Tentative Rulings for July 8, 2021
Department 503

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.

16CECG02071 ***Gutierrez v. Sozinho*** **is continued to Tuesday, August 31, 2021 at 3:30 p.m. in Dept. 503**

17CECG02267 ***Singh v. Singh*** **is continued to Wednesday, July 21, 2021 at 3:30 p.m. in Dept. 503**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 503

Begin at the next page

(14)

Tentative Ruling

Re: ***Fletcher v. Surinder Kumar, et al***
Superior Court Case No. 18CECG00954 (consolidated with Case Nos. 18CECG01980 and 19CECG03193)

Hearing Date: July 8, 2021 (Dept. 503)

Motion: By defendant Karamjit Kaur Dhaliwal for summary adjudication of all causes of action against him for negligent entrustment, respondeat superior liability for negligence, and negligent maintenance of a motor vehicle

Tentative Ruling:

To grant.

Explanation:

Defendant Karamjit Kaur Dhaliwal ("Dhaliwal") seeks adjudication of all claims against him for negligent entrustment of a motor vehicle, respondeat superior liability, and negligent failure to properly maintain or repair the vehicle.

In relation to the cause of action for negligent entrustment, Dhaliwal has offered facts and evidence to support a finding that:

- It was Surinder Kumar, not Deepak Kumar, who was operating the vehicle at the time of the accident [see evidence supporting UMF No. 3];
- Dhaliwal loaned the vehicle to Deepak Kumar on September 4, 2017 [UMF No. 4];
- Deepak Kumar had a driver's license and Dhaliwal had no information that Deepak Kumar had any prior accidents or negative driving record [UMF Nos. 5, 6];
- On a prior occasion where Dhaliwal had lent the car to Deepak Kumar, there were no negative incidents [UMF No. 7];
- Dhaliwal had no knowledge that Deepak Kumar would allow anyone else to drive the vehicle [UMF Nos. 8, 9]; and
- At no time prior to or at the time of the accident did Dhaliwal loan to or authorize Surinder Kumar to drive the vehicle [UMF No. 10].

Those facts are supported by Dhaliwal's declaration, to which no objections have been raised. No opposing facts have been asserted by any of the plaintiffs against whom summary adjudication of the cause of action for negligent entrustment of a motor vehicle is made.

As for the cause of action for respondeat superior liability, Dhaliwal offers the following facts and evidence:

- Prior to and at the time of the accident, Depak Kumar was not, and has never been, an employee or agent of Karamjit Dhaliwal [UMF No. 11]; and

- Prior to and at the time of the accident, Karamjit Dhaliwal did not know Surinder Kumar [UMF No. 12].

These facts too, which are supported by Dhaliwal's declaration, are undisputed and preclude a finding that Dhaliwal can be liable for the accident vicariously on the theory that the negligent driver was his employee or agent acting within the course and scope of the employment or agency.

Finally, in relation to the claims against Dhaliwal based on the theory that he negligently maintained or repaired the vehicle, Dhaliwal offers facts and evidence that establish:

- There were no defects or malfunctions with the vehicle when he loaned it to Deepak Kumar on September 4, 2017 [UMF No. 13];
- At the time of the accident on September 5, 2017, Dhaliwal was unaware of any defect or malfunction with the vehicle [UMF No. 14]; and
- The vehicle was serviced as per the manufacturer's recommended servicing [UMF No. 15].

Again, no opposing facts or evidence have been offered, and these fact negate a claim that Dhaliwal was negligent in failing to maintain or repair the vehicle.

The motion for summary adjudication of the claims against Dhaliwal for negligent entrustment, respondeat superior liability, and negligent maintenance or repair of the vehicle is therefore granted.

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

Tentative Ruling
Issued By: KAG on 7/1/2021 .
(Judge's initials) (Date)

(32)

Tentative Ruling

Re: ***Tiwana v. Muskan Food & Fuel, Inc., et al.***
Superior Court Case No. 20CECG01929

Hearing Date: July 8, 2021 (Dept. 503)

Motions: Defendants' Demurrer to Plaintiff's First Amended Complaint
Defendants' Motion to Strike Plaintiff's First Amended Complaint

Tentative Ruling:

To sustain defendants' general demurrer to the first and sixth causes of action, with leave to amend. To overrule defendants' general demurrer to the fourth and fifth causes of action. To overrule defendants' special demurrer to the First Amended Complaint.

To grant defendants' motion to strike with leave to amend as to requests 6, 7, 8, 10, 11, 12, 14, 16 ¶3, 17, 19: attorney's fees, 20: attorney's fees, 21: economic damages and attorney's fees, and 23: attorney's fees. To deny as to the remaining requests. (Code Civ. Proc., § 436.) Plaintiff is granted 20 days, running from service of the minute order by the clerk, to file and serve a second amended complaint. All new allegations in the amended complaint are to be set in **boldface** type.

