Tentative Rulings for April 13, 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.

19CECG03608	***Nationstar Mortgage LLC v. Juan Gonzalez* is continued to Wednesday, May 4, 2022 at 3:30 p.m. in Dept. 501**
20CECG02289	***Yarnell v. Michael Cadillac, Inc.* is continued to Tuesday, April 19, 2022 at 3:30 p.m. in Dept. 501**
21CECG00097	***Pittenger v. Nunno* is continued to Tuesday, April 19, 2022 at 3:30 p.m. in Dept. 501**
21CECG00908	***Anderson v. Smith* is continued to Wednesday, May 4, 2022 at 3:30 p.m. in Dept. 501**
21CECG00917	***Martinez v. Cassio* is continued to Wednesday, May 4, 2022 at 3:30 p.m. in Dept. 501**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 501

Begin at the next page

(03)

Tentative Ruling

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

Hearing Date: April 13, 2022 (Dept. 501)

Motion: by Defendant Kia America for Summary Adjudication

Tentative Ruling:

To grant defendant Kia America's motion for summary adjudication of the fourth and fifth causes of action. (Code Civ. Proc. § 437c.) To deny defendant's motion with regard to the punitive damage claim, as defendant's notice of motion and separate statement do not request summary adjudication of punitive damages. (Cal. Rules of Court, rule 3.1350(b).)

Explanation:

Fourth Cause of Action: The elements of a fraudulent concealment cause of action are " '(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.' " (*Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248, quoting *Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 748.)

In *Bigler-Engler v. Breg, Inc., supra,* 7 Cal.App.5th 276, the Court of Appeal held that there must be some relationship between the plaintiff and the defendant, who was the manufacturer of a medical device that allegedly caused plaintiff's injuries, in order for the defendant to have a duty to disclose to the plaintiff the fact that the device had caused injuries to other patients. (*Id*. at pp. 311-312.)

"'There are "four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts.' Where, as here, a fiduciary relationship does not exist between the parties, only the latter three circumstances may apply. These three circumstances, however, 'presuppose[ ] the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise.' 'A duty to disclose facts arises only when the parties are in a relationship that gives rise to the duty, such as "seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual arrangement."'" (*Id*. at p. 311.)

"Our Supreme Court has described the necessary relationship giving rise to a duty to disclose as a 'transaction' between the plaintiff and defendant: 'In *transactions* which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff.' Other cases have described the requisite relationship with the same term. Such a transaction must necessarily arise from direct dealings between the plaintiff and the defendant; it cannot arise between the defendant and the public at large." (*Id*. at pp. 311–312, internal citations omitted.)

In *Bigler-Engler*, the Court of Appeal held that there was no transactional relationship between the patient and the manufacturer of the medical device, and the manufacturer had not made any misleading partial statements to plaintiff that would have imposed a duty on it to make further disclosures about the risks of the device. (*Id*. at pp. 312-314.) In fact, there was no relationship at all between the parties and there were no communications between the plaintiff and the manufacturer, as the device was provided by the plaintiff's doctor to the plaintiff without any involvement of the manufacturer. (*Ibid*.) "The evidence also does not show that Breg directly advertised its products to consumers such as Engler or that it derived any monetary benefit directly from Engler's individual rental of the Polar Care device. Indeed, Oasis appears to have obtained the Polar Care device Engler used from Breg several years before Engler's surgery and maintained the device itself for rental to its patients. Under these circumstances, there was no relationship between Breg and Engler (or her parents) sufficient to give rise to a duty to disclose." (*Id*. at p. 314.)

However, plaintiff points out that some courts have found that a car manufacturer may communicate indirectly with its customers through its authorized dealerships, and thus the manufacturer may have a duty to disclose information about defects in its cars to its customers. (*Daniel v. Ford Motor Company* (2015) 806 F.3d 1217, 1227.)

Here, there is no evidence of any direct transactional relationship between Kia America and plaintiff, and indeed plaintiff admitted that she never communicated directly with Kia America at the time she purchased the subject vehicle. Instead, plaintiff only communicated with Future Kia in Clovis when she purchased the car. Future Kia is a separate entity from Kia America. (Defendant's UMF Nos. 1-3, 14-16.) Nevertheless, there is evidence that Kia America advertised directly to customers like plaintiff, and that plaintiff saw some of the advertisements. (UMF Nos. 5, 18.) Kia America also directs customers to contact it directly about any repair or warranty claims. (Plaintiff's Additional Fact No. 10.) Thus, there is at least a triable issue of material fact with regard to whether there was a sufficient transactional relationship between the parties to impose a duty on Kia America to disclose that the GDI engine might be defective.

