Tentative Rulings for June 16, 2022
Department 403

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.

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(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

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(20)

Tentative Ruling

Re: ***Adventure Church, Inc. v. Tower Theater Productions for the Performing Arts, et al.***
Superior Court Case No. 22CECG00415

Hearing Date: June 16, 2022 (Dept. 403)

Motion: Plaintiff's for Preliminary Injunction
Defendant's Special Motion to Strike

Tentative Ruling:

To deny both motions.

Explanation:

Church's Motion for Preliminary Injunction

Church seeks to enjoin Tower from selling, transferring, disposing of, encumbering, or offering for sale, real property known as 777-815 East Olive Avenue, Fresno, APN 451-265--3 ("Parcel"), which encompasses the premises operated as a restaurant and brewery by J&A known as Sequoia Brewing Company (777 and 779 East Olive, hereinafter "Premises"). Church's sole cause of action is for specific performance of the "Standard Offer, Agreement and Escrow Instructions for Purchase of Real Estate" ("PSA") between Church and Tower, entered into in September 2020. The PSA as amended provides that Tower would sell to Church the entire Parcel, including J&A's Premises, for $4,815,000. (Flores Decl., Exs. A, B.)

It is important to note the context of J&A's lawsuit against, and the Court of Appeal's decision in, *J&A Mash & Barrel, LLC v. Superior Court* (2022) 74 Cal.App.5th 1. J&A's predecessor-in-interest originally leased the Premises in 2012 and, in 2017, executed an extension to the lease which contained a right of first refusal to purchase the Premises. "J & A purchased Sequoia Brewing from the prior owners on March 11, 2020, and the lease of the brewery premises was assigned to J & A." (*Id.* at p. 11.) After the Tower's pending sale of the property to Church was discovered, J&A attempted to exercise its option to purchase under the lease, but Tower did not honor it. J&A therefore proceeded to file suit against Tower (and eventually Church), to stop the sale.

The trial court denied J&A's request for a preliminary injunction preventing the sale, and granted the motion to expunge J&A's lis pendens, finding, in part, that J&A did not carry its burden of showing its real property claims were probably valid. The appellate court disagreed and noted that "J & A has shown it is more likely than not a parcel split can be obtained and the right of first refusal can be enforced." (*Id*. at p. 39.) The court found "probable validity to J & A's claim the right of first refusal was not waived as it was never provided an offer providing a purchase price for the brewery premises complying with the terms of the lease. (*Id.* at pp. 40-41.) The appellate court further found that Tower Theater and its counsel "engaged in bad faith by initially failing to disclose and then

exaggerating the sales price to induce J & A not to exercise its right of first refusal." (*Id.* at pp. 41-42.) In conclusion, the appellate court ruled that "J & A has shown the probable validity of its real property claims and is entitled to the continued recordation of the lis pendens pending the outcome of this litigation." (*Id.* at p. 42.)

This motion for preliminary injunction cannot be decided without strong consideration of J&A's judicially-confirmed rights, which conflict with Church's rights under the PSA (assuming it remains enforceable).

"A preliminary injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor." (Code Civ. Proc., § 527, subd. (a).)

Grounds for injunction are set forth in section 526. Church relies on the following grounds:

> (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.
>
> (2) When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action.
>
> (3) When it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual.

(Code Civ. Proc., § 526, subd. (a).)

The trial court evaluates two interrelated factors when deciding whether to issue a preliminary injunction. The first is the likelihood that plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff will likely sustain if the injunction were denied as compared to the harm that defendant will likely suffer if the injunction were issued. The latter factor involves consideration of such things as the inadequacy of other remedies, the degree of irreparable harm, and the necessity of preserving the status quo. (*14839 Moorpark Homeowner's Ass'n v. VRT Corp.* (1998) 63 Cal.App.4th 1396, 1402.)

By balancing the respective equities, the trial court should conclude whether, pending trial on the merits, defendant should or should not be restrained from exercising his or her claimed right. (*Calif. Correctional Peace Officers Ass'n* (2000) 82 Cal.App.4th 294, 302.) The more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm they allege will occur if the injunction does not issue; this is especially true when the requested injunction maintains, rather than alters, the status quo. (*14839 Moorpark*, *supra*, 63 Cal.App.4th at 1407.) "Status quo" has been defined to mean the last actual peaceable, uncontested status which preceded the pending controversy. (*Id*. at p. 1408.) It is well settled that an injunction should not issue when the party seeking the

injunction will not succeed on the merits, even though its issuance might prevent irreparable harm, because there is no justification in delaying that harm where, although irreparable, it is also inevitable. (*Ibid*.)