Explanation:

Demurrer

First Cause of Action - Wrongful Termination

"The elements of a claim for wrongful discharge in violation of public policy are (1) an employer-employee relationship, (2) the employer terminated the plaintiff's employment, (3) the termination was substantially motivated by a violation of public policy, and (4) the discharge caused the plaintiff harm." (*Yau v. Allen* (2014) 229 Cal.App.4th 144, 154.) "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.'" (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889–890, fn. omitted.) The state's highest court has recognized "four categories of employee conduct subject to protection under a claim of wrongful discharge in violation of fundamental public policy: (1) refusing to violate a statute; (2) performing a statutory obligation; (3) exercising a statutory right or privilege; and (4) reporting an alleged violation of a statute of public importance." (*Id.* at p. 889.)

Plaintiff claims that he started working at Johnny Quick #155 ("Johnny Quick") in 2011, and then entered into a business relationship with defendants Rajdeep Singh and Navdeep Singh and incorporated their business on or about June 12, 2014, naming it

Muskan Food & Fuel, Inc. ("MFF"). (FAC ¶¶ 1, 13.) Plaintiff subsequently served as the secretary of MFF and came to own a twenty-five percent (25%) share in the business. (FAC ¶¶ 1, 13, 15.) Plaintiff states that MFF is the parent corporation of Johnny Quick and that Johnny Quick had been plaintiff's place of employment until the time he was terminated. (FAC ¶ 3.) He claims that an employee-employer relationship existed between plaintiff and defendants Rajdeep Singh, Navdeep Singh and MFF. (FAC ¶ 25.) Plaintiff claims that he was wrongfully and untruthfully accused of having embezzled monies from the corporation and that this was the stated reason for his termination on August 11, 2018. (FAC ¶¶ 25, 29.)

In short, plaintiff contends that he was an employee of Johnny Quick and a minority shareholder of MFF and that he was terminated from his job on the pretext of embezzling funds from the corporation. (See *Stephenson v. Drever* (1997) 16 Cal.4th 1167 [recognizing that a minority shareholder may also be an employee of the corporation].) However, plaintiff has failed to allege sufficient facts to show that his termination was substantially motivated by a violation of public policy. Plaintiff simply states that he was wrongfully accused of embezzling funds from MFF and was terminated on those grounds. Plaintiff does not allege that he was terminated for engaging in conduct subject to protection under a claim of wrongful discharge in violation of fundamental public policy, such as refusing to violate a statute, or performing a statutory obligation, or exercising a statutory right or privilege or reporting an alleged violation of a statute of public importance. Therefore, plaintiff has failed to sufficiently allege facts to show that his termination was substantially motived by a violation of a public policy. Accordingly, the demurrer to this cause of action is sustained with leave to amend.

Fourth Cause of Action - Unjust Enrichment

Defendants contend that unjust enrichment is not a cognizable cause of action in California. There is a split of authority on this issue. Courts of Appeal in the Second and Fourth Districts appear to disagree on whether unjust enrichment is a valid claim under California law. (See *Lectrodryer v. SeoulBank* (2000) 77 Cal.App.4th 723, 726 (Second District stating unjust enrichment is a claim) and *Melchior v. New Line Prods., Inc.* (2003) 106 Cal.App.4th 779, 793 (Second District stating unjust enrichment is not claim); see also *Peterson v. Cellco* (2008) 164 Cal.App.4th 1583, 1593 (Fourth District, stating elements of unjust enrichment) and *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1370 (Fourth District stating unjust enrichment is not a claim).) In *Elder v. Pacific Bell Telephone Co.* (2012) 205 Cal.App.4th 841, the First District stated that "[t]his allegation satisfies 'the elements for a claim of unjust enrichment: receipt of a benefit and unjust retention of the benefit at the expense of another. [Citation.]' (*Lectrodryer v. SeoulBank*, *supra,* 77 Cal.App.4th 723, 726 . . . ; see *Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 50 . . . [in accord].)" (*Elder v. Pacific Bell Telephone Co.*, *supra*, 205 Cal.App.4th at 857.) "A person is enriched if the person receives a benefit at another's expense. [Citation.] Benefit means any type of advantage." (*Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 398.) "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." (*CTC Real Estate Services v. Lepe* (2006) 140 Cal.App.4th 856.)

Where there is a split of authority, the trial courts have discretion to choose between the decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456.) The Court exercises its discretion to allow the unjust enrichment claim to stand. The

crux of plaintiff's unjust enrichment claim is that plaintiff had customarily been receiving $125,000 in annual distributions as a shareholder of MFF, but that in 2018, he was only offered an annual distribution of $65,000 without any explanation. (FAC ¶ 60.) This is sufficient to withstand demurrer. Accordingly, the demurrer to this cause of action is overruled.

Fifth Cause of Action – Violation of California Business and Professions Code Section 17200, et seq.