Kia America also argues that it did not have "exclusive knowledge" of the alleged engine defect, so it was not under a duty to disclose the defect to plaintiff as she could have learned about it from publicly available sources. "[A] duty to disclose exists 'when the defendant had exclusive knowledge of material facts not known to the plaintiff.'

(*Falk v. General Motors Corp.* (N.D. Cal. 2007) 496 F.Supp.2d 1088, 1096, internal citation omitted.) However, even if there is some information available from publicly available sources like customer complaints on the internet, if the manufacturer still had superior knowledge of the alleged defect, then it may have a duty to disclose the defect to potential customers. (*Id*. at p. 1097; see also *Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices and Products Liability Litigation* (C.D. Cal. 2010) 754 F.Supp.2d 1145, 1174.) "It is true that prospective purchasers, with access to the Internet, could have read the many complaints about the failed speedometers (as quoted in the complaint). Some may have. But GM is alleged to have known a lot more about the defective speedometers, including information unavailable to the public. Many customers would not have performed an Internet search before beginning a car search. Nor were they required to do so." (*Falk, supra,* at p. 1097.)

Here, there is at least some evidence indicating that Kia America had superior knowledge of the alleged defects in the GDI engines due to customer complaints and warranty claims, as well as communications with NHTSA regarding recalls for engine failures. (Plaintiff's Additional Fact No. 9, citing Dreblow decl., ¶ 14, Exhibit J.) However, Kia America did not disclose these facts to plaintiff. Therefore, there is at least a triable issue of fact as to whether Kia America had a duty to disclose the alleged engine defect to plaintiff based on its superior knowledge of the facts regarding the problems with its GDI engines.

On the other hand, it does not appear that plaintiff can show that she suffered any damages as the result of any concealment of the engine defect by Kia America. In order to prevail on a claim for fraud, plaintiff must show that she was damaged by the concealment or misrepresentation. (*Goehring v. Chapman Univ.* (2004) 121 Cal.App.4th 353, 364; *Lazar v. Sup Ct.* (1996) 12 Cal.4th 631, 638.) "To recover for fraud, the plaintiff must prove 'detriment proximately caused' by the defendant's tortious conduct. [Citation.] Deception without resulting loss is not actionable fraud. [Citation.] 'Whatever form it takes, the injury or damage must not only be distinctly alleged but its causal connection with the reliance on the representation must be shown.' 'Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty.'" (*Goehring, supra,* at p. 364, internal citations omitted.)

Here, plaintiff claims that defendant Kia America fraudulently concealed from her the fact that its GDI engines were defective and could fail at any time, potentially causing an accident or an engine fire. She also claims that she would not have bought the car if she had known that its engine was defective, and thus she was damaged. However, there is no evidence that plaintiff's car's engine was actually defective and caused her any harm as a result of the defect. In fact, plaintiff admitted during her deposition that she has no recollection of ever having any engine trouble with her car. (Defendant's UMF Nos. 8, 21.) She does not recall ever bringing her car in for service on the engine. (*Ibid*.) She also denied that she ever had an engine fire. (*Ibid*.) She did not recall having any conversations with anyone at the dealership about her engine during any of the repair visits. (*Ibid*.)

Plaintiff did bring her car in for service on multiple occasions, but those repairs were due to problems with her transmission, which needed to be replaced twice, as well as some other non-engine related problems. (Plaintiff's Additional Facts 14-20.) Plaintiff

experienced stress and worry that the transmission problems might cause an accident, as the car would sometimes lunge forward on its own or rev to high RPMs. (Plaintiff's Additional Facts 15, 16.) However, there is no evidence that plaintiff's car had a defective engine or that she experienced any engine problems, as opposed to transmission problems.

To the extent that plaintiff relies on the declaration of her expert, Anthony Micale, to attempt to establish that her car had a defective engine, the declaration does not provide any evidence that would be relevant to the question of whether her vehicle has a defective engine. Micale's declaration was filed in a completely different case, *Walter Alfaro v. Kia Motors America, Inc*., Los Angeles Superior Court case no. BC714039, and it only states that the 2012 Kia Sorrento that is the subject of that case has a defective Theta II GDI engine. (Micale decl., ¶¶ 3-8.) In the present case, plaintiff purchased a completely different year and model of car, namely a 2017 Kia Sportage. Thus, the Micale declaration is irrelevant and fails to show that plaintiff's car has a defective engine, or even that her car has the same type of Theta II GDI engine that was in Mr. Alfaro's car.[1]

Also, the types of problems that Mr. Alfaro experienced as described in Micale's declaration do not appear to be similar to the problems that plaintiff experienced in the present case. According to Micale, Mr. Alfaro complained of the "engine making a rattle, grinding, knocking noise, the vehicle having an unusual vibration when driving, the motor mount getting cracked, the vehicle hesitates to start and turn over, the engine starter binding, and the airbag service indicator light appearing. Apart from the airbag indicator light concern, the remainder of Plaintiffs verified concerns are textbook examples of the Theta II engine defect." (Micale decl., ¶ 7.)