Likelihood of Prevailing on the Merits

As Church points out, to obtain specific performance after a breach of contract, a plaintiff must generally show: "(1) the inadequacy of his legal remedy; (2) an underlying contract that is both reasonable and supported by adequate consideration; (3) the existence of a mutuality of remedies; (4) contractual terms which are sufficiently definite to enable the court to know what it is to enforce; and (5) a substantial similarity of the requested performance to that promised in the contract. (*Real Estate Analytics, LLC v. Vallas* (2008) 160 Cal.App.4th 463, 472.)

The court will discuss just a few of the issues raised in this motion, which demonstrate that Church has not shown likelihood of prevailing on the merits of its request to obtain specific performance of the PSA.

The Court Cannot Order the Specific Performance Requested

It is true that real property is unique, the loss of which cannot adequately be compensated by monetary damages. (*Stockton v. Newman* (1951) 148 Cal.App.2d 558, 564; see Civ. Code, § 3387 [damages presumed inadequate for breach of agreement to convey real property].) "Where land, or any estate therein, is the subject matter of the agreement, the inadequacy of the legal remedy is well settled, and the equitable jurisdiction is firmly established." (*Stockton, supra*, 148 Cal.App.2d at p. 564.) But Church has not shown how the court can possibly order specific performance of the PSA under the circumstances of this case. Church's contract is to purchase the entire Parcel, which includes the Premises to which J&A has a right of first refusal that, per the Court of Appeals, is valid and enforceable. J&A has a judicially-confirmed right of first refusal; the Court of Appeals reversed the expungement of J&A's lis pendens, and that lis pendens remains in effect today.

Church's contract with Tower is not specifically enforceable because it covers the same subject matter as J&A's prior, enforceable contract which created superior rights. Compelling specific performance would result in Tower violating its prior contract with J&A. Specific performance is denied "where the result of enforcement would be inequitable, or unjust as to an innocent third person – for example, where specific performance would result in compelling a defendant to violate a prior contract with such third person." (*Casady v. Mod. Metal Spinning & Mfg. Co.* (1961) 188 Cal.App.2d 728, 731.) Compelling Tower's performance of Church's contract to purchase the Parcel would force Tower to violate its existing contractual obligation with J&A to sell J&A the Premises.

An agreement to perform an act which the party has no power lawfully to perform when required to do so cannot be specifically enforced. (Civ. Code, § 3390, subd. (c) [emphasis added].) Tower is unable to convey the deed called for in the Church contract because it would require conveying J&A's premises as part of the larger parcel, which Tower does not have the right to do. As Church puts it, "At no point after J&A filed suit in February 2021, were the TOWER DEFENDANTS able to provide clean title." (MPA 12:11-12.)

Church is Not Ready and Able to Complete the Transaction

"To obtain specific performance, a buyer must prove not only that he was ready, willing and able to perform at the time the contract was entered into but that he continued ready, willing and able to perform at the time suit was filed." (*C. Robert Nattress & Assocs. v. Cidco* (1986) 184 Cal.App.3d 55, 64.)

Tower has raised the issue of Church's ability to obtain financing for the purchase. To show that it has obtained financing through America's Christian Credit Union ("ACCU"), Church submits a declaration by Matthew Johansen of ACCU. Johansen does state that ACCU remains ready, willing, and able to supply the loan proceeds to the Church to finance the subject real property transaction for the purchase of the Tower Theatre Property. (Johansen Decl., ¶ 9.) But in discussing the declaration, Church leaves out an important part: Mr. Johansen states in his declaration that ACCU "remains ready, willing, and able to supply the loan proceeds to the CHURCH to finance the subject real property transaction for the purchase of the Tower Theatre Property, **provided** […] the expungement of the *lis pendens* ACCU's ability to perfect a first priority mortgage lien on the Tower Theater Property free and clear of J&S's alleged right of first refusal. (Johansen Decl., ¶ 9(ii), emphasis added.)