"[U]nfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code." (Bus. & Prof. Code, § 17200.) Conduct violating the Unfair Competition Law ("UCL") includes "any unlawful, unfair or fraudulent business act or practice. . . ." By proscribing unlawful business practices, the UCL borrows violations of other laws and treats them as independently actionable. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) A business practice is "forbidden by law" under the UCL if it violates any law, civil or criminal, statutory or judicially made, federal, state or local. (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1476.) The UCL provides a remedy even where the underlying statute giving rise to the claim of "unlawfulness" has no private right of action. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 561-567.) In addition, practices may be deemed unfair or deceptive even if not proscribed by some other law. (*Ibid*.) Thus, there are three varieties of unfair competition: practices which are unlawful, or unfair, or fraudulent. (*Ibid*.) "Because the statute is framed in the disjunctive, a business practice need only meet one of the three criteria to be considered unfair competition." (*Ibid*.) "A business practice is unfair within the meaning of the UCL if it violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits." (*McKell v. Washington Mutual, Inc.*, *supra*, 142 Cal.App.4th 1457, 1473.)

Only injunctive and restitutionary relief are available in a private action under the UCL. Damages are not available. (See Bus. & Prof. Code, § 17203; *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 173.) Private citizens have standing to bring an action under Business and Professions Code section 17200 if they have "suffered injury in fact and have lost money or property" as a result of unfair competition. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 320.) "A plaintiff alleging unfair business practices under these statutes must state with reasonable particularity the facts supporting the statutory elements of the violation." (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619.)

As a preliminary matter, the Court notes that this cause of action has been misnumbered in the First Amended Complaint as the fifth cause of action when it should be the sixth cause of action. Plaintiff claims that, at a board meeting held on October 29, 2019, defendant Rajdeep Singh and Navdeep Singh failed to provide plaintiff with business records and an accounting that plaintiff had requested pursuant to Corporations Code section 1601. (FAC ¶ 77 A, B.) Plaintiff states that as a result of defendants' unlawful, unfair and/or fraudulent conduct, he has sustained damages. Here, plaintiff bases his UCL claim on an alleged violation of Corporations Code section

1601. "Because the statute is framed in the disjunctive, a business practice need only meet one of the three criteria [unlawful, unfair or fraudulent] to be considered unfair competition." (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, *supra,* 17 Cal.4th 553, 561-567.) That the cause of action includes an improper request for relief, i.e., damages is irrelevant in determining the sufficiency of the cause of action pleaded. (See *Gomez v. Volkswagen of America, Inc.* (1985) 169 Cal.App.3d 921, 925.) Here, plaintiff has identified the particular statute that was violated and has recited facts describing the violation. Plaintiff has plead this cause of action sufficiently to withstand demurrer. Accordingly, defendants' demurrer to this cause of action is overruled.

Sixth Cause of Action - Declaratory Relief

Generally speaking, a demurrer is not an appropriate means of testing the merits of the controversy in a declaratory relief action because the plaintiff is entitled to a declaration of its rights, even if that declaration is adverse to plaintiff's interest. (*Qualified Patients Ass'n v. City of Anaheim* (2010) 187 Cal.App.4th 734, 751; *Taxpayers for Improving Pub. Safety v. Schwarzenegger* (2009) 172 Cal.App.4th 749, 769.) A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the parties under a written instrument or with respect to property and requests that the rights and duties of the parties be adjudged by the court. (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 615.) Plaintiff need not allege facts establishing the right to a favorable declaration: "The complaint is sufficient if it shows an actual controversy; it need not show that plaintiff is in the right." (*Lockheed Martin Corp. v. Continental Ins. Co*. (2005) 134 Cal.App.4th 187, 221.)

Initially, the Court notes that this cause of action has been misnumbered in the First Amended Complaint as the sixth cause of action when it should be the seventh cause of action. Plaintiff claims than an actual controversy has arisen between the plaintiff and the defendants. (FAC ¶ 85.) He states that there is a dispute concerning the amount of plaintiff's annual distributions as a shareholder of the corporation. (FAC ¶ 89.) He contends that since the date of its incorporation, MFF has been giving plaintiff an annual distribution of approximately $125,000, but in 2018 defendants Rajdeep Singh and Navdeep Singh offered plaintiff a distribution of $65,000 after accusing plaintiff of embezzling money from the corporation. (*Ibid*.) Plaintiff seeks a determination by this Court to provide plaintiff with an accounting to determine the hours plaintiff worked in excess of forty (40) hours per week and paying plaintiff for those overtime hours he worked; provide plaintiff with an accounting of the earnings for MFF to determine the accurate amount for plaintiff's annual distribution for the year of 2018; and provide plaintiff per Corporations Code section 1601 with the records and accounting that were requested at the October 29, 2019 board meeting. (FAC ¶ 92 a, b, and c.)