The plaintiff in the present case, however, experienced problems like leaking transmission oil, high RPMs when she let off the gas pedal, sudden lunging forward without warning, the transmission slipping, and the vehicle pausing and hesitating under acceleration. (Plaintiff's Additional Facts 14-20.) The dealership diagnosed problems with the transmissions, which required at least two replacement transmissions to be installed, although the car continues to have problems. (*Ibid*.) Thus, the problems described by plaintiff do not appear to show that she has a defective engine, and instead seem to indicate a series of defective transmissions.

As a result, while there appear to be some triable issues of material fact with regard to whether Kia America concealed the alleged defect in its GDI engines from plaintiff, there is no evidence that the concealment actually caused her any harm. Plaintiff has not submitted any admissible evidence showing that her car had the defective GDI engine, or that she has had any problems with her car's engine since she bought the car. At most, she appears to speculate that the car's engine may develop problems in the

[1] Defendant has objected to Micale's declaration on various grounds, including relevance and lack of foundation, and the court intends to sustain the objections as to the entire declaration.

With regard to the objections lodged by defendant to Thomas Dreblow's declaration, the court intends to sustain objections 2-5, 12, 14, 15, 16, and overrule the other objections.

The court intends to overrule all of plaintiff's objections to defendant's evidence.

future, as it allegedly has the same type of engine as other cars that have developed problems. However, such speculative future damages are not sufficient to support a claim for fraud. Generally, "damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery." (*Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1132, internal citation omitted.) Since plaintiff's engine has not actually failed or experienced any problems, she was not damaged by the alleged fraudulent concealment and she cannot prevail on her claim. Consequently, the court intends to grant summary adjudication of the fourth cause of action for fraudulent concealment.

Fifth Cause of Action: "The elements of fraud that will give rise to a tort action for deceit are: '(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.'" (*Engalla v. Permanente Medical Group, Inc*. (1997) 15 Cal.4th 951, 974, internal citation omitted.)

Statements made in advertisements that are "mere puffery" are not actionable misrepresentations because they are not statements of fact. (*Cook, Perkiss and Liehe, Inc. v. Northern California Collection Service, Inc*. (1990) 911 F.2d 242, 245-246.) Courts may decide as a matter of law whether a statement is nothing more than puffery, or whether it is an actionable statement of fact. (*Ibid*.)

"'Puffing' has been described by most courts as involving outrageous generalized statements, not making specific claims, that are so exaggerated as to preclude reliance by consumers." (*Id*. at p. 246, internal citation omitted.) "[W]e have recognized puffery in advertising to be 'claims [which] are either vague or highly subjective.' The common theme that seems to run through cases considering puffery in a variety of contexts is that consumer reliance will be induced by specific rather than general assertions. '[A]dvertising which merely states in general terms that one product is superior is not actionable.'" (*Ibid*.)

In *Cook*, the Ninth Circuit Court of Appeals held that the statement that "We're the low cost commercial collection experts" was mere puffery, and thus not actionable. (*Id*. at p. 246.) Similarly, in *Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, the Court of Appeal found that statements that defendant's system provided "crystal clear digital" video and "CD quality" sound were not actionable misrepresentations. " 'Crystal clear' and 'CD quality' are not factual representations that a given standard is met. Instead, they are boasts, all-but-meaningless superlatives, similar to the claim that defendants 'love comparison,' a claim which no reasonable consumer would take as anything more weighty than an advertising slogan." (*Id*. at p. 1361.)

Here, plaintiff claims that she relied on Kia's statements in its marketing materials that its GDI engines have "markedly improved power and efficiency with cleaner emissions" than conventional engines. (Complaint, ¶ 113.) However, these statements appear to be nothing more than vague and generalized superlatives rather than statements of fact that can be quantified. In other words, they are "mere puffery" and are not actionable representations. Nor has plaintiff presented any evidence that the statements were actually false, as she has not pointed to any evidence that the GDI

engines did not have improved power and efficiency or lower emissions than conventional engines.

