

Tentative Rulings for March 15, 2022
Department 501

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

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

16CECG02457 *Maxwell v. Crawford & Company* motions are continued to
Wednesday, April 13, 2022 at 3:30 p.m. in Dept. 501

21CECG00097 *Pittenger v. Nunno* is continued to Wednesday, April 13, 2022 at
3:30 p.m. in Dept. 501

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Tentative Rulings for Department 501

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(29)

Tentative Ruling

Re: ***In Re: Jorge Torres Zavala***
Superior Court Case No. 21CECG01389

Hearing Date: March 15, 2022 (Dept. 501)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. No appearances necessary. Petitioner to submit properly completed proposed Orders for signature and notify department clerk upon filing.

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** 3/14/2022.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Estate of Clarence Richard Billingsley v. Larry Davis, et al.***
Superior Court Case No. 20CECG01179

Hearing Date: March 15, 2022 (Dept. 501)

Motion: Defendants' Demurrer and Motion to Strike a Portion of the
Second Amended Complaint

Tentative Ruling:

To sustain, in part, the general demurrer to the Fifth Cause of Action. To sustain the general demurrer to the Ninth Cause of Action with leave to amend. To deny the motion to strike attorney's fees. Plaintiff is granted 10 days' leave to file a Third Amended Complaint, which will run from service by the clerk of the minute order. New allegations/language must be set in **boldface** type.

Explanation:

Demurrer

It is "the established rule that as against a general demurrer a complaint will be liberally construed[...]; that any mere ground of special demurrer for uncertainty will be resolved in support of the complaint and the demurrer overruled, when the necessary facts are shown to exist, although inaccurately or ambiguously stated, or appearing only by necessary implication." (*Hunter v. Freeman* (1951) 105 Cal.App.2d 129, 133; see *Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1238 [pursuant to rule of liberal construction, court draws inferences favorable to plaintiff, not defendant].) In testing a pleading against a demurrer, the facts alleged are deemed to be true, as it is "not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which [plaintiff] describes the defendant's conduct." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47.) Pleadings are to be reasonably interpreted, read as a whole and in context. (*Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 955.) Plaintiff is not required to plead evidentiary facts supporting the allegation of ultimate fact; the pleading is adequate if it apprises defendant of the factual basis for plaintiff's claim. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6; see *Fundin, supra*, 152 Cal.App. 3d at p. 955 ["All that is necessary as against a general demurrer is to plead facts showing that the plaintiff may be entitled to some relief."].)

Fifth Cause of Action – Conversion

Conversion is the wrongful exercise of dominion over the property of another. (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240.) The elements of a conversion claim are: (1) plaintiff's ownership or right to possession of the property; (2) defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. (*Ibid.*)

The fifth cause of action is brought as a derivative action on behalf of Air-O-Fan and alleges Fiduciary Defendants wrongfully exercised control over Air-O-Fan's profits from the sale of real property in Gilroy, California, by requiring Air-O-Fan to lease property from the Non-Fiduciary Defendants to the detriment of Air-O-Fan. Construing these allegations liberally, Defendants thus deprived Air-O-Fan of profits from the sale and converted the profits by using the profits to lease property from the Non-Fiduciary Defendants.

The cause of action further alleges that Defendants intentionally interfered with Air-O-Fan's right to profits on its post-production products by selling the products at no profit. Again, construing the allegations liberally, Defendants thus converted the right to profits in these products by selling the products at cost and taking no profits from their sale to the detriment of Air-O-Fan.

The demurring defendants take issue with "profits" being the subject of a cause of action for conversion as there is no specific, identifiable sum alleged. (*Haigler v. Donnelly* (1941) 18 Cal.2d 674, 681.) Profits can be the subject of a cause of action for conversion where there is an identifiable sum and, as alleged in the Second Amended Complaint (SAC) at paragraphs 94-95, those identifiable sums are the profits from the sale of the real property. (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1404-1405.) To extend the tort of conversion to include the absence of profits, as plaintiff seeks to do here, is a step too far. Plaintiff has provided no support for the proposition that the absence of property can be "personal property" subject to conversion. This is sufficient as against a demurrer. Plaintiff is not required at this stage to plead evidentiary facts, only ultimate facts. (*Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1549 [plaintiff need not plead evidentiary facts supporting allegation of ultimate fact, pleading is adequate so long as it apprises defendant of factual basis for claim].)