Because declaratory relief operates prospectively, rather than to redress past wrongs, it is a proceeding to declare future rights rather than a proceeding to execute them. (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 848; *County of San Diego v. State* (2008) 164 Cal.App.4th 580.) Declaratory relief does not constitute the proper procedure when the rights of a party have crystallized into a cause of action for past wrongs, all relationship between the parties has ceased to exist, and there is no conduct of the

parties subject to regulation by the court. (*Roberts v. Los Angeles County Bar Assn*. (2003) 105 Cal.App.4th 604, 618.)

Here, the allegations in the First Amended Complaint, so far as they pertain to plaintiff's cause of action for declaratory relief, all relate to past wrongs. Here, the rights of the parties have crystallized into a cause of action for past wrongs. There is no basis for declaratory relief where only past wrongs are involved. (*Osseous Technologies of America, Inc. v. DiscoveryOrtho Partners LLC* (2010) 191 Cal.App.4th 357, 366.) Accordingly, the demurrer to this cause of action is sustained with leave to amend.

Special Demurrer for Uncertainty

Demurrers for uncertainty are disfavored and are granted only if the pleading is so incomprehensible that defendant cannot reasonably respond. (See Code Civ. Proc., § 430.10, subd. (f); *Mahan v. Charles W. Chan Ins. Agency, Inc.* (2017) 14 Cal.App.5th 841; see *Khoury v. Maly's of California, Inc.*, *supra,* 14 Cal.App.4th 612, 616 ["A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures"].) "All that is required of a plaintiff, as a matter of pleading, even as against a special demurrer, is that his complaint set forth the essential facts of the case with reasonable precision and with sufficient particularity to acquaint the defendant with the nature, source and extent of his cause of action." (*Rannard v. Lockheed Aircraft Corp.* (1945) 26 Cal.2d 149, 156-157.) A demurrer for uncertainty should be overruled when the facts as to which the complaint is uncertain are presumptively within the defendant's knowledge." (*Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 822.)

While the failure to clearly indicate against whom each cause of action is alleged does render the First Amended Complaint somewhat ambiguous, it is not so uncertain that defendants cannot reasonably respond. (See *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139.) Accordingly, the special demurrer to the First Amended Complaint is overruled.

Motion to Strike

A motion to strike can be used to cut out any "irrelevant, false or improper" matters or "a demand for judgment requesting relief not supported by the allegations of the complaint." (Code Civ. Proc., § 431.10, subd. (b).) A motion to strike is the proper procedure to challenge an improper request for relief, or improper remedy, within a complaint. (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166-167.)

The portions of the First Amended Complaint that defendants request be stricken, along with the Court's rulings, are as follows:

1. The portion of the caption containing JOHNNY QUICK #155 as a defendant because the matter is improper.

   Defendants contend that Johnny Quick is a non-entity and not a proper defendant, and references to Johnny Quick therefore should be stricken. This alleged defect, however, does not appear on the face of the First Amended

Complaint or from any judicially noticeable matter. Denied. (Code Civ. Proc., § 437.)

2. All of paragraph 3 because the matter is improper.

   Denied. (Code Civ. Proc., § 437.)

3. All of paragraph 11 because the matter is improper.

   Denied. (Code Civ. Proc., § 437.)

4. That portion of paragraph 12 referring to "Johnny Quick Store #155" because the matter is improper.

   Denied. (Code Civ. Proc., § 437.)

5. All allegations pertaining to the first cause of action for wrongful termination including all of paragraphs 24-33 as the matter is improper.

   Since the demurrer to the first cause of action for wrongful termination in violation of public policy is sustained with leave to amend, the motion to strike this portion of the complaint is denied as moot.

6. That portion of paragraph 33 which seeks punitive damages contained on page 8, lines 10-13, which states: "Plaintiff is therefore entitled to recover an award of punitive damages in an amount of at least $3,000,000.00 for the sake of example and by way of punishing defendants Rajdeep Singh and Navdeep Singh, and each of them."

   Granted. Plaintiff must plead specific facts showing that defendant acted with malice, fraud or oppression. (*Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1041-1042.) Plaintiff has not done so. Here, the allegations against defendants Rajdeep Singh and Navdeep Singh fail to show "tortious conduct [which] rises to the levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate." (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 716.) Also, the amount of punitive damages sought may not be stated in the pleading. (Civ. Code, § 3295, subd. (e).)

7. All of paragraph 39, for which plaintiff requests an award of punitive damages.

   Granted. A breach of fiduciary duty alone without malice, fraud or oppression does not permit an award of punitive damages. (*Scott v. Phoenix Schools, Inc., supra,* 175 Cal.App.4th 702, 715.) Plaintiff must plead specific facts showing that defendant acted with malice, fraud or oppression. (*Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1041-1042.) Plaintiff has not done so. Here, the allegations against defendants Rajdeep Singh and Navdeep Singh fail to show "tortious conduct [which] rises to the levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not

have to tolerate." (*Scott v. Phoenix Schools, Inc., supra,* 175 Cal.App.4th 702, 716.) Also, the amount of punitive damages sought may not be stated in the pleading. (Civ. Code, § 3295, subd. (e).)