In any event, plaintiff admitted in her deposition that she did not recall having heard or read any statements from Kia America or the dealership about the quality or reliability of Kia's engines. She stated that she had seen Kia advertisements on TV, but she was unable to recall anything specific about the ads other than that they had "hamsters", and mentioned "wheels", "engines and the lights and stuff like that." (Defendant's UMF Nos. 5, 18.) She did not recall any conversations she had with Future Kia's employees about the engine in the car. (Defendant's UMF Nos. 7, 20.) Even after she started experiencing problems with the car, she did not recall having any conversations with the dealer's employees about her engine. (Defendant's UMF Nos. 8, 21.)

Plaintiff has not cited to any admissible evidence showing that she ever read or relied upon marketing materials from Kia regarding the quality or reliability of its engines. While plaintiff cites to paragraphs of her complaint in her opposition to the summary adjudication motion to show that she read and relied on marketing materials from Kia, a plaintiff cannot rely on the allegations of their complaint to raise a triable issue of material fact in opposition to summary judgment. (Code Civ. Proc. § 437c, subd. (p)(2).) To meet her burden of demonstrating a triable issue of fact, the plaintiff must respond to the motion with admissible evidence. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 356.) Even the allegations of a verified complaint are not sufficient to show the existence of a triable issue of material fact. (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 720, fn. 7.) Here, plaintiff points to no admissible evidence showing that she actually relied on any statements regarding Kia's GDI engines, or that the statements misled her and caused her to purchase the car when she would not have otherwise done so.

Moreover, as discussed above, even if Kia America did make misrepresentations to plaintiff about the quality of its engines, and even if she relied on those statements when she purchased the car, she was not damaged because her car did not actually experience any engine problems. The evidence only shows that she has experienced several problems with her transmission, which have resulted in the dealership replacing her transmission at least twice. (Plaintiff's Additional Facts 14-20.) Plaintiff does not recall ever having engine problems with her car. (Defendant's UMF No. 21.) Thus, even assuming that Kia misrepresented the facts about its engines, plaintiff suffered no harm as a result of the misrepresentations, as her car has not had any engine failures or other engine problems. Consequently, plaintiff has not suffered any harm from the misrepresentations, and she cannot prevail on her intentional misrepresentation claim. Therefore, the court intends to grant summary adjudication of the fifth cause of action.

Punitive Damages: Defendant contends that, since plaintiff cannot prevail on her fraud causes of action, and since there is no evidence defendant acted with malice or oppression, plaintiff cannot recover punitive damages. (Civil Code § 3294.)

However, under Rule of Court 3.1350(b), "If summary adjudication is sought, whether separately or as an alternative to the motion for summary judgment, the specific cause of action, affirmative defense, *claims for damages*, or issues of duty *must be stated*

specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts." (Cal. Rules of Court, Rule 3.1350(b), italics added.)

Here, defendant's notice of motion does not mention that it is seeking summary adjudication of the punitive damage claim. It only states that defendant seeks adjudication of the fourth and fifth causes of action. Nor does defendant's separate statement address the punitive damage claim. As a result, the motion is procedurally defective to the extent that it seeks adjudication of punitive damages, and the court intends to deny the motion regarding the punitive damage claim.

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 4/7/2022.
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Maxwell v. Crawford & Company et al.***
Superior Court Case No. 16CECG02457

Hearing Date: April 13, 2022 (Dept. 501)

Motion: (1) by Plaintiff For Final Approval of Class Settlement
(2) by Plaintiff for Attorneys' Fees, Costs, Service Enhancement
(3) by Defendants for Relief From August 25, 2020, Order

Tentative Ruling:

To grant final approval of the settlement. To grant attorney costs in the amount of $10,000 and administrator costs in an amount of $7,750. To award attorneys' fees in the amount of $1,283,333. To grant the named plaintiff (class representative) an incentive award in the amount of $15,000.

To order the parties to return on March 21, 2023, at 3:30 p.m. in Department 501 to inform the court of the total amount actually paid to the class members, pursuant to Code of Civil Procedure section 384, subdivision (b), so that the judgment can be amended and the distribution of any cy pres funds can be ordered. Documentation as to the amount paid to class members must be filed no later than March 7, 2023.

To grant defendants' motion for relief from the August 25, 2020, Order to the extent that it prohibited defendants from communicating with the class members.

Explanation:

Final Approval of Settlement

California Rules of Court, rule 3.769(g), states: "Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement." Subsection (h) states: "If the court approves the settlement agreement after the final approval hearing, the court must make and enter judgment. The judgment must include a provision for the retention of the court's jurisdiction over the parties to enforce the terms of the judgment. *The court may not enter an order dismissing the action at the same time as, or after, entry of judgment*."[2] (Emphasis added.)

