiff's trial team consisted of Scot Wilson, partner and highly experienced trial attorney, Sundeep Samra, a five-year attorney, and Diana Folia, a highly experienced litigation paralegal. Defendant argues the time billed by attorney Samra for his travel and attendance at trial was duplicative and unnecessary. Although plaintiff argues attorney Samra contributed to certain tasks in the preparation of trial he did not participate in the jury trial itself. The argument that defense counsel also had a second chair attorney present does not persuade the court that it is reasonable to *bill* for a second chair attorney. Attorney Samra billed 27.6 hours of travel time and 33.3 hours to attend trial, not including specific contributions separately billed during the trial. This results in a $22,838.50 reduction in the total fee.

During the course of litigation counsel for plaintiff travelled to attend the deposition of plaintiff and the vehicle inspection in Fresno. Counsel billed at their full hourly rates for the 8.1 hours attributed to travel time. (See Suarez Decl., Exh. B, entries for July 30, 2021 and August 18, 2022.) The court does not find it reasonable to bill at an attorney's full hourly rate for travel time and discounts those entries by 50%, resulting in a $1,460.50 reduction in the total fee.

As its final category of disputed billing entries, defendant challenges the block billing, primarily submitted by Scott Wilson and Diana Folia and related to the trial of this action. (Suarez Decl., Exh. C.) The court has reviewed the challenged entries and the listed in Exhibit C to the Declaration of Jeanette Suarez and for the most part is satisfied that the tasks described are compensable. However, there are entries by Ms. Folia on July 7, 2023 and October 23, 2023 that appear to be entirely clerical tasks that cannot be billed and a July 6, 2023 call with attorney Caitlin Rice also billed by Ms. Rice. The deduction of these entries results in a reduction of $1,475 to the fees. Additionally, the block billing includes travel time from Orange County to Fresno that should be billed at a discounted 50% rate. Presuming an average travel time of 4.5 hours one-way between Orange County and Fresno, the court discounted the block-billed entries by 4.5 hours and billed those 4.5 hours at a 50% rate for the respective biller. This results in a discount of $2,250 for travel by Ms. Folia and $5,805 for Mr. Wilson. In total, the reductions from the block-billed entries results in a $9,530 reduction in the total fee.

After careful review of the challenged billing entries a total reduction of $44,640.50 from the total fee. This adjustment reduces the lodestar amount to $255,721.50.

<u>*Multiplier*</u>

Plaintiff seeks a multiplier of 1.5 to apply to the lodestar on the basis that counsel took the case on a contingency basis. Defendant argues a negative multiplier is

warranted due to the absence of a contingent award due to the mandatory fee-shifting within the Song-Beverly Act and near certainty of prevailing on the merits. (See *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1174- 1175 [multiplier not warranted for contingency risk on claim with a mandatory fee-shifting provision, because "the possibility of receiving full compensation for litigating the case was greater than that inherent in most contingency fee actions"].)

A multiplier enhancement to the lodestar "is primarily to compensate the attorney for the prevailing party at a rate reflecting the risk of nonpayment in contingency cases as a class." (*Ketchum*, *supra*, 24 Cal.4th at p. 1138.) A multiplier may also be applied where the attorney has shown extraordinary skill, resulting in exceptional results. (*Ibid.*; *Graham*, *supra*, 34 Cal.4th at p. 582.) Courts have substantial discretion to select the factors they deem relevant to their multiplier analysis. (*Lealao v. Beneficial California, Inc*. (2000) 82 Cal.App.4th 19, 40–41.) The factors include: (1) the novelty and difficulty of the questions involved and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; and (3) the contingent nature of the fee award, based on the uncertainty of prevailing on the merits and of establishing eligibility for the award. (*Robertson v. Fleetwood Travel Trailers of California, Inc*. (2006) 144 Cal.App.4th 785, 819.)

Reviewing the case in light of these factors, the court does find that the application of a multiplier is appropriate. However, the uncertainty of prevailing on the merits was reduced significantly after plaintiff was presented with an offer to repurchase the vehicle only months into litigation. Although she was right to decline the offer, given the ultimate jury award of an additional $30,000 in civil penalties, it cannot be said that the risk of recovery was uncertain. The court finds it reasonable to award a multiplier of 1.25.