8. That portion of paragraph 43 contained on page 10 lines 22-26, which states as follows: "The defendants Rajdeep Singh and Navdeep Singh began to require that the plaintiff work in excess of forty hours a week, sometimes working as much as sixty (60) and eighty (80) hours per week. On the weeks in which the plaintiff worked in excess to full time, he was not paid for his overtime hours. In addition, the defendants Rajdeep Singh and Navdeep Singh did not give the plaintiff lunch or other work breaks to which he was entitled under California Labor Law." This matter is irrelevant based on the claims in the First Amended Complaint.

   Granted. As plaintiff voluntarily withdrew the former employment law claims alleged in his original complaint, these vestigial allegations are no longer relevant to the claims alleged in the First Amended Complaint. The court may, upon motion, strike out any irrelevant, false, or improper matter inserted in any pleading. (Code Civ. Proc., 436, subd. (a).)

9. All of paragraphs 55-64 pertaining to plaintiff's cause of action for unjust enrichment because the matter is improper.

   Since the demurrer to the fourth cause of action for unjust enrichment is overruled, the motion to strike this portion of the First Amended Complaint is denied.

10. All of paragraph 59 of the First Amended Complaint because it is improper and irrelevant.

    Granted. As plaintiff voluntarily withdrew the former employment law claims alleged in his original complaint, these vestigial allegations are no longer relevant to the claims alleged in the First Amended Complaint. The court may, upon motion, strike out any irrelevant, false, or improper matter inserted in any pleading. (Code Civ. Proc., 436, subd. (a).)

11. All of paragraph 67 of the First Amended Complaint because it is improper and irrelevant.

    Granted. As plaintiff voluntarily withdrew the former employment law claims alleged in his original complaint, these vestigial allegations are no longer relevant to the claims alleged in the First Amended Complaint. The court may, upon motion, strike out any irrelevant, false, or improper matter inserted in any pleading. (Code Civ. Proc., 436, subd. (a).)

12. All of paragraphs 82 and 83 because both are improper for the claim of unfair competition.

Granted. Only injunctive and restitutionary relief are available in a private action under the UCL. Damages are not available. (See Bus. & Prof. Code, § 17203; *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 173.) Paragraph 83 pertains to the unjust enrichment claim, as opposed to the UCL claim, and is therefore irrelevant. (Code Civ. Proc., 436, subd. (a).)

13. All of paragraphs 84-92 pertaining to plaintiff's cause of action for declaratory relief because the matter is improper.

    Since the demurrer to the sixth cause of action for declaratory relief is sustained with leave to amend, the motion to strike this portion of the complaint is denied as moot.

14. All of paragraphs 88 of the First Amended Complaint because it is improper and irrelevant.

    Granted. As plaintiff voluntarily withdrew the former employment law claims alleged in his original complaint, these vestigial allegations are no longer relevant to the claims alleged in the First Amended Complaint. The court may, upon motion, strike out any irrelevant, false, or improper matter inserted in any pleading. (Code Civ. Proc., 436, subd. (a).)

15. All of paragraph 92 of the First Amended Complaint because it is improper and irrelevant.

    Since the demurrer to the sixth cause of action for declaratory relief is sustained with leave to amend, the motion to strike this portion of the complaint is denied as moot.

16. Plaintiff's entire prayer for relief as to the first cause of action for wrongful termination because the matter is improper.

    Granted only as to paragraph 3, the request for punitive damages. Plaintiff must plead specific facts showing that defendant acted with malice, fraud or oppression. (*Smith v. Superior Court*, *supra,* 10 Cal.App.4th 1033, 1041-1042.) Plaintiff has not done so.

17. Paragraphs 3 and 4 pertaining to plaintiff's prayer for relief as to the second cause of action for breach of fiduciary duty which seeks punitive damages and attorneys' fees because the matter is improper.

    Granted. A breach of fiduciary duty alone without malice, fraud or oppression does not permit an award of punitive damages. (*Scott v. Phoenix Schools, Inc., supra,* 175 Cal.App.4th 702, 715.) Plaintiff has failed to allege facts showing that defendants acted with malice, fraud or oppression. The general rule is that attorney's fees are not recoverable in the absence of a statute or enforceable contract providing therefor. (See Code Civ. Proc., §1021.) Plaintiff has failed to allege any basis for recovery of attorney fees with respect to the breach of fiduciary duty cause of action.

18. Paragraph 2 pertaining to plaintiff's prayer for relief as to the third cause of action for accounting and production of records which seeks attorneys' fees because the matter is improper.

    Denied. "In any action or proceeding under Section 1600 or Section 1601, if the court finds the failure of the corporation to comply with a proper demand thereunder was without justification, the court may award any amount sufficient to reimburse the shareholder . . . for the reasonable expenses incurred by such holder, including attorneys' fees, in connection with such action of proceeding." (Corp. Code, § 1604.)