The PSA states that the sale will be "subject to the rights of tenants under Existing Leases." (Abbate Decl., Ex. 1 at ¶ 13.) For the reasons discussed above regarding J&A's right to purchase the Premises, which has been upheld and confirmed by the Court of Appeal, Church does not have funding that will enable it to purchase the Parcel subject to J&A's lis pendens, and J&A's lis pendens and option to purchase the Premises are not going away.

In *Henry v. Sharma* (1984) 154 Cal.App.3d 665, 672, the court stated, "we find no support for the iron-clad rule suggested by seller that plaintiffs could only establish ability to perform by proving they had obtained a legally enforceable loan contract. Rather, the proof needed to show ability depends on all the surrounding circumstances."

Here, while Church has established the ability to obtain funds to purchase the Parcel free of any cloud on title, Church has not established that purchasing the property pursuant to the terms of the PSA is feasible. And certainly the financing commitment Church has obtained from ACCU will not permit purchasing the property subject to J&A's option and lis pendens. Church has not established or even argued J&A's option is invalid or unenforceable. J&A's rights have already been adjudicated in the *J&A v. Tower* litigation. (See *J&A Mash & Barrel, LLC v. Superior Court* (2022) 74 Cal.App.5th 1.) Nor has Church alleged or demonstrated that J&A has engaged in any wrongdoing or that Church is entitled to have J&A's right to purchase its Premises enjoined. Church offers no feasible way around J&A's right.

"A lis pendens acts as a cloud against the property, effectively preventing sale or encumbrance until the litigation is resolved or the lis pendens is expunged. (Miller & Starr, *supra,* § 11:134, p. 337.)" (*Amalgamated Bank v. Superior Court* (2007) 149 Cal.App.4th 1003, 1011.)

As noted in *Henry*, proof of ability to perform depends on all the surrounding circumstances. Given J&A's superior right, the cloud on title to the Parcel that superior right creates, and the qualification of the lending commitment in Johansen's declaration, Church has not shown that it has the ability to perform.

The PSA Has Likely Expired

The PSA states in paragraph 23.3 that time is of the essence, and in paragraph 17.2 that the agreement can only be amended in writing signed by both parties. (Abbate Decl., Ex. 1 at pp. 15-16.) Extensions were executed by the parties, with the last by its terms expiring on March 31, 2021. Tower proffers that no writing signed by both parties amended or waived that deadline (Abbate Decl., ¶ 11), and Church does not show or argue that it was further extended in writing.

Church argues based on declarations submitted with the moving papers that the parties waived strict compliance with these timing requirements. Church points out that "[c]ontractual rights are subject to waiver, and waiver may be expressed or implied from the parties conduct." (*Cinel v. Barna* (2012) 206 Cal.App.4th 1383, 1389.) "California courts will find waiver when a party intentionally relinquishes a right or when that party's acts are so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished." (*Old Republic Ins. Co. v. FSR Brokerage, Inc.* (2000) 80 Cal.App.4th 666, 678.)

Church contends that at all times it has worked with Tower to close the deal, and that no evidence exists supporting a claim that Church ever indicated or notified them that the Church no longer wished to accept title to the property. That statement is true so far as it goes, but this was not simply a one-sided provision. Church has not demonstrated that Tower waived the timing or written amendment provisions of the PSA.

Communications leading up to the March 31 expiration date indicate that, while the parties intended to work together to come up with some sort of deal to sell the Property to Church, the deal as outlined under the PSA was dead. Communications between Church's Richardson and Tower's Abbate include: (1) a March 25th email from Richardson himself indicating a discussion item was to "cancel current escrow" (Abbate Decl., Ex. 4); and (2) a May 5, 2021 e-mail from Richardson, with an attachment of Church's proposal, which would involve a "simultaneous cancellation of the Original PSA, cancellation instruction for the Original Escrow, and grant of an option from Seller to Buyer for Buyer to purchase the Tower Theater Premises once it is separated from the Subject Parcel." (Id. at ¶ 23 and Ex. 5, p. 16.) On March 30, 2021, Tower's attorney Fred Meine asked Church's attorney Nathan Klein to "Please confirm that your client will sign the escrow instruction to cancel the escrow." (Meine Decl., Ex. 1 at p 10.) Mr. Meine explained that this would moot out Sequoia's lawsuit, and allow the parties to work on an alternative deal structure that could avoid litigation. (Ibid.) Mr. Klein then responded that he expected that the client would sign the escrow cancellation "so long as they have written assurance from your client that they are still in 'first position' to either buy the property or buy into the corporation with the property remaining an asset of the corporation […] We'd like to incorporate [cancellation instructions] into whatever agreement our clients reach with respect to cancelling this transaction." (Id. at p. 9, emphasis added.) Tower's attorney also stated that "The agreed closing date is

tomorrow and escrow will not close because: (1) Chicago Title will not allow it […] (2) your client's lender will not waive the subordination letter issue […]" (*Id*. at p. 10.) This does not express an intent to waive the timing requirements of the PSA.