The court has vetted the fairness of the settlement through prior hearings, each with its own filings. The settlement here generally meets the standards for fairness, and the class has approved it, with no objections, opt-outs or disputes. Only six of 414 notices were undeliverable. The court finds that the method of notice followed, which this court approved at the prior hearing, comports with due process and was "reasonably calculated to reach the absent class members:

[2] The proposed order and judgment contains a provision, at paragraph 18, for dismissal of the action. This provision must be removed and the order/judgment resubmitted.

> "Individual notice of class proceedings is not meant to guarantee that every member entitled to individual notice receives such notice," but "it is the court's duty to ensure that the notice ordered is reasonably calculated to reach the absent class members." *Hallman v. Pa. Life Ins. Co.,* 536 F.Supp. 745, 748–49 (N.D.Ala.1982) (quotation marks and citation omitted); *see also In re Viatron Computer Sys. Corp. Litig.,* 614 F.2d 11, 13 (1st Cir.1980); *Key v. Gillette Co.,* 90 F.R.D. 606, 612 (D.Mass.1981); *cf. Lombard,* at 155. <u>*After such appropriate notice is given, if the absent class members fail to opt out of the class action, such members will be bound by the court's actions, including settlement and judgment, even though those individuals never actually receive notice.*</u> *Cooper,* 467 U.S. at 874, 104 S.Ct. 2794; 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1789 (2d ed.1986).

(*Reppert v. Marvin Lumber and Cedar Co., Inc.* (1st Cir. 2004) 359 F.3d 53, 56-57 emphasis added.)

<u>Incentive Award</u>

Plaintiff asks the court to confirm that he receive a $15,000 service enhancement paid from the settlement. The court has read plaintiff's declaration submitted with the preliminary approval motion. He has served ably as class representative, procured documents for counsel, communicated with and assisted counsel in prosecution of the case in various ways, took the risk of losing his employment and potentially jeopardizing future employment, helping to locate other employees and witnesses, among other activities. The court finds the amount requested to be reasonable in light of the settlement obtained, and approves the request.

<u>Costs</u>

Class counsel presents evidence of the actual costs incurred in the litigation to date and requests cost reimbursement in the amount of $10,000. All costs are permissible and are granted.

<u>Attorneys' Fees</u>

The settlement provided that the parties agreed (i.e., defendant agreed not to oppose) fees calculated at 33 percent of the gross settlement amount. Counsel has provided evidence of the actual time expended by the various attorneys representing plaintiff and the class throughout this action, as a cross-check of the lodestar. The court finds that the amount requested in fees is reasonable and justified by the efforts made and results obtained with this settlement, and awards attorney fees in the amount of $1,283,333.

<u>Administrator's Costs</u>

The court finds the amount requested, which is less than was agreed to in the settlement agreement, to be reasonable, and approves them as requested.

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 4/7/2022 .
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Christopher v. Tarlton Fresno, LLC***
Superior Court Case No. 20CECG02318

Hearing Date: April 13, 2022 (Dept. 501)

Motion: by Defendants Rodney Bernaldo and Ruanne Bernaldo, Co-Trustees of The Bernaldo Family Trust, for Order Deeming Admitted Truth of Facts, and for Monetary Sanctions

Tentative Ruling:

To grant defendants' motion to deem requests for admissions admitted. The truth of the matters specified in the Requests for Admission, Set One, are to be deemed admitted unless plaintiff serves, before the hearing, a proposed response to the requests for admission that is in substantial compliance with Code of Civil Procedure section 2033.220.

To grant monetary sanctions against plaintiff, Michael Christopher, in the total amount of $285. Monetary sanctions are ordered to be paid within 20 calendar days from the date of service of the minute order by the clerk.

Explanation:

Since no opposition to this motion was filed, there is no excusable reason for defendant's failure to respond to the discovery propounded, despite ample time being given.

Failure to timely respond to Requests for Admissions results in a waiver of all objections to the requests, and upon proper motion the court *shall* deem them admitted. (Code Civ. Proc. §2033.280.) The statutory language leaves no room for discretion. (*Tobin v. Oris* (1992) 3 Cal.App.4th 814, 828.) However, the court may relieve the party who fails to file a timely response if, before entry of the order deeming the requested matters admitted, the party in default 1) moves for relief from waiver and shows that the failure to serve a timely response was due to "mistake, inadvertence or excusable neglect; and 2) the party has served a response in "substantial compliance with Code of Civil Procedure Section 2033.220. (Code Civ. Proc. §2033.280(a)-(c); *see Brigante v. Huang* (1993) 20 Cal.App.4th 1569, 1584.)

