Tentative Rulings for December 16, 2021
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.

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(Tentative Rulings begin at the next page)

Tentative Rulings for Department 501

Begin at the next page

(03)

Tentative Ruling

Re: ***Ghost Golf, Inc., et al. v. Newsom, et al.***
Superior Court Case No. 20CECG03170

Hearing Date: December 16, 2021 (Dept. 501)

Motion: by Defendants for Judgment on the Pleadings and to Strike Portions of Complaint

Tentative Ruling:

To deny defendants' motion for judgment on the pleadings. (Code Civ. Proc. § 438.)

To grant defendants' motion to strike the prayer for nominal damages from the Complaint, without leave to amend. (Code Civ. Proc. §§ 435, 436.)

Explanation:

Motion for Judgment on the Pleadings: Defendants move for judgment on the pleadings as to the entire Complaint on the ground that the case has become moot due to the Governor's decision to rescind the Blueprint for a Safer Economy.

A motion for judgment on the pleadings will lie where the issues of the case have become moot. (*Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 746.) "Courts do not decide abstract questions of law. An indispensable element to jurisdiction is that there be an actual controversy between parties who have an adversarial interest in the outcome of the litigation. As the California Supreme Court explained nearly a century and a half ago: 'When questions are presented in good faith in the regular course of honest litigation, and are necessary to the determination of the case, we shall not hesitate to decide them; but it is no part of our duty to investigate and decide questions not regularly arising in the due course of litigation, for the gratification of the curiosity of counsel, or to serve some ulterior purpose of parties who choose to procure them to be raised against themselves by others who feel no interest in the contest.'" (*Ibid*, internal citation omitted.)

A case becomes moot when events that transpire after the filing of the action eliminate the controversy between the parties regarding the issues raised in the complaint, at which point there is no longer any dispute for the court to resolve. (*Wlison & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573-1574.) "Because '"'the duty of ... every ... judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or ... to declare principles or rules of law which cannot affect the matter in issue in the case before it[,] [i]t necessarily follows that when ... an event occurs which renders it impossible for [the] court, if it should decide the case in favor of plaintiff, to grant him any effectual relief whatever, the court will not proceed to formal judgment....'"' The

pivotal question in determining if a case is moot is therefore whether the court can grant the plaintiff any effectual relief." (*Id*. at p. 1574, internal citations omitted.)

"When events render a case moot, the court, whether trial or appellate, should generally dismiss it." (*Ibid*, internal citations omitted.) This is because "[t]he rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court." (*People ex rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910, 912, internal citations omitted.) "[A]n intervening change in the law that is the crux of a case may result in mootness. For example, repeal or modification of a statute under attack, or subsequent legislation correcting a challenged deficiency, can render a case moot." (*Association of Irritated Residents v. Department of Conservation* (2017) 11 Cal.App.5th 1202, 1222, internal citations omitted.)

Here, defendants argue that the Complaint has become moot because the Blueprint for a Safer Economy has been rescinded, and plaintiffs' businesses are no longer subject to the restrictions that existed under the Blueprint. As a result, plaintiffs are now free to operate their businesses without capacity restrictions or limitations on indoor dining or other activities. Thus, defendants contend, there is no longer anything for the court to enjoin, and the court cannot grant any practical relief on plaintiffs' claims for declaratory or injunctive relief.

Also, defendants contend that plaintiffs no longer have standing to bring their injunctive or declaratory relief claims, as there is no active controversy between the parties and there is nothing causing an injury to plaintiffs. (*D. Cummins Corp. v. U.S. Fid. & Guar. Co*. (2016) 246 Cal.App.4th 1484, 1489 [an actual, active controversy between the parties is an essential element of a declaratory relief claim]; *Connerly v. Schwarzenegger*, *supra*, 146 Cal.App.4th at p. 748 [in order to obtain an injunction, plaintiff must show that challenged law is causing an injury as to himself].) They argue that the fact that there might be a void law on the books, or that there might be an abstract or academic dispute about the validity of the Governor's actions, is not enough to give plaintiffs standing to challenge the State's emergency powers. (*Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 866.) Therefore, defendants argue that the court should dismiss the entire action.