There are other statements that Church has pointed to, such as statements by Abbate to the media indicating a deal was still in the works or possibly still alive. But that does not mean that the timing requirements of this specific contract were waived, or that written amendment requirement had been waived.

While there were ongoing discussions to complete a sale to Church, those communications do not indicate that the deal as set forth in the PSA was being kept alive. The PSA had an end date, and express notice requirements for waiver of the timing requirements under the PSA. The court finds that the PSA expired on March 31, 2021.

For the above reasons, the court finds that Church has not shown that it is likely to prevail on the merits of its request for specific performance of the PSA. The court does not express an opinion regarding whether Tower otherwise breached the PSA with regards to its disclosures, or in entering into the PSA without first satisfying J&A's rights under its lease. But Church's remedy for any such breaches would be damages, not specific performance, and there is no reason to enjoin the pending sale to the City and J&A.

Interim Harm

Given the court's conclusion that Church has not shown likelihood of prevailing on the merits, the court will not address the interim harm. This factor obviously favors Church, as the property will be sold. But given the unlikelihood of obtaining specific performance of the PSA, the court denies the motion for preliminary injunction.

Plaintiff's Special Motion to Strike

The Complaint filed on 2/8/22 alleges a sole cause of action for "Breach of Contract – Specific Performance." In this action plaintiff Adventure Church ("AC" or "Church") seeks specific performance of a contract to sell specific real property by the Tower Theater defendants (collectively, "Tower"). This is not the type of action that would typically implicate free speech and petitioning activity so as to invoke the applicability of Code of Civil Procedure section 425.16. However, Tower took advantage of a possible opening due to the inclusion in the Complaint of the following allegations:

> 15. On January 12, 2022, in oral argument before the appellate court, counsel for Tower Parties represented to the Court that the agreement between AC and the Tower Parties has expired and is of no force or effect.
> 16. The Tower Parties, by representing the deal with AC is dead, have breached the agreement.
> * * * *
> 24. Tower Parties have breached their contractual obligations by . . . representing to the court that the proposed sale between AC and the Tower Parties is cancelled.

Based on these allegations, Tower contends, "The alleged action that constitutes the breach of contract is a statement made in a 'judicial proceeding" and thus Adventure's claim arises from activity protected under the anti-SLAPP statute at section 425.16(e)(1)." (MPA 11:28-12:2.)

Initially the court notes that the moving papers are inconsistent with regards to what Tower moves to strike. Tower quotes the above allegations, misidentifies the allegations as paragraphs 14, 15 and 24, and then specifies that only language from paragraphs 16 and 24 are to be stricken. (See Notice of Motion, p. 1, lines 9-17.) The notice renders it uncertain what exactly is to be stricken should the court grant the motion.

Assuming the intent is to strike all language from paragraphs 15, 16 and 24 regarding representations to the appellate court, the court also notes that granting the motion would have no meaningful impact in this action. It would not result in the Complaint being stricken. Nor would it result in the sole cause of action being stricken. It would not negate an essential element from the sole cause of action for specific performance. The only significant result would be a presumably large attorney fee award against Church (see Code Civ. Proc., § 425.16, subd. (c)) due to the burden and expense of adjudicating the merits of the entire action at this early stage.

Anti-SLAPP Motions Generally

A SLAPP suit (Strategic Litigation Against Public Participation) is a suit brought "primarily to chill the valid exercise of constitutional rights of freedom of speech and petition for redress of grievances." (Code Civ. Proc., § 425.16, subd. (a).)

The anti-SLAPP statute permits a defendant whose free speech rights and/or right to petition have been infringed to move the court to strike the SLAPP suit. The anti-SLAPP statute may be invoked to challenge suits based on four different categories of speech:

> (1) statements made before a legislative, executive, judicial, or other official proceeding;
> (2) statements made in connection with an issue being considered by a legislative, executive, or judicial body;
> (3) statements made in a public forum or in connection with an issue of public interest; OR
> (4) any other conduct in furtherance of the exercise of the constitutional right of petition or free speech, in connection with an issue of public interest.