Plaintiffs also allege the conversion of profits not taken from the sale of post-production products. To extend the tort of conversion to include the absence of profits, as plaintiff seeks to do here, is a step too far. Plaintiff has provided no support for the proposition that the absence of property can be "personal property" subject to conversion. The demurrer is sustained as to the allegations regarding the loss of post-production profits.

Ninth Cause of Action – Civil Conspiracy

The ninth cause of action in the SAC is labelled "Civil Conspiracy" and is brought as a derivative action on behalf of Air-O-Fan against all defendants. The cause of action describes an agreement between the Fiduciary Defendants and Non-Fiduciary Defendants for the Fiduciary Defendants to use their control of Air-O-Fan to wrongfully transfer profits of Air-O-Fan to the Non-Fiduciary Defendants in violation of their fiduciary duties to Air-O-Fan. The cause of action goes on to describe those transactions between Air-O-Fan and the Non-Fiduciary Defendants.

Civil conspiracy is not an independent cause of action but a theory of liability to hold alleged co-conspirators liable as joint tortfeasors. It is the civil wrong that is the cause of action, not the conspiracy. (*Mox, Inc. v. Woods* (1927) 202 Cal. 675, 677; *Orloff v.*

Metropolitan Trust Co. (1941) 17 Cal.2d 484, 488.) The complaint does not sufficiently plead the elements of a cause of action for a tort or other wrong the defendants conspired to undertake and is defective. The demurrer is sustained with leave to amend to allow plaintiff to define what tort or wrong defendants conspired to commit and the damages resulting therefrom.

Motion to Strike

A motion to strike can be used to cut out any "irrelevant, false or improper" matters inserted therein. (Code Civ. Proc. § 436, subd. (a).) "Irrelevant matter" includes a demand for judgment "requesting relief not supported by the allegations of the complaint or cross-complaint." (Code Civ. Proc. § 431.10, subd. (b).)

Code Civil Procedure section 1021 provides: "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties."

Here, the SAC contains no allegations identifying any statute or contract provision authorizing a recovery of attorney's fees by plaintiff against the moving parties.

The SAC includes nine derivative causes of action brought on behalf of Air-O-Fan against the moving parties. A shareholder who successfully pursues a derivative action that establishes a common fund or substantial benefit to the corporation may look to the corporation to pay the costs of the litigation that has benefited it. (*Cziraki v. Thunder Cats, Inc.* (2003) 111 Cal.App.4th 552, 557-558.)

Courts generally apply the common fund and substantial benefit theories to cases involving a distinct class of beneficiaries, among whom the costs of litigation can be fairly spread to prevent the unjust enrichment of class members at the expense of the successful litigant. In a derivative action, the corporation represents the class of beneficiary shareholders. When the corporation pays attorney fees to the successful plaintiff, all shareholders indirectly share the cost of the beneficial litigation with the shareholder who brought the action. In contrast, when a shareholder brings a derivative suit for the true purpose of advancing his or her "personal adverse interests," neither equitable doctrine allows an award of attorney fees.

(*Cziraki v. Thunder Cats, Inc.*, *supra*, 111 Cal.App.4th 552, 558.)

Defendants seek to strike "attorney fees" from Item J of plaintiff's prayer for damages where the request as worded is for plaintiff alone, rather than "Plaintiff and/or Air-O-Fan" in Item I. Plaintiff's direct causes of action seek to compel defendants to declare or pay a dividend to plaintiff as a stockholder and are not for the benefit of the corporation. However plaintiff's derivative causes of action as alleged for the benefit Air-O-Fan and may ultimately confer a benefit to Air-O-Fan. The motion to strike 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** 3/14/2022.
(Judge's initials) (Date)