It is true that as of June 11, 2021, the Governor rescinded the Blueprint for a Safer Economy, which is the order plaintiffs seek to have declared invalid and which they seek to enjoin. (Jones decl., Exhs. M, N and O, the court intends to take judicial notice of the executive orders under Evidence Code section 452 as official acts of a government official.) The restrictions on capacity and indoor activities at restaurants and entertainment venues like those owned by plaintiffs are no longer in effect. (Jones decl. Exh. O.) Thus, there is no longer an executive order in effect that the court can enjoin. Nor can plaintiffs show that they are currently being harmed by the executive orders, as they are no longer in effect.

Nevertheless, plaintiffs' claims are not moot, because the Governor could easily re-impose similar restrictions to the ones they challenge in the Complaint if the pandemic situation worsens. Courts will not find a case moot where the defendant voluntarily ceases the challenged conduct, unless it is absolutely clear that the allegedly wrongful behavior is not reasonably likely to recur. In *Elim Romanian Pentecostal Church v. Pritzker*

(7th Cir. 2020) 962 F.3d 341, the Seventh Circuit Court of Appeals stated that, "[v]oluntary cessation of the contested conduct makes litigation moot only if it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' Otherwise the defendant could resume the challenged conduct as soon as the suit was dismissed." (*Id*. at p. 345, internal citations omitted.)

Also, several federal courts, including the United States Supreme Court, have recently found that the loosening of pandemic restrictions did not render challenges to those restrictions moot, as the government could quickly tighten restrictions again if the situation changes. For example, in *Elim Romanian Pentacostal Church, supra*, the court stated that, "[t]he list of criteria for moving back to Phase 2 (that is, replacing the current rules with older ones) shows that it is not 'absolutely clear' that the terms of Executive Order 2020-32 will never be restored. It follows that the dispute is not moot and that we must address the merits of plaintiffs' challenge to Executive Order 2020-32 even though it is no longer in effect." (*Elim Romanian Pentecostal Church v. Pritzker*, *supra*, 962 F.3d at p. 345, internal citation omitted.)

"'[A] case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' 'There is, however, a well-recognized exception to the mootness doctrine holding that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice."' 'To that end, "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur."' '[C]ourts have been particularly unwilling to find that a defendant has met its heavy burden to establish that its allegedly wrongful conduct will not recur when the defendant expressly states that, notwithstanding its abandonment of a challenged policy, it could return to the contested policy in the future.'" (*Antietam Battlefield KOA v. Hogan* (D. Md. 2020) 461 F.Supp.3d 214, 227–228, internal citations omitted.)

Recently, federal courts have held that the government's voluntary lifting of Covid restrictions does not necessarily render a challenge to those restrictions moot. "Governor Lamont concedes that he cannot say with certainty that it will never be necessary to re-impose restrictions in the future. Because it cannot 'be said with assurance that there is no reasonable expectation that the alleged violation will recur,' Governor Lamont cannot meet his burden at the first step of the voluntary cessation analysis. The motion to dismiss Plaintiffs' claims for declaratory and injunctive relief as moot is denied." (*Amato v. Elicker* (D. Conn. 2021) 534 F.Supp.3d 196, internal citations omitted.)

The Central and Northern California Districts of the Federal District Court have also found that the voluntary lifting of pandemic protocols does not mean that cases challenging those protocols are moot. "Although the State has permitted comities to advance through Stage 2 more quickly, the State is not constrained from later reenacting the harsh restrictions which existed at the beginning of this pandemic." (*Professional Beauty Federation of California v. Newsom* (C.D. Cal., June 8, 2020, No. 2:20-CV-04275-RGK-AS) 2020 WL 3056126, at *4, internal citations omitted.)

"The pandemic has involved multiple setbacks in the progress toward reopening. The Court, therefore, agreed that there exists a reasonable enough likelihood that the

health order will be reinstated to warrant consideration of the preemption issue." (*Seaplane Adventures, LLC v. County of Marin* (N.D. Cal., Nov. 22, 2021, No. C 20-06222 WHA) 2021 WL 5449071, at *1.)