(Code Civ. Proc., § 425.16, subd. (e).)

Categories (a) and (b) are NOT limited to issues of public interest, while categories (c) and (d) ARE limited to issues of public interest. (*Ibid*.)

The anti-SLAPP is one of the few motions where the burden is on the party opposing the motion. First, the defendant must make a prima facie showing that plaintiff's lawsuit arises from "an act in furtherance of a person's right of petition or free speech under the United States or California Constitutions in connection with a public issue," as defined in subdivision (e).

Once defendants make such prima facie showing, the burden shifts to the plaintiff to establish a "probability" that it will prevail on whatever claims are asserted against the defendants. (See Code Civ. Proc., § 425.16, subd. (b) and *Dixon v. Superior Court* (1994) 30 Cal.App.4th 733 at 744 [plaintiff had no probability of success where defendant's statements were made in response to governmental agency's invitation for public comment and hence entitled to absolute immunity]; see also *Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 950 953 [held that in light of defendant's constitutional defenses, plaintiff failed to establish probability of prevailing in libel action].)

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

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

A defendant first has the burden of showing that the action against it arises from the exercise of free speech rights and/or right to petition. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658.)

While Tower cites to no authority providing that an anti-SLAPP motion can be used to surgically excise from a complaint allegations referencing protected activity, such an approach has been approved by the Supreme Court in *Baral v. Schnitt* (2016) 1 Cal.5th 376.

However, "if the allegations of protected activity are only incidental to a cause of action based essentially on nonprotected activity, the mere mention of the protected activity does not subject the cause of action to an anti-SLAPP motion." (*Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 414.) A claim based on protected activity is incidental or collateral if it "merely provide[s] context, without supporting a claim for recovery." (*Baral*, *supra,* at p. 394.)

Here, while Church does allege in paragraph 16 that Tower's representation that the deal is dead breached the contract, and that statement was made during arguments before the appellate court, paragraph 24 alleges a number of different ways that Tower breached the contract:

> Tower Parties have breached their contractual obligations by, without limitation, **[a]** refusing to close escrow, **[b]** representing to the court that the proposed sale between AC and the Tower Parties is cancelled, **[c]** refusing to provide clear title to the Property as evidenced by the cloud on title created by J&A's claim of right and notice of pendency of action recorded by J&A affecting title to the Property.

(Complaint, ¶ 24.)

The court finds that the fact that Tower was in a judicial forum when it stated its position that the deal is dead is merely incidental to the claim for breach of contract. The location where the statement is made is not as relevant as Tower's decision not to sell to Church. Tower's representatives could have been waiting at a car wash when they declared that the deal is dead and it would have the same legal effect. And in addition to the numerous ways Tower is alleged in paragraph 24 to have breached the obligation to sell to Church, Tower is now under contract to sell the Property to J&A and the City – another basis for breach of the alleged contractual obligation to sell the Property to Church. Church has presented substantial evidence in support of this opposition to prove that its Complaint is not based on statements made by Tower's attorney in a legal proceeding. The Church's complaint arises out of Tower's allegedly dishonest dealings and the decision to breach the contract with the Church and sell the Property to J&A and the City.

There are cases where breaches of contract occurring in judicial forums were found to be protected activity:

> (e) [7:590] **Breach of contract:** Where the alleged breach of contract consists of activity protected under the statute, the anti-SLAPP statute applies. [*Bonni v. St. Joseph Health System* (2021) 11 C5th 995, 1025-1026, 281 CR3d 678, 702—communications to medical board in violation of settlement agreement were protected activity; *Vivian v. Labrucherie* (2013) 214 CA4th 267, 274, 153 CR3d 707, 713—action for breach of settlement agreement not to disparage based on statements made in court papers and to official investigators seeks to subject defendant to liability for protected activity and is subject to statute; see *Olson v. Doe* (2022) 12 C5th 669, 674, 684, 288 CR3d 753, 755, 763-764—nondisparagement clause in mediation agreement reached in civil harassment action did not prohibit making allegations in separate unlimited civil lawsuit arising out of same conduct, which constituted protected activity subject to anti-SLAPP statute]