Accordingly, a total of $319,652.00 in attorney's fees are awarded.

The parties' evidentiary objections are overruled.

<u>*Motion to Tax Costs:*</u>

On December 22, 2023, plaintiff filed a memorandum of costs seeking $45,466.61 in costs across multiple categories. On January 8, 2024, defendant filed a motion to tax costs. Defendant challenges $28,579.61of the costs sought.

<u>*Deposition Costs*</u>

Defendant requests the court tax a total of $4,275.85 in costs related to "non-appearances" of defendant's and the dealership's person most knowledgeable after timely objections to the notices of deposition were served and cancellation fees resulting from plaintiff's unilaterally noticing and re-noticing depositions of dealership personnel which ultimately resulted in no depositions of service advisors or sales personnel due to the fact that there was no dispute that plaintiff's car contained a defect.

In the same vein, defendant seeks to tax $1,365.50 in deposition subpoena costs associated with the depositions of dealership employees that never went forward.

In opposition, plaintiff argues the depositions challenged were necessary to prepare for trial as the persons who actually worked on the car and could provide relevant information about the vehicle repair history and to authenticate and explain the records. This argument is premised as though the challenged depositions did in fact go forward and does not address that the plaintiff ultimately never obtained the depositions of dealership service personnel. Nor does it acknowledge that the statements of non-appearance on February 25, 2022, September 22, 2022 and February 23, 2023 were taken after a timely objection to the notice of deposition was served. Moreover, the Joint Trial Exhibit List indicates the parties stipulated to the authentication and admission of dealership repair orders. (Melero Decl., Exh. E.) Thus, the depositions of dealership personnel were not necessary.

Plaintiff has not rebutted defendant's argument as to why the costs associated with depositions of persons most knowledgeable that went forward despite a valid objection being served are not reasonably necessary expenses. Likewise, plaintiff's subpoena service and cancellation of depositions noticed by plaintiff of local dealership personnel that ultimately never went forward do not appear reasonably necessary to the prosecution of the action. The motion to tax deposition fees is granted. Costs in the amount of $5,641.35 are taxed.

Expert Fees

Defendant requests the court tax a total of $10,701.59 in expert witness fees attributed to plaintiff's experts Barry Bookman and Thomas Lepper. Defendant argues the failure to specify the fee and failure to provide evidence of the hours billed, as the hours billed exceed the time of the vehicle inspection, deposition and trial testimony that took place on the dates indicated on the memorandum.

In opposition, plaintiff produces the invoices from experts Bookman and Lepper reflecting the charges challenged by defendant. The motion to tax costs is denied.

Photocopies of Exhibits

Defendant seeks to tax the entirety of the $1,379.84 in costs for printing, binders and tabs due to the absence of itemization and invoices. Plaintiff has produced the invoice for the same amount for such costs. The motion to tax costs is denied.

Other Costs

Defendant challenges $904.38 in costs for attorney services and messengers for court filings, arguing overnight postage is not recoverable and plaintiff does not provide enough information to the court for it to determine whether these were incurred by necessity rather than convenience. Plaintiff has produced an itemized list indicating these costs are associated primarily with fees for electronic filing. The motion to tax costs is denied.

Defendant is also challenging travel costs of $5,946.48 based on the failure to provide enough information to determine whether these costs were reasonably incurred.

Plaintiff argues in opposition that the Song-Beverly Act specifically authorizes an award of reasonable costs *and expenses* reasonably incurred in the prosecution of the action. (Civ. Code. §1794, subd. (d).) Counsel's travel expenses incurred specifically in the trial of this action were reasonably incurred in the prosecution of the action. The motion to tax costs is denied.

Defendant is challenging costs of $4,005.97 for trial transcripts, as the transcripts were not court ordered and only voluntarily sought. (Code. Civ. Proc. § 1033.5, subd. (b)(5).) Plaintiff argues these costs were reasonably necessary to the conduct of the litigation as necessary for the motion for prejudgment interest and to oppose defendant's motion for a new trial. Moreover, the Song-Beverly Act specifically authorizes an award of reasonable costs *and expenses* reasonably incurred in the prosecution of the action. (Civ. Code. §1794, subd. (d).) The motion to tax costs is denied.