19. Plaintiff's entire prayer for relief as to the fourth cause of action for unjust enrichment because the matter is improper.

    Granted only as to the request for attorney's fees. The general rule is that attorney's fees are not recoverable in the absence of a statute or enforceable contract providing therefor. (See Code Civ. Proc., §1021.) Plaintiff has failed to allege any basis for recovery of attorney fees with respect to this cause of action.

20. Paragraph 2 pertaining to plaintiff's prayer for relief as to the fifth cause of action for constructive trust which seeks attorneys' fees because the matter is improper.

    Granted as to the request for attorney's fees. The general rule is that attorney's fees are not recoverable in the absence of a statute or enforceable contract providing therefor. (See Code Civ. Proc. §1021.) Plaintiff has failed to allege any basis for recovery of attorney fees with respect to this cause of action.

21. Paragraphs 4 and 5 pertaining to plaintiff's prayer for relief as to the sixth cause of action for unfair business practices which seeks attorneys' fees because the matter is improper.

    Granted as to the request for economic damages and attorney's fees. "An unfair competition law action is equitable in nature; damages cannot be recovered." (*Korea Supply Co. v. Lockheed Martin Corp*., *supra,* 29 Cal.4th 1134.) "Restitution is the only monetary remedy expressly authorized by Bus. & Prof. Code., § 17203." (*Ibid*.) Therefore, plaintiff's request for economic damages is improper. Additionally, plaintiff seeks an award of attorney's fee pursuant to Code of Civil Procedure section 1021.5. However, plaintiff has failed to allege facts showing his entitlement to fees under Code of Civil Procedure section 1021.5—the private attorney general statute.

22. Paragraphs 4 and 5 pertaining to plaintiff's prayer for relief as to the sixth cause of action for unfair business practices which seeks attorneys' fees because the matter is improper.

    This request is duplicative of the prior request.

23. Plaintiff's entire prayer for relief as to the seventh cause of action for declaratory relief because the matter is improper.

    Granted as to the request for attorney's fees. The general rule is that attorney's fees are not recoverable in the absence of a statute or enforceable contract providing therefor. (See Code Civ. Proc., § 1021.) Plaintiff has failed to allege any basis for recovery of attorney fees with respect to this cause of action.

Request for Judicial Notice

Defendants' request for judicial notice 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: KAG on 7/2/2021.
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***Vu v. Hovannisian***
Superior Court Case No. 14CECG00062

Hearing Date: July 8, 2021 (Dept. 503)

Motion: Plaintiffs' Motion for Attorney's Fees and Costs

Tentative Ruling:

To grant the motion for attorney's fees and costs in favor of plaintiffs, in the full amounts requested. (Code Civ. Proc., § 1021.5.)

Explanation:

The court has already stated in its order on the earlier motion for preliminary class settlement approval that the amount of attorney's fees requested appears to be reasonable. (See court's November 22, 2019 order adopting tentative ruling of November 21, 2019.) Nothing has occurred in the interim that would suggest that the fees are unreasonable or that they should be reduced.

As the court observed in its previous order, plaintiffs' counsel has submitted detailed time records and summaries of the work done on the case, as well as the hourly rates of the attorneys who performed the work. According to the time summaries and hourly rates, counsel actually incurred over $3,000,000 in fees while working on the case, so the requested amount of $1,150,000 is a substantial discount from the actual fees incurred. Also, it is worth noting that the fees will not be paid out of plaintiffs' recovery, as is the usual scenario in class action settlements, but rather will be paid by defendants separately. Therefore, the class members' recovery will not be reduced by the amount of fees their attorneys will receive.

Furthermore, to the extent that the court was previously concerned that the attorney's fees are several times greater than the total money recovery received by plaintiffs here, plaintiffs' counsel points out that they are seeking fees under Code of Civil Procedure section 1021.5, not a class fund theory. Under section 1021.5,

> Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

In the present case, it does appear that the class settlement will provide for a significant benefit to the general public or a large class of persons, as it will allow thousands of current and former tenants of JD Homes to obtain inspections, diligent repairs, vouchers, and other forms of relief from the habitability problems at defendants' properties. The necessity and financial burden of private enforcement also make an award of fees appropriate to plaintiffs' counsel here, as prosecuting the present case has conferred a significant benefit on the public by addressing the habitability problems with defendants' properties, which house thousands of people in the Fresno area. Also, the monetary recovery received was secondary to the other, non-monetary forms of relief, such as the right to receive detailed inspections, pest control, and diligent repairs to the properties. Indeed, the cost of litigating the action far outweighs the monetary recovery received by the class. Thus, it appears that an award of fees under section 1021.5 is appropriate.