Sanctions are mandatory against the party who loses the motion to compel responses to discovery unless the court finds that the party acted "with substantial justification" or other circumstances that would render sanctions "unjust." (Code Civ. Proc. § 2033.280, subd. (c).) Pursuant to California Rules of Court, rule 3.1030(a), this also applies where no opposition to the motion was filed. The sanctions requested were reasonable, but the court has removed the amounts included for preparing a reply, for preparing for and attending the hearing, and for the CourtCall fee, since none of these were necessary as plaintiff did not file opposition.

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 4/8/2022.
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Johnson, et al. v. JD Home Rentals, et al.***
Superior Court Case No. 19CECG04148

Hearing Date: April 13, 2022 (Dept. 501)

Motion: by Defendant to Disqualify Plaintiffs' Counsel

Tentative Ruling:

To grant. Wanger Jones Helsley PC is disqualified from representing plaintiffs in the instant matter. (Code Civ. Proc., § 128, subd. (a)(5).)

Explanation:

The court may order disqualification where necessary, in an exercise of its power to "control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto." (Code Civ. Proc., § 128, subd. (a)(5).)

Substantial Relationship of Representation:

Cases disqualifying attorneys for receiving confidential information in the absence of an attorney-client relationship, as is this case, are generally limited to situations where the information is relevant and material to the current matter. In determining whether the information is relevant, some courts apply the "substantial relationship" test ordinarily applied in successive representations cases. (*Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft, LLP* (1999) 69 Cal.App. 223, 232-235.) Other courts examine whether the information obtained may be useful or pertinent to the attorney's current employment. (*William H. Raley Co., Inc. v. Superior Court* (1983) 149 Cal.App.3d 1042, 1047-1048.) Given that the parties do not discuss the usefulness of the confidential information, the court limits its discussion to the "substantial relationship" test.

If the subjects of the prior representation[3] are such as to "make it likely the attorney acquired confidential information" that is relevant and material to the present representation, then the two representations are substantially related. (*City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 847.) When a substantial relationship is established, the attorney is automatically disqualified from representing the second client. (*Ibid.*) To establish the existence of a substantial relationship between prior and current representations, the moving party must present evidence "that information material to the evaluation, prosecution, settlement or accomplishment of the former representation given its factual and legal issues is also material to the evaluation, prosecution, settlement or accomplishment of the current representation given its factual

[3] While Judge Wanger did not represent defendants in the prior matter and only served as a mediator for the parties, the court will define this mediation as a "prior representation" only for the limited purpose of application of the "substantial relationship" test.

and legal issues." (*Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 713.) Moreover, "[t]he substantial relationship test requires comparison not only of the legal issues in successive representations, but also of evidence bearing on the materiality of the information the attorney received during the earlier representation." (*Khani v. Ford Motor Co.* (2013) 215 Cal.App.4th 916, 921 [brackets added].)

Here, it is undisputed that Oliver W. Wanger ("Judge Wanger"), a partner at Wanger Jones Helsley PC, served as a mediator in *Vu, et al. v. Hovannisian, et al.*, Fresno Superior Court Case No. 14CECG00062 (the "*Vu* Action")—"a 2014 class action brought against various individuals and entities affiliated with Defendant JD Home Rentals…" (Memo, 1:8-10.)

The opposition argues that the underlying legal claims in the instant case are not substantially related to those presented in the *Vu* Action, specifically— the *Vu* Action involved class claims exclusively related to the habitability of JD Home Rentals' properties, whereas here, the claims concern alleged retaliatory eviction and the failure to return security deposits. While the issues relating to retaliatory eviction and failure to return security deposits encompasses a portion of plaintiff's allegations against JD Home Rentals, plaintiffs neglect to mention that they are also asserting causes of actions for breach of implied warranty of habitability and breach of statutory warranty of habitability, which was, according to the opposition, the primary subject of the *Vu* Action.

Further, the opposition concedes that "[h]abitability claims relate to whether a landlord has provided the 'bare living requirements' and have maintained 'safe, clean and habitable housing,' often with reference to building and housing code standards." (Opp., 8:7-9 [internal citations omitted, brackets added].) To the extent that the operative complaint alleges that JD Home Rentals had a duty "to comply with all building, fire, health and safety codes, ordinances, regulations and other laws, and to maintain the premises in a habitable condition[,]"[4] and breached such duty, it would appear that there is merit to JD Home Rentals' contention that the information exchanged in the *Vu* Action is relevant and material to the litigation of the instant matter. While plaintiffs also suggest that the causes of actions relating to habitability may need to be removed from the First Amended Complaint, dependent on the outcome of the *Vu* Action settlement, the court only considers the facts currently in existence.