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 4/30/2024 .
(Judge's initials) (Date)

(29)

Tentative Ruling

Re: ***In re: Izabella Lopez***
Superior Court Case No. 24CECG00568

Hearing Date: May 2, 2024 (Dept. 501)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To deny without prejudice. Petitioner must file an amended petition, with appropriate supporting papers and proposed orders, and obtain a new hearing date.

Explanation:

Item 18b(2) and attachment 18b(2) indicate that petitioner seeks to have claimant's settlement funds deposited into a blocked account. No proposed order to deposit has been filed, however. Also, as explained in the court's last ruling, it is not appropriate to reduce the amount of the settlement to which claimant is entitled in order for it to go to petitioner because petitioner is claimant's caregiver. Again, the implication is that claimant's mother intends to offset the parents' obligation to provide care for claimant by use of claimant's settlement funds. It remains unclear to the court how providing to claimant's mother moneys that otherwise would be distributed to claimant "will directly benefit [claimant] in a more immediate and appreciable way" or how this is appropriate or allowable under the law. Last, counsel indicates at paragraph 5 of his declaration that he is including overhead costs in his fee request, however does not provide authority supporting this. (See, e.g., *Margolin v. Regional Planning Com*. (1982) 134 Cal.App.3d 999, 1004–1005 ["California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys' fee award. Consideration of the cost of providing services has no place in that formula." Citations omitted.]; see also Cal. Rules of Court, rule 7.955(b).)

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 5/1/2024 .
(Judge's initials) (Date)

(29)

<u>Tentative Ruling</u>

Re:	***In re: Nico Rodriguez*** Superior Court Case No. 24CECG00574
Hearing Date:	May 2, 2024 (Dept. 501)
Motion:	Petition to Compromise Minor's Claim

Tentative Ruling:

To deny without prejudice. Petitioner must file an amended petition, with appropriate supporting papers and proposed orders, and obtain a new hearing date.

Explanation:

Petitioner has again marked item 18b(5), asking that claimant's settlement funds be distributed to petitioner. However, petitioner has also provided attachment 18b(2), indicating that petitioner seeks to have claimant's settlement funds deposited into a blocked account. It appears, then, that petitioner intended to mark item 18b(2), however the court found no proposed order to deposit in its file. Further, as explained in the court's last ruling, it is not appropriate to reduce the amount of the settlement to which claimant is entitled in order for it to go to petitioner because petitioner is claimant's caregiver. Again, the implication is that claimant's mother intends to offset the parents' obligation to provide care for claimant by use of claimant's settlement funds. It remains unclear to the court how providing to claimant's mother moneys that otherwise would be distributed to claimant "will directly benefit [claimant] in a more immediate and appreciable way" or how this is appropriate or allowable under the law. Last, counsel indicates at paragraph 5 of his declaration that he is including overhead costs in his fee request, however does not provide authority supporting this. (See, e.g., *Margolin v. Regional Planning Com*. (1982) 134 Cal.App.3d 999, 1004–1005 ["California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys' fee award. Consideration of the cost of providing services has no place in that formula." Citations omitted.]; see also Cal. Rules of Court, rule 7.955(b).)

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: <u>DTT</u> on <u>5/1/2024</u> .
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***HC v. Pike***
Superior Court Case No. 22CECG03888

Hearing Date: May 2, 2024 (Dept. 501)

Motion: 1) by the Court for Reconsideration of its Order Entered on July 20, 2023.

2) Renewed by Plaintiff for Order Permitting Pretrial Discovery Regarding Defendant Richard Pike's Profits and Financial Condition (trailing the ruling on the court's motion for reconsideration)

Tentative Ruling:

To grant reconsideration of the order entered on July 20, 2023. The court finds that it erred in not specifically denying the motion *without prejudice*. The ruling is hereby amended to reflect that plaintiff's first Motion for Order Permitting Pretrial Discovery Regarding Defendant Richard Pike's Profits and Financial Condition is denied *without prejudice*. Plaintiff's second motion is now continued to Thursday, June 27, 2024, at 3:30 p.m. in Department 501. In ruling on the motion, the court will consider all evidence presented by plaintiff on this second motion, including the declaration plaintiff belatedly filed on February 28, 2024. New opposition and reply are authorized, and are due pursuant to Code of Civil Procedure section 1005.