Federal courts in other states have also held that the lifting of Covid restrictions did not moot the actions challenging them. "Here, the current executive order permits in-person religious services at half-capacity, but this is due to downward trends in COVID-19 hospitalizations, not because of the plaintiffs' claims. The Governor could amend the executive order to again include religious gatherings in the ban on gatherings of ten or more people. Therefore, voluntary cessation does not moot the motion for a temporary restraining order with respect to the religious claims." (*Antietam Battlefield KOA v. Hogan, supra,* 461 F.Supp.3d 214, footnote omitted.)

The United States Supreme Court has also held that the government's decision to voluntarily lift pandemic restrictions does not necessarily moot cases challenging those restrictions. For example, in *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020) 141 S.Ct. 63, which dealt with New York's capacity restrictions on church services, the Supreme Court stated that, "It is clear that this matter is not moot. And injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified as red or orange. The Governor regularly changes the classification of particular areas without prior notice. If that occurs again, the reclassification will almost certainly bar individuals in the affected area from attending services before judicial relief can be obtained." (*Id.* at p. 68, internal citations and footnote omitted.)

Likewise, in *Tandon v. Newsom* (2021) 141 S.Ct. 1294, which involved California's pandemic capacity restrictions on at-home religious gatherings, the Supreme Court held that, "even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case. And so long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions… [A]lthough California officials changed the challenged policy shortly after this application was filed, the previous restrictions remain in place until April 15th, and officials with a track record of 'moving the goalposts' retain authority to reinstate those heightened restrictions at any time." (*Id.* at p. 1297, internal citations omitted.)

In the present case, the Governor and public health officers have made it clear that they could re-impose restrictions if infection and hospitalization rates go up, so it is not "absolutely clear" that the controversy between the parties will not become active again. While considerable progress has been made against the pandemic in California, including high rates of vaccination and, for now, lower rates of hospitalizations and deaths, it is not possible to say with "absolute certainty" that the situation will not worsen in the future and cause the Governor to impose new restrictions, including the types of restrictions that plaintiffs challenge here. The course of the pandemic remains unpredictable. The emergence of new variants, including the recently discovered "Omicron" variant, continue to pose challenges to the efforts of scientists, health care professionals, and the government to control the pandemic. There is a real possibility that the existing vaccines may not be as effective against new variants of the virus, which

could lead to increased infections, hospitalizations and deaths. There is also the threat of a surge of cases as the state moves into the winter months and friends and families gather inside for holiday celebrations.

Therefore, unfortunately, it remains reasonably foreseeable that the government may have to impose new restrictions in order to control the spread of the coronavirus. As a result, the court intends to find that plaintiffs' claims are not moot, despite the rescission of the Blueprint.

In addition, it appears that the mootness exception for matters of public interest applies here. "[T]his court has discretion to decide a case which, although technically moot, poses an issue of broad public interest that is likely to recur." (*Newsom v. Superior Court (Gallagher)* (2021) 63 Cal.App.5th 1099, 1111, internal citations and quote marks omitted.) Here, the question of whether the Governor has the constitutional and statutory authority to impose pandemic restrictions on businesses without legislative approval is clearly a matter of public concern. It also appears to be at least reasonably likely to recur, as the pandemic is far from over and there is no guarantee that the situation will not worsen in the future, which could cause the Governor to impose new restrictions.

In *Gallagher,* the Third District Court of Appeal held that, "Given that the COVID-19 crisis is not over and the efforts to combat it are of statewide concern, there can be no doubt that this appeal falls within our discretion. [¶] We are mindful that, '[i]n passing judgment on cases requesting declaratory relief, we decide only actual controversies and refrain from issuing advisory opinions.' However, we conclude there is an actual controversy regarding the scope of the Governor's authority to issue and implement executive orders under the Emergency Services Act, which the Governor clearly intends to continue to do during the COVID-19 state of emergency." (*Gallagher, supra,* 63 Cal.App.5th at p. 1111, internal citations omitted.)

Likewise, in the present case, despite the rescission of the Blueprint for a Safer Economy, the Governor retains the power under the Emergency Services Act to impose new restrictions on businesses at any time if the pandemic worsens. The Governor and his public health officers have made it clear that they will take whatever measures they deem necessary to address the pandemic. Therefore, it appears that there is still an actual controversy regarding the scope of the Governor's authority under the Emergency Services Act, and the court intends to exercise its discretion to hear the merits of the plaintiffs' claims. Consequently, the court intends to deny the motion for judgment on the pleadings.