Moreover, the evidence suggests that the *Vu* Action also involved claims relating to lost money or property by the tenant class members relating to payment of rent or deposits and claims relating to JD Homes Rentals' retaliation and/or harassment of tenant class members, (Wilkins, Decl., Ex. K, [Proposed] Final Judgment and Order, 8:16-18; 9: 14-16.) which are directly at issue in the instant matter. Provided that JD Home Rentals indicates that the conversations with Judge Wanger covered essentially every aspect of JD Home Rentals' business practices as landlords and duties owed to tenants apart from individual claims for personal injury[5], it follows that Judge Wanger received information that is material to the evaluation, prosecution, settlement or accomplishment of the current representation. Thus, the prior representation is substantially related to the current representation in the context of disqualifying Judge Wanger from the case.

[4] First Amended Complaint, 7:12-18.

[5] Declaration of David Hovannisian in Support of Motion to Disqualify Counsel, ¶1, ¶4.

Vicarious Disqualification:

"Once the moving party in a motion for disqualification has established that an attorney is tainted with confidential information, a rebuttable presumption arises that the attorney shared that information with the attorney's law firm. The burden then shifts to the challenged law firm to establish that the practical effect of formal screening has been achieved. The showing must satisfy the trial court that the tainted attorney has not had and will not have any involvement with the litigation, or any communication with attorneys or employees concerning the litigation, that would support a reasonable inference that the information has been used or disclosed." (*Kirk v. American Title Ins. Co.* (2010) 183 Cal.App.4th 776, 809-810 [internal citations omitted, brackets omitted].) "However, if the tainted attorney was actually involved in the representation of the first client, and switches sides in the <u>*same*</u> case, no amount of screening will be sufficient, and the presumption of imputed knowledge is conclusive." (*Id*., 814 [emphasis added, internal citations omitted].)

Here, it is undisputed that the *Vu* Action and the instant action are separate actions, therefore, the automatic vicarious disqualification rule is inapplicable. JD Home Rentals relies primarily on *Cho v. Superior Court* (1995) 39 Cal.App.4th 113 and *Castaneda v. Superior Court* (2015) 237 Cal.App.4th 1434 to argue that an individual attorney and his firm must be disqualified from representing any party in connection with the same or a substantially similar matter, where the attorney has received confidential information while acting as a neutral mediator. However, *Cho* and *Castaneda* are clearly distinguishable from the instant action in that both cases involved judicial officers changing roles in the <u>*same*</u> action wherein the confidential information was obtained.

Notably, while the reasoning in *Cho* was determined by following the analysis of *Poly Software International, Inc. v. Superior Court* (D. Utah 1995) 880 F. Supp. 1487, which, just as here, involved the disqualification of a mediator "from representing a litigant in a subsequent matter related to an earlier case in which the mediator had received confidences from the parties…"[6], *Poly Software International, Inc.* does not guide us here, because the moving party has not shown how this case has any bearing on California law. Moreover, although the moving party argues that *Cho* quoted and approved of the language in *Poly Software International. Inc.*, "language contained in a judicial opinion is to be understood in the light of the facts and issue then before the court, and an opinion is not authority for a proposition not therein considered." (*Dyer v. Superior Court* (1997) 56 Cal.App.4th 61, 66 [internal citations omitted].) Thus, the moving party has provided no binding authority to support its contention that Wanger Jones Helsley PC is automatically vicariously disqualified.

- <u>*Ethical Screen:*</u>

"When considering a motion to disqualify a law firm on the basis of imputed knowledge in a case where the presumption is rebuttable, a trial court should consider, on a case-by-case basis, whether the ethical screening imposed by the firm is effective to prevent the transmission of confidential information from the tainted attorney.

[6] *Cho v. Superior Court* (1995) 39 Cal.App.4th 113, 122 [internal citations omitted].

Moreover, the court should consider all of the policy interests implicated by the disqualification motion, in determining how to exercise its discretion." (*Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, 814.)