(Weil & Brown, *Cal. Practice Guide: Civ. Proc. Before Trial* (TRG 2022) ¶ 7:590.) Here, the alleged breach itself (declaring that the deal is dead) did not constitute protected activity. The judicial forum is mere happenstance. Because the forum is irrelevant to the substance of the claim, and the Complaint alleges numerous other ways the contract was breached, the allegations that Tower moves to strike are incidental to the claim presented in this action. The motion to strike is denied for this reason alone.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 06/14/22 .
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Public Employment Relations Board v. Fresno County Public Safety Association***
Superior Court Case No. 22CECG01506

Hearing Date: June 16, 2022 (Dept. 403)

Motion: Order Show Cause re Preliminary Injunction

Tentative Ruling:

To grant the request and sign the proposed order. **All parties must appear at the hearing.**

Explanation:

Introduction

The Public Employment Relations Board ("PERB") possesses the exclusive jurisdiction to determine whether a charge of unfair practices is justified, and, if so, what remedy is appropriate. (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 604.) "If PERB applies to the court for injunctive relief … the court must determine that there exists *reasonable cause* to believe an unfair labor practice has been committed and that the relief sought is *just and proper." (Public Employment Relations Bd. v. Modesto City Schools Dist.* (1986) 136 Cal.App.3d 881, 896-897 *[*noting that "[w]e believe that traditional equitable considerations would certainly come into play during this part of the test.*"].)*

"'[T]he trial court is the judge of the credibility of the affidavits filed in support of the application for preliminary injunction and it is that court's province to resolve conflicts.' " (*Hilb, Rogal & Hamilton Ins. Services v. Robb* (1995) 33 Cal.App.4th 1812, 1820.) Consideration of injunctive relief in an unfair labor practice case may involve hearsay. (*Coffman v. Queen of the Valley Medical Center* (9th Cir. 2018) 895 F.3d 717, 729.)

Reasonable Cause

Whether there is reasonable cause to believe an unfair labor practice has been committed requires only a "minimal" burden of proof and is met if the theory is "neither insubstantial nor frivolous." (*Modesto, supra,* 136 Cal.App.3d at p. 896-897.) Accordingly, the "key question is *not* whether PERB's theory would eventually prevail, but whether it is *insubstantial* or *frivolous." (Ibid.)*

In addition, PERB is vested with "[t]he initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter …." (Gov. Code., § 3541.5; *San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447, 1458.) Although the court generally is not "bound by the recommendations" of the administrative agency (*Modesto, supra,*

136 Cal.App.3d 881, 896), deference is given to their statutory interpretations and determinations. (*Styne v. Stevens* (2001) 26 Cal.4th 42, 53; *Santa Ana Hospital Medical Center v. Belshe* (1997) 56 Cal.App.4th 819, 831.) In essence, there is "a general scheme of recognizing the importance of deferring to the expertise of PERB in appropriate circumstances." (*Modesto, supra,* 136 Cal.App.3d at p. 894.)

PERB contends that it has already determined that the Fresno County Public Safety Association ("Association") committed an unfair labor practice by threatening a strike. The threatened strike is an unfair labor practice because it involves essential employees, who cannot be replaced with temporary employees, and there are inadequate non-unit county personnel to provide coverage.

Ultimately, to satisfy the first prong of the *Modesto* analysis, PERB only must show that its alleged unfair practice is neither insubstantial nor frivolous. PERB's application attaches declarations by the Sheriff and Chief Probation Officer, both of whom have extensive personal knowledge of their respective staffs, the hardships resulting from a sudden and dramatic staffing disruption, and the potential for harm. In particular, Correctional Officers respond to jail emergency situations, such as riots and escape attempts. A large staff shift infuses unfamiliar and perhaps untrained personnel into an environment with the potential for significant harm, which, in the case of an escape, would reasonably pose a threat to the public at large.

Accordingly, as PERB indicated in its pre-lawsuit notices, there is reasonable cause that a strike or threatened strike of Correctional Officers, in the number proposed, would constitute an unfair labor practice. (*City of Santa Ana v. Santa Ana Police Benevolent Assn.* (1989) 207 Cal.App.3d 1568, 1572-1573 (*Santa Ana*) ["Repeated references to strikes by police officers as ones which would still be prohibited lead us to conclude that police work stoppages are still per se illegal."].)