Motion to Strike: Defendants move to strike the prayer for nominal damages from the Complaint, contending that the prayer is improper because all claims for damages against the government and government officials are barred by sovereign immunity. (Govt. Code § 815; *County of Los Angeles v. Superior Court* (2009) 181 Cal.App.4th 218, 233.)

"[S]overeign immunity is the rule in California; governmental liability is limited to exceptions specifically set forth by statute." (*Cochran v. Herzog Engraving Co*. (1984) 155 Cal.App.3d 405, 409.) Also, under the express terms of the Emergency Services Act, "[t]he state or its political subdivisions shall not be liable for any claim based upon the

exercise or performance, or the failure to exercise or perform, a discretionary function or duty on the part of a state or local agency or any employee of the state or its political subdivisions in carrying out the provisions of this chapter." (Gov. Code, § 8655.) Thus, any claims against the government or its officials that are based on policy level decisions or actions under the Emergency Services Act are subject to immunity under section 8655.

"Since plaintiffs' claim is based directly upon these acts, section 8655 applies to provide the state with immunity from liability. The purpose of the statute is obvious. In those cases where the state must take the steps necessary to quell an emergency, it must be able to act with speed and confidence without fear of incurring tort liability." (*Farmers Ins. Exchange v. State of California* (1985) 175 Cal.App.3d 494, 505, internal citation omitted.) Claims under 42 USC section 1983 which seek nominal damages are also barred by sovereign and statutory immunity. (*Arizonans for Official English v. Arizona* (1997) 520 U.S. 43, 68–70; *Hemphill v. Kincheloe* (9th Cir. 1993) 987 F.2d 589, 592.)

Here, plaintiffs are suing Governor Newsom and various other government officials for policy level decisions that they made in their capacity as officials of the State. They seek nominal damages of one dollar, in addition to injunctive and declaratory relief. However, since plaintiffs are essentially attempting to hold the Governor and his officials liable for their decisions as government officials, their claim for nominal damages is barred by sovereign and statutory immunity. (Govt. Code § 8655; *Farmer Ins. Exchange v. State of California, supra*, 175 Cal.App.3d at p. 505.)

Plaintiffs argue that since they are only seeking nominal damages rather than compensatory or punitive damages, their claim is not barred by sovereign immunity. They point out that nominal damages are not intended to compensate them for actual injury, but are instead awarded to recognize that they have been injured, if only in a technical sense. Thus, they conclude that their claim for nominal damages is proper and should not be dismissed.

"'Nominal damages' are defined in Bouvier's Law Dictionary as 'a trifling sum awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained'; or 'where, from the nature of the case, some injury has been done, the amount of which the proofs fail entirely to show'. A 'trifling sum' is said to be 'a penny, one cent, 614 cents'." (*Price v. McComish* (1937) 22 Cal.App.2d 92, 100.)

"On the distinction between nominal and compensatory damages, it is said in 17 Corpus Juris, page 720: 'Nominal damages are so called in contradistinction to actual, substantial, or compensatory damages. They are given not as an equivalent for the wrong but in recognition of a technical injury, and by way of declaring the right. Hence they are not the same as damages which are small in amount, and in reality are damages in name only, not in fact, or, as it has been otherwise stated, are in fact the same as no damages.'" (*Ibid*.)

Plaintiffs are correct that nominal damages are different from compensatory damages, as they are not intended to provide actual compensation for plaintiffs' injuries, and are instead awarded to show that they were injured even if the amount of damages is impossible to determine or the injury is technical in nature. However, plaintiffs have

failed to cite to any authorities holding that they are allowed to recover even nominal damages against government officials despite statutory and sovereign immunity doctrines.

Plaintiffs cite to *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139 in support of their position that sovereign immunity does not bar an award of nominal damages. However, *Kizer* only dealt with the issue of whether the Tort Claims Act applies to awards of statutory penalties designed to enforce minimum health and safety standards. (*Id*. at p. 146.) It says nothing about awards of nominal damages. Therefore, *Kizer* does not assist plaintiffs here.