The requested amount of fees also appears to be reasonable, as counsel has stated that they actually incurred far more fees than the amount they are claiming. In light of the many years of work and investigation required by the case, the number of hours incurred by counsel appears to be reasonable. Also, while counsel has requested rates that are higher than the rates normally charged by Fresno attorneys, plaintiffs have provided evidence indicating that they were unable to obtain local counsel who were willing and able to represent them in this complex and highly contested case. As a result, use of out-of-town rates to calculate fees is justified under the circumstances. (*Horsford v. Bd. of Trustees of California State Univ.* (2005) 132 Cal. App. 4th 359, 399.)

The costs requested also appear to be reasonable. Consequently, the court grants plaintiffs' motion for attorney's fees and costs, and approves the requested amounts in full.

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: KAG on 7/2/2021 .
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Hallmark Specialty Insurance Company v. Haight Brown & Bonesteel, LLP.***
Superior Court Case No. 20CECG03200

Hearing Date: July 8, 2021 (Dept. 503)

Motion: Defendant's demurrer to the first amended complaint

Tentative Ruling:

To sustain with leave to amend. Plaintiff is granted 30 days' leave to file the second amended complaint. The time in which the complaint can be amended will run from service by the clerk of the minute order. New allegations in the second amended complaint are to be set in **boldface** type.

Explanation:

"In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." (Code Civ. Proc., § 452.) Furthermore, "[t]his rule of liberal construction means that the reviewing court draws inferences favorable to the plaintiff, not the defendant." (*Perez v. Golden Empire Transit Dist*. (2012) 209 Cal.App.4th 1228, 1238.) The function of a demurrer is to test the sufficiency of a plaintiff's pleading by raising questions of law. (*Plumlee v Poag* (1984) 150 Cal.App.3d 541, 545.) The truth of the facts alleged in the complaint are assumed true as well as the reasonable inferences that may be drawn from those facts. (*Miklosy v. Regents of University of California* (2008) 2 Cal.4th 876, 883.)

Intended Beneficiary

The existence of a contract and a duty of care are elemental to plaintiff's causes of action. (Civ. Code, § 1550 [elements to the existence of a contract]; *Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228, 1238 ["consent to a written contract may be implied by conduct"]; *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397 [existence of duty of care "toward the interest of another" is the "threshold element" of a negligence cause of action].) In addition, "[a] key element of any action for professional malpractice is the establishment of a duty by the professional to the claimant. Absent duty there can be no breach and no negligence." (*Goldberg v. Frye* (1990) 217 Cal.App.3d 1258, 1267.) In other words, simply assuming a duty to a particular client does not impose a duty on the attorney to nonclients not in privity, although it is conceivable that an attorney may undertake to perform legal services at the behest of, and as attorney for, the nonclient. (*Ibid.* [determination made on summary judgment].) Consequently, "[t]he predominant inquiry [is] whether the principal purpose of the attorney's retention is to provide legal services for the benefit of the plaintiff. For example, the intention of a testator to benefit legatees, through the retention of an attorney to draft his will, can confer a cause of action in favor of a disappointed legatee against the

negligent draftsman." *(Id.* at p. 1268, citing *Lucas v. Hamm* (1961) 56 Cal.2d 583; *Biakanja v. Irving* (1958) 49 Cal.2d 647.)

Furthermore, although the attorney client relationship is "created by contract, express or implied" (*Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 729), even where the attorney is not providing legal representation, but some other legal service, a duty may still be owed to the nonclient. (*Furia v. Helm* (2003) 111 Cal.App.4th 945, 954; see also *Sky Valley Ltd. Partnership v. ATX Sky Valley, Ltd.* (N.D. Cal. 1993) 150 F.R.D. 648, 652 [setting forth a number of factual circumstances for consideration].)

Accordingly, under particular circumstances, third party beneficiaries may recover against an attorney for failing to property perform duties owed to the client. (*Lucas v. Hamm, supra,* 56 Cal.2d at p. 591 [intended beneficiaries of a will, who lost their testamentary rights, entitled to maintain suit against the attorney who drafted the will]; *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1095-1096 ["courts have extended an attorney's duty of care to nonclients . . . in limited circumstances"].) Similarly, "when, pursuant to insurance policy obligations, an insurer hires and compensates counsel to defend an insured, *provided that the interests of the insurer and insured are not in conflict*, the retained attorney owes a duty of care to the insurer which will support its independent right to bring a legal malpractice action against the attorney for negligent acts committed in the representation of the insured." (*Unigard Ins. Group v. O'Flaherty & Belgum* (1995) 38 Cal.App.4th 1229, 1235, emphasis in original.) Nevertheless, incidental benefit to the claimant is insufficient—both the attorney and the client must have intended to confer a benefit. *(Zenith Ins. Co. v. O'Connor* (2007) 148 Cal.App.4th 998, 1008 (*Zenith*) ["This rule governs the analysis, even if the attorney knows that third parties will be affected by his representation of his client. Without more, such knowledge is not sufficient to create a duty of care."].)