Just and Proper

With PERB satisfying the reasonable cause prong, the analysis turns to whether injunctive relief would be "just and proper." The relief will be "just and proper" "[w]here there exists a probability that the purposes of [EERA] will be frustrated unless temporary relief is granted or the circumstances of a case create a reasonable apprehension that the efficacy of the [Board's] final order may be nullified, or the administrative procedures will be rendered meaningless." (*Modesto, supra,* 136 Cal.App.3d at p. 902, internal brackets and quotations omitted.)

As mentioned above, the declarations submitted by PERB are sufficient to demonstrate a threat to public safety should a strike, in the numbers proposed, go forward. Association's opposition relies on a declaration by one of its members, capacity undisclosed, who claims his personal knowledge is based on his unexplained experience working in the jails. (See Necochea, Decl. ¶¶ 1-3[1].) Mr. Necochea states that other non-unit personnel (i.e. Sheriff Deputies) have experience in custodial settings and that many started their careers working at the jail. Mr. Necochea also states that covering with

[1] Real Party in Interest the County of Fresno objections are sustained.

Sheriff Deputes would be greatly beneficial considering the amount of trainees currently assigned. (*Id*. at ¶ 16.)

However, Mr. Necochea's declaration is inadequate to rebut the evidence presented by PERB. Particularly, Mr. Necochea states that Association's counter offer was for only 50 Correctional Officers to remain, with 100 other county employees to provide supplemental coverage. (Necochea, Decl. ¶ 8.) This is a 100 employee difference from what was proposed and accepted by the County of Fresno ("County"). (*Id*. at ¶ 6.) Yet, Mr. Necochea's declaration does nothing to address how such a sudden and substantial infusion of, in the very least unfamiliar, personnel will be able to maintain operations without even a momentary lapse in vigilance. In essence, as the *Santa Ana* court noted, "[if] a disaster occurs during a police slowdown or strike, the inevitable investigation which will follow will undoubtedly point to the absent dispatcher or tardy patrol car as a cause." (*Santa Ana, supra,* 207 Cal.App.3d at p. 1572-1573.) Consequently, considering the constant attentiveness required to respond to instances of riot or escape attempts, the issuance of an injunction, utilizing the number proposed by County, is just and proper under the *Modesto* analysis.

Therefore, PERB has satisfied the requirements to obtain injunctive relief pursuant to *Modesto, supra,* 136 Cal.App.3d 881.

Injunctive Relief: Striking Public Employees (Substantial or Imminent Threat to Public Safety)

The California Supreme Court has held that society no longer requires a complete prohibition of strikes by public employees, provided the nature of the employees' function did not disrupt public welfare. (*County Sanitation Dist. No. 2 v. Los Angeles County Employee Assn.* (1985) 38 Cal.3d 564, 580 (*Sanitation District*).) The Supreme Court has also provided guidance to courts in resolving future disputes: "strikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public. This standard allows exceptions in certain essential areas of public employment (e.g., the prohibition against firefighters and law enforcement personnel) and also requires the courts to determine on a case-by-case basis whether the public interest overrides the basic right to strike." (*Id*. at p. 586.)

Unlike the Legislature's specific bar to strikes by firefighters (Lab. Code, § 1962), there does not appear a similar statutory prohibition of strikes by law enforcement officers. (*Santa Ana, supra,* 207 Cal.App.3d at p. 1572.) However, that same case held that police officers may not engage in a sick-out (blue flu) during labor negotiations reasoning "it seems clear that work slowdowns or stoppages by police officers tread dangerous waters … [but] strikes by law enforcement officers are not specifically and unequivocally exempted from the court's decision in *Sanitation District*." *(Ibid.)*

Association argues that the Correctional Officers are not "peace officers" as contemplated in *Santa Ana*. However, the California Supreme Court's guidance in *Sanitation District* specifically involved a "case-by-case" determination and gave examples (e.g. "law enforcement personnel") where the prohibition would reasonably apply. (*Sanitation District, supra,* 38 Cal.3d at p. 586.) Furthermore, the reasoning of

Santa Ana would appear to apply here, given the evidence supplied in the application from County officials, including the Sherriff, Chief Probation Officer, and County Administrative Officer. This evidence tends to show a signification disruption of staffing that a serious threat of public safety would be posed, i.e. the dispositive inquiry under *Sanitation District* and *Santa Ana*.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 06/15/22.
(Judge's initials) (Date)