As an award of nominal damages is barred by statutory and sovereign immunity, the prayer for nominal damages in the Complaint has been improperly alleged and will be stricken without leave to amend.

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

Tentative Ruling
Issued By: DTT on 12/9/2021.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Calaveras Materials, Inc. v. Rick Carsey Trucking and Construction, Inc., et al.***
Superior Court Case No. 08CECG02178

Hearing Date: December 16, 2021 (Dept. 501)

Motion: by Judgment Creditor Assignee Forster-Gill, Inc., to Amend Judgment to Add Alter Ego as Judgment Debtor

Tentative Ruling:

To grant the motion. Moving party is directed to submit to the court, within five days of service of the minute order, an amended Judgment consistent with this ruling.

Explanation:

Judgment Creditor Assignee Forster-Gill, Inc., seeks to add Canales Group LLC as a judgment debtor on the Judgment entered against Canales-Selma LLC and Michael Canales, individually and doing business as Michael Canales Construction on July 24, 2012.

After a judgment creditor obtains a judgment against a corporation and it then discovers that the corporation has few or no assets and is controlled by a nonparty alter ego, the judgment creditor may ask the court for leave to amend the judgment to add the alter ego as a judgment debtor and enforce the judgment against that debtor. The court's authority for this is pursuant to Code of Civil Procedure Section 187, which allows the court to use "all the means necessary" to carry its jurisdiction into effect. (*Dow Jones Co. v. Avenel* (1984) 151 Cal.App.3d 144, 148—Section 187 serves as basis for amendment of judgment pursuant to alter ego doctrine.) The amendment is not meant to add a new defendant, but rather to set forth the *true name of the real defendant*. (*Id.* at p. 149; *Misik v. D'Arco* (2011) 197 Cal.App.4th 1065, 1074-1075, *as modified (Aug. 9, 2011)*—failure to allege alter ego doctrine in underlying lawsuit did not preclude amendment of judgment to add the judgment debtor's alter ego.)

Amending a judgment to add a nonparty defendant necessarily means liability is imposed on someone without benefit of trial. Thus, a judgment creditor moving for this relief must establish <u>both</u> 1) that the new party is the alter ego of the old party; <u>and</u> 2) that the new party "controlled the litigation, thereby having had the opportunity to litigate, in order to satisfy due process concerns." (*Triplett v. Farmers Ins. Exchange* (1994) 24 Cal.App.4th 1415, 1421.) "The due process considerations are in addition to, *not in lieu of,* the threshold alter ego issues." (*Id.*, emphasis in the original.) The moving party must prove these elements by a preponderance of the evidence. (*Wollersheim v. Church of Scientology* (1999) 69 Cal.App.4th 1012, 1016.)

Alter Ego

Judgment debtor uses a "reverse" veil piercing theory to demonstrate that Canales Group LLC, solely owned by Michael Canales, is rightly an alter ego that should be added as a judgment debtor in this action. To establish liability under a reverse piercing theory, a plaintiff need only show that there is a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and its equitable owner do not really exist an there will be an inequitable result if the acts in question are treated as those of the corporation alone. (*Curci Investments, LLC v. Baldwin* (2017) 14 Cal.App.5th 214, 221.)

Canales Group LLC was registered in California by Michael Canales on August 29, 2008. The most recent Statement of Information on file with the Secretary of State indicates Canales Group LLC's only member is Michael Canales. Canales has testified in depositions in other matters that he has no bank accounts personally and the efforts the judgment creditor has taken to garnish bank accounts in Canales' name have been fruitless. (Connell Decl. ¶ 13.) Additionally, Canales does not own real property in his own name. In contrast, Canales Group LLC assets include seven parcels of real property in San Diego, California and a $5.3 million promissory note with the Pinoleville Pomo Nation. (Connell Decl. ¶ 18, 19.) Canales intends to use the matured promissory note to pay his personal creditors. (Id. at ¶ 16.) In addition to the Carsey judgment, Canales has at least six additional judgments against him in the State of California. (Id. at ¶¶ 5-10.)

The evidence provided is sufficient to support that Michael Canales, as the sole member of Canales Group LLC, has a clear unity of interest and is the sole owner of the LLC. As such, Michael Canales and Canales Group LLC are properly considered alter egos of the other.

Jurisdiction

The court must have jurisdiction over the judgment debtor's alter ego in order to enter a valid judgment against the alter ego. This is normally accomplished by service of process. (*Milrot v. Stamper Medical Corp.* (1996) 44 Cal.App.4th 182, 185 [noting the only other potential source of jurisdiction there was alleged alter ego's attorney's appearance at motion to amend judgment].) Canales Group LLC was served via the California Secretary of State on October 13, 2021, effectively conferring jurisdiction of this court over Canales Group LLC.

Due Process

Ordinarily, based on due process concerns, the process of amending the judgment is not available where the judgment in question was obtained by default. (*Motores De Mexicali, S. A. v. Superior Court In and For Los Angeles County* (1958) 51 Cal.2d 172, 175-176; *Wolf Metals Inc. v. Rand Pacific Sales, Inc.* (2016) 4 Cal.App.5th 698, 703-704, 708-709; *NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 779.) Here, the judgment on the cross-complaint against Canales was obtained by default, however, Canales's other sole member LLC appeared in the litigation as Canales-Selma, LLC. Although an appearance was made in the complaint, no responses were filed to the cross-complaint filed by Carsey against Canales individually and doing business as

Michael Canales Construction and Canales-Selma LLC although Canales-Selma LLC was represented by an attorney at the time the cross-complaint was filed and served. Canales substituted as his own counsel in the matter in March 2009. His unwillingness to participate in the litigation does not mean he did not have the opportunity to do so and to control the underlying litigation.

Due process requires that the alleged alter ego must control the underlying litigation and have the opportunity to defend against the plaintiff's allegations, such that he was virtually represented therein. (*Highland Springs, supra*, 244 Cal.App.4th at p. 280; see *Minton v. Cavaney* (1961) 56 Cal.2d 576, 581 (*Minton*).) The circumstances before the court in this matter can be distinguished from the default judgments in *Motores*, *Wolf Metals*, and *NEC* in that the sole member of the LLC sought to be added as an alter ego was both a party to the litigation and represented his other sole membership LLC in the complaint for almost five years. It cannot be said that the interests of Michael Canales the individual and Michael Canales, sole member of Canales-Selma, LLC's interests were not aligned. He had the opportunity to defend the litigation and appears to have made a strategic decision not to do so, both upon substituting as his own counsel and not responding to the Carsey cross-complaint for himself, or his two business entities. It was Canales' decision not to actively participate in the litigation while the other multiple parties actively worked to resolve the litigation over five years. Michael Canales' roles during litigation support that the defaulted cross-defendants with Michael Canales at the helm had control of the underlying litigation to support amending the judgment to include alter ego Canales Group LLC.

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 12/13/2021.
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Johnson v. Watt***
Superior Court Case No. 17CECG02337

Hearing Date: December 16, 2021 (Dept. 501)

Motion: Expedited Petitions for Compromise of the Claims of Minors Javen and Jada Frazier

Tentative Ruling:

To continue to January 20, 2022, at 3:30 p.m. in Department 501, requiring petitioner to file a supplement to the Petition, *verified by petitioner*, addressing the concerns raised below.

Explanation:

The declaration of counsel, filed on December 3, 2021, does not sufficiently answer all issues outlined in the court's minute order issued on October 7, 2021. First, that order specified that petitioner must provide the following information by way of a *supplement* to the Petition, and not by way of a declaration from counsel. The court needs to see a supplement which is signed and verified by petitioner, just as the Petition itself was. Therefore, the court again continues the matter and requires petitioner and her attorney to provide the following information:

1. The court needs to see proof of what the entire global settlement with defendant Watt was, and the breakdown as to what went to each plaintiff, given the wildly varying discrepancies regarding this in the past Petitions. The September 2017 Petitions, prepared by Mr. Shemtoub, stated that a total of $10,000 each was offered Javen and Jada, with $13,000 offered to Kyla Frazier and $4,900 being offered to Janetra Johnson, for a total settlement of $37,900. However, the 2020 and 2021 Petitions indicated that $5,200 was offered to Jada, $4,000 to Javen, $5,200 to Kyla, and $4,900 to Janetra, for a total settlement of only $19,300. Petitioner must explain this discrepancy. The only thing attached to counsel's declaration to address this is a release pertaining to Jada in exchange for $5,200, signed by Janetra Johnson. There is no release as to Javen. Nor does counsel explain or even acknowledge the large difference between the September 2017 Petition and the 2020/2021 Petitions.

2. Proof must be submitted as to whether the settlement monies have already been paid and, if so, who has been in possession of these funds since that payment. If counsel has been in possession of the funds, this must be disclosed. If so, the funds should have been deposited in his attorney-client trust account, and the interest accrued must be added to the gross amount payable to the minors. Counsel's declaration did not address this issue.

3. The court's order informed petitioner that it intended to deny the request for the net settlement amounts to be paid to the parent, and that it would instead require blocked accounts. Counsel's declaration merely states that he does not have "an issue" with this. However, a *supplement*, as the court had ordered to be filed, will necessarily be signed by petitioner, indicating her awareness of this requirement.

4. The court's order also indicated it would not allow the "COPP Charges" as attorney costs ($724 for each minor). And yet, the attorney's declaration still indicates this is still being requested.

5. The court is disturbed by additional cost apparently being charged by Aslan Pirouz, M.D., as shown at PDF page 15 of counsel's declaration. The petition filed in July indicated that he charged a total of $500 ($250 each minor) for a televisit with each minor, apparently done in order to show their full recovery. However, page 15 shows an invoice dated December 2, 2021, showing a "Service Fee" for the televisit, and now reflects the charge for each minor at $300, for a total cost of $600. This "service fee" appears to represent the equivalent of an interest rate at nearly 25% per annum. The court will not approve this additional charge. It is unreasonable and improper.

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 12/13/2021.
(Judge's initials) (Date)

(20)

Tentative Ruling

Re: ***Krier v. G-On Cuisine, Inc.***
Superior Court Case No. 20CECG01470

Hearing Date: December 16, 2021 (Dept. 501)

Motion: by Defendant for Summary Judgment

Tentative Ruling:

To grant. (Code Civ. Poc., § 437c, subd. (c).) Within five days of service of the minute order, moving party shall submit to this court a proposed Judgment consistent with this ruling.

Explanation:

This is a slip and fall personal injury action. Plaintiff alleges that on 3/3/19 she had dinner at defendant's restaurant. She slipped and fell on a slippery substance on the floor as she walked back to her table after using the restroom. She felt sudden and severe pain in her right knee. The Complaint alleges a single cause of action for premises liability.

Initially the court will address plaintiff's evidentiary objections. The first three objections are expressly directed at portions of defendant's separate statement. These objections should be overruled, as they are not directed at the evidence. Evidentiary objections can only be made to the underlying evidence, not the facts contained within the separate statement. (See Cal. Rules of Court, rules 3.1352 and 3.1354.) Objections 4-8 purport to object to material from declarations filed in support of the motion, but actually quote from the separate statement's description of the evidence. Accordingly, the objections fail to comply with Rule of Court 3.1354(b) (each objection must quote or set forth the material objected to), and still object to the separate statement's characterization of the evidence (see UMF 19 [objection 4], UMF 23 [objection 5], UMF 24 [objection 6], UMF 23 [objection 7], UMF 24 [objection 8].) Plaintiff's objections are all overruled.

> Summary judgment is warranted "if all the papers submitted show that there is no triable issue as to any material fact" such that "the moving party is entitled to judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) "The moving party bears the burden of showing the court that the plaintiff 'has not established, and cannot reasonably expect to establish, a prima facie case.' " (*Miller v. Department of Corrections, supra,* 36 Cal.4th at p. 460, 30 Cal.Rptr.3d 797, 115 P.3d 77.) The burden then " 'shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff "may not rely upon the mere allegations or denials of its pleadings ... but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action." ' " (*Lyle v. Warner Brothers*

> *Television Productions* (2006) 38 Cal.4th 264, 274, 42 Cal.Rptr.3d 2, 132 P.3d 211.)

(*Peralta v. Vons Companies, Inc.* (2018) 24 Cal.App.5th 1030, 1034–1035.)

> A store owner is not the insurer of its patrons' personal safety, but does have a duty to exercise reasonable care to keep the premises reasonably safe for patrons. (See *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205