"First, the screen must be timely imposed; a firm must impose screening measures when the conflict first arises." (*Id*., 810.) "Screening should be implemented before undertaking the challenged representation or hiring the tainted individual." (*Id*., fn. 31 [internal citations omitted, brackets omitted].) "Second, it is not sufficient to simply produce declarations stating that confidential information was not conveyed or that the disqualified attorney did not work on the case; an effective wall involves the imposition of *preventative measures* to guarantee that information will not be conveyed." (*Id*., 810.) Third, while the former two elements are required for an effective ethical screen, the court may also consider additional factors, such as: "[1] physical, geographic, and departmental separation of attorneys; [2] prohibitions against and sanctions for discussing confidential matters; [3] established rules and procedures preventing access to confidential information and files; [4] procedures preventing a disqualified attorney from sharing in the profits from the representation; and [5] continuing education in professional responsibility." (*Id.*, 811 [internal citations omitted].) Finally, the policy considerations to be taken into consideration involve "(1) a client's right to chosen counsel; (2) an attorney's interest in representing a client; (3) the financial burden on a client to replace disqualified counsel; (4) the possibility that tactical abuse underlies the disqualification motion; (5) the need to maintain ethical standards of professional responsibility; and (6) the preservation of public trust in the scrupulous administration of justice and the integrity of the bar." (*Id.*, 807-808.)

Here, the record shows that two substitution of attorneys were filed on August 13, 2021, indicating that plaintiffs were represented by Patrick D. Toole of Wanger Jones Helsley PC ("Firm"). The Firm provides that prior to the undertaking of the subject representation, its internal conflict check system rightfully flagged the *Vu* Action as a potential conflict of interest. The Firm also determined the *Vu* Action and the instant action to be not substantially related, but elected to put an ethical screen in place. (Hoffman, Decl., ¶4.) The date that the ethical screen was put in place is unclear; however, it appears the memoranda identifying cases in which an ethical screen has been erected was circulated as early as October 22, 2021 to some employees of the Firm and as late as February 16, 2022—just *one day* prior to plaintiffs' filing of its opposition, for other employees. (Hoffman, Decl., ¶8, Ex. A, Ex. B.) Thus, plaintiffs have not sufficiently shown that the ethical screen was timely imposed and that preventative measures were properly taken to guarantee the information was not conveyed.

While the physical placement of the attorneys and whether the tainted attorney has been prevented from sharing in the profits of the representation, is unclear, the Firm does establish a policy for sanctions against employees for discussing confidential matters and rules and procedures to prevent access to the confidential information. (Hoffman, Decl., ¶7, ¶9, ¶10, ¶11.) However, because plaintiffs have not established that the two requisite elements for an effective ethical screen have been met, the court cannot consider the ethical screen erected by plaintiffs' counsel to have been effective in preventing the transmission of confidential information to other members of the Firm.

Moreover, while a client's right to choose its counsel is *undoubtedly* crucial, here, where opposing counsel has confidential information that is potentially directly related to the disputed matters in the action, it is impossible to continue the representation while maintaining the ethical standards of professional responsibility and public trust in the integrity of justice system and the bar. No evidence has been provided to establish plaintiffs' potential financial burden in seeking replacement counsel, nor is there any evidence indicating any possibility of tactical abuse. Consequently, the court intends to grant JD Home Rentals' motion to disqualify Wanger Jones Helsley PC from representing plaintiffs 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: DTT on 4/11/2022.
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***Lowe, et al. v. Happy Yu LLC***
Superior Court Case No. 16CECG03557

Hearing Date: April 13, 2022 (Dept. 501)

Motion: by Plaintiffs for Default Judgment

Tentative Ruling:

Deny the motion, without prejudice.

Explanation:

Form CIV-100 is a mandatory form in seeking default judgment. (Cal. Rules of Ct., rule 3.1800(a).) No Form CIV-100 has been filed. On this basis alone, the request for default judgment is denied.

The court notes, in addition, that no evidence or argument was presented to establish the values sought in general damages; no evidence was presented as to costs; the calculation for attorney's fees, while supported by factors required by local rules, exceed the allowable amount on a default judgment based on an action on contract's Civil Code section 1717 fees provision (Fresno Super. Ct. Local Rules, Appendix A); no basis for attorney's fees was presented as to plaintiff Joann Jackson; and the proposed judgment names Defendant Theresa Duncan, who on November 30, 2018, was added to the action as DOE 1, and on March 12, 2021, dismissed from this action on request to dismiss DOES 1 through 50.

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 4/12/2022.
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***In Re: Diego Gonzalez***
Superior Court Case No. 22CECG00900

Hearing Date: April 13, 2022 (Dept. 501)

Motion: Petition to Compromise Disputed Claim of Minor

Tentative Ruling:

To grant. However, petitioner only provided a proposed Order Approving Compromise. She also needs to submit a proposed "Order to Deposit Funds in Blocked Account," Judicial Council Form MC-355, filled out to provide for the deposit of $48,674.73 into a blocked account. Once the court has both proposed Orders, it will sign them. No appearances are necessary, but if petitioner wishes to appear in order to submit the additional proposed Order, she will need to timely call and request oral argument.

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 4/12/2022.
(Judge's initials) (Date)