Defendant cites to *Zenith, supra,* 148 Cal.App.4th 998, for the proposition that a non-client cannot achieve intended beneficiary status where its interests are potentially adverse to those of a law firm client. *Zenith*, however, is distinguishable because, in that case, the plaintiff's exposure arose from a policy of reinsurance issued to the client, and the plaintiff had no control over claims settlement. (*Id*. at p. 1007.) Here, in contrast, plaintiff's settlement obligations arose directly from its issuance of its policy to the insured, and not from a reimbursement context such as that of the reinsurer in *Zenith*.

Furthermore, the *Zenith* court specifically noted the absence of mutual consent of the defendant law firm and its client in intending to confer a benefit to the plaintiff. Particularly, the court recognized that the client's interest in avoiding bad faith liability was materially different than the reimbursement obligations incurred by the plaintiff. (*Zenith*, *supra*, 148 Cal.App.4th at pp. 1008.) The court concluded that the law firm could not have ethically represented both its client and the plaintiff, and thus it was impossible that the law firm and its client ever intended to confer upon the plaintiff beneficiary status of the services performed for the client. (*Ibid*.) The lack of mutual consent was dispositive, especially because there was no allegation the law firm intended to risk liability or otherwise benefit the plaintiff. (*Id*. at p. 1009.)

The first amended complaint contains the conclusory allegation that defendant's representation of the insured was "intended to benefit" plaintiff. (FAC, ¶48.) Plaintiff's

opposition to demurrer, however, supports its claim that it was an intended beneficiary through its assertion of the reports it received directly from defendant addressing liability, the comparative fault of the County of Fresno, the cross-complaint filed against the County of Fresno, and the email by defendant containing settlement recommendations. (Opp. p. 8:16-24.) Plaintiff also claims it discussed the underlying action "extensively" with defendant. (*Id*. at p. 8:23-34.) Plaintiff supports these assertions, however, with counsel's declaration and without citation to its complaint. Rather, with one exception, plaintiff's complaint does not allege the existence of these communications from defendant. (FAC, ¶ 19.)

Plaintiff's assertions of facts indicating that it received confidential information and settlement recommendations tends to demonstrate participation and involvement greater than that in *Zenith* and approaches that of an intended beneficiary. Nevertheless, those facts are not alleged in the complaint. Accordingly, given the liberality allowed for amendment, the demurrer is sustained with leave to amend.

Subrogation

Subrogation requires that "the insured has an existing, assignable cause of action against the defendant which the insured could have asserted for its own benefit had it not been compensated for its loss by the insurer . . . ." (*Fireman's Fund Ins. Co v. Maryland Cas. Co.* (1998) 65 Cal.App.4th 1279, 1292.) An assignable cause of action is one which could have been asserted by the insured had it not been compensated for its loss. (See *Interstate Fire & Casualty Ins. Co. v. Cleveland Wrecking Co.* (2010) 182 Cal.App.4th 23, 36.) In addition, "California courts have consistently held legal malpractice claims are nonassignable to protect the integrity of the uniquely personal and confidential attorney-client relationship." (*Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg* (1994) 30 Cal.App.4th 1373, 1383.)

Generally, "a chose in action for legal malpractice is not assignable [because of] the uniquely personal nature of legal services and the contract out of which a highly personal and confidential attorney-client relationship arises, and public policy considerations based thereon." (*Goodley v. Wank & Wank, Inc.* (1976) 62 Cal.App.3d 389, 395.) The *Goodley* court was principally concerned with the "merchandizing" and commercial aspect of allowing legal malpractice claims—and the potential damage and exploitation—which were premised on the confidentiality of attorney-client relationship. (*Ibid*; see also *Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg, supra,* 30 Cal.App.4th 1373, 1384 ["legal malpractice claims are generally not assignable."].)

However, since the decisions in *Goodley v. Wank & Wank, Inc., supra,* 62 Cal.App.3d 389, and *Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg*, *supra*, 30 Cal.App.4th 1373, courts have carved an exception from the general rule under appropriate circumstances. (*White Mountains Reinsurance Co. of America v. Borton Petrini, LLP* (2013) 221 Cal.App.4th 890, 908-910 [subrogation of legal malpractice claim permitted because it was not treated as a "distinct commodity" and there was no former adversarial interest].)

In this case, as discussed above, plaintiff's opposition asserts multiple factual circumstances indicating that it acquired its causes of action against defendant as an

intended beneficiary of defendant's legal services, not through prohibited "merchandizing." (*Goodley v. Wank & Wank, Inc., supra,* 62 Cal.App.3d at p. 395.) Similarly, the new facts indicate involvement akin to a participant rather than an adversary. (*White Mountains Reinsurance Co. of America v. Borton Petrini, LLP, supra,* 221 Cal.App.4th at pp. 908-910.) Nevertheless, as also addressed above, although plaintiff asserts new facts in its opposition, those facts are not alleged in the operative complaint.

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: KAG on 7/6/2021.
(Judge's initials) (Date)