Explanation:

In *Le Francois v. Goel* (2005) 35 Cal.4th 1094 ("*Le Francois*"), the California Supreme Court considered whether, and to what extent, Code of Civil Procedure section 1008 ("section 1008") limited the trial court's ability to reconsider its prior orders, there in the context of a motion that violated section 1008 (as here).[2] "Thus the questions are squarely presented: May a trial court reconsider interim orders it has already made in the absence of new facts or new law? If so, may it do so only on its own motion, or may a party move for reconsideration?" (*Id.* at p. 1101.) The Supreme Court recognized that these questions implicated the separation of powers principles, i.e., the Legislature's power to limit, by statute, the court's ability to correct an erroneous ruling. (*Id.* at pp. 1009-1102 (discussing cases developing the issue relative to section 1008).)

After discussing the separation of powers doctrine generally, the Court concluded that the applicable test "can be stated quite simply: The Legislature may regulate the courts' inherent power to resolve specific controversies between parties, but it may not defeat or materially impair the courts' exercise of that power." (*Id.* at p. 1103.) It noted

[2] The motion at issue in *Le Francois* also violated Code of Civil Procedure section 437c's restrictions on bringing a second summary judgment motion on the same issue, but that is not germane to the case at bench. Therefore, any references in *Le Francois* to section 437c are omitted herein.

that an interpretation that section 1008 could "limit the court's authority to act on its own motion to correct its own errors," might go too far and "emasculate the judiciary's core power to decide controversies between parties." (*Le Francois, supra*, 35 Cal.4th at p. 1104, internal quotes omitted.)

After engaging in statutory construction, including examining the legislative history behind section 1008, the Court concluded that the statute "limit[s] the parties' ability to file repetitive motions but do[es] <u>not</u> limit the court's ability, on its own motion, to reconsider its prior interim orders so it may correct its own errors." (Id. at p. 1107.) "If a court believes one of its prior interim orders was erroneous, it should be able to correct that error no matter how it came to acquire that belief." (*Id.* at p. 1008.) However, in keeping with the statute's restrictions placed on parties' ability to file repetitive motions, the Court held that if the trial court wished to reconsider a prior order, it must "inform the parties . . ., solicit briefing, and hold a hearing." (*Id.* at p. 1108.) "Then, and only then, would a party be expected to respond to another party's suggestion that the court should reconsider a previous ruling." (*Id.* at pp. 1108-1109.) "This procedure provides a reasonable balance between the conflicting goals of limiting repetitive litigation and permitting a court to correct its own erroneous interim orders." (*Id.* at p. 1109.)

Finally, as defendant correctly points out, if the court undertakes to reconsider an earlier ruling on its own motion, the trial court must conclude that its earlier ruling was wrong, and change that ruling *based on the evidence originally submitted."* (*In re Marriage of Barthold* (2008) 158 Cal.App.4th 1301, 1314, emphasis original.)

In keeping with the above, on March 28, 2024, this court set a hearing on the court's own motion for reconsideration of its order on the initial motion, entered on July 20, 2023. The court also set a briefing schedule for the parties to raise their arguments. The court also continued plaintiff's current motion to the same date, to trail the ruling on the court's motion for reconsideration.

In undertaking the analysis of the parties' initial arguments on this second motion, the court became aware of the holding in *Farber v. Bay View Terrace Homeowners Assn.* (2006) 141 Cal.App.4th 1007 ("*Farber*"), which the court discussed in its ruling on March 28, 2024. In *Farber,* the trial court denied defense counsel's first fee motion, but then granted his second (i.e., "renewed") fee motion. On appeal, plaintiff argued this was improper because the second motion did not state the grounds for a renewed motion required by section 1008. (*Id.* at p. 1014.) However, the appellate court found that since the first motion was denied *without prejudice*, section 1008 *was inapplicable*. "Denial of a motion without prejudice impliedly invites the moving party to renew the motion at a later date, when he can correct the deficiency that led to the denial. (*Id.* at p. 1015.) The court explained:

> In this case, the first motion was denied for want of sufficient evidence. The trial court might have continued the motion to allow the Association to submit a detailed fee bill, but instead it chose to deny the motion with, in effect, leave to renew it upon further evidence. *Which route to choose is an administrative matter of calendar management—some might want to streamline a docket and continue a pending motion to allow supplemental filings, while others might prefer to decide*

> *the motion on the existing papers and reconsider that decision in a new motion. In any event, the trial court acted within its powers when, essentially on its own motion, it reconsidered fees and made the instant fee award.*

(*Farber, supra,* 141 Cal.App.4th at p. 1015, emphasis added.)

The court's consideration of the *Farber* opinion made it aware that it erred in not denying plaintiff's first motion *without prejudice*. As in *Farber,* the first motion was denied for want of sufficient evidence. The court has stated in its prior adopted Tentative Rulings on this second motion that it did not rule on the merits of the first motion. However, after further consideration, whether or not the initial ruling was on the merits is immaterial. In *Farber,* the court considered the merits of the attorney's supporting declaration stating the hours he had spent on the case and his regular billing rate, and denied the motion "'without prejudice on the grounds that Moving Party did not supply the court with sufficient information to determine whether the fees were reasonable and necessary.'" (*Farber, supra,* 141 Cal.App.4th at p. 1014, quoting from the lower court's ruling.) This allowed the attorney to file a second motion with a more detailed declaration, and the court granted the motion. (*Ibid.*) Thus, the court in *Farber* clearly ruled on the merits of the first motion, but this did not foreclose or in any way limit the court's ability to allow the moving party to bring a second motion, with additional evidence, by simply denying the motion *without prejudice*.

Here, the court had no choice but to deny the first motion given its deficiencies. However, in doing so the court in no way intended this to prevent plaintiff from refiling her motion with the defects corrected. Plaintiff has stated very serious allegations against defendant and, if established at trial, these would be a prototypical example of the kinds of wrongs that would warrant the imposition of punitive damages. In examining the evidence submitted on the first motion (i.e., the defectively executed declarations, as well as the declarations filed on reply), it is clear that plaintiff may be able to correct the defects and meet her moving burden sufficient to raise defendant's burden to present evidence in opposition. On such facts, the motion should have been denied *without prejudice*, making section 1008 inapplicable. (*Farber, supra,* 141 Cal.App.4th at p. 1015; *National Grange of Order of Patrons of Husbandry v. California Guild* (2019) 38 Cal.App.5th 706, 716, fn 10.) Therefore, the court corrects its error now, and enters a new ruling on that motion, denying it *without prejudice*.

Defendant argues that the court can only reconsider its earlier ruling if it made an "error of law," and that no such errors exist in the court's original ruling. Defendant concedes that "the court was vested with discretion to deny the original motion with or without prejudice," but since this "choice of options was not a misapplication of the law but an exercise of its discretion [it] cannot be used to neutralize the jurisdictional time limits imposed by Section 1008." As the court understands defendant's argument, the court is not allowed to reconsider decisions made *in the exercise of its discretion* which the court, in hindsight, considers erroneous, but may only reconsider "errors of law." However, defendant provide no authority for this contention. While the court does not doubt it is possible that the majority of instances of reconsideration concern errors of law, that does not mean the court cannot look back and see errors made in the exercise of its discretion, especially when exercising its broad inherent authority to reconsider its prior

ruling, as opposed to exercising its more restrictive statutory authority to reconsider under section 1008.

The court has broad inherent power to "amend and control its process and orders so as to make them conform to law and justice." (Code Civ. Proc., § 128, subd. (a)(8).) Specifically, in this case, the court believes it would be a miscarriage of justice to not allow plaintiff's motion to be considered "on the merits" in the sense of the evidence from both sides being considered and weighed. Even assuming, *arguendo*, defendant is correct that the court's first ruling was "on the merits," the evidence was not weighed and considered. The court intends to consider and weigh all the evidence presented, from both sides, at the next hearing.

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 5/1/2024 .
(Judge's initials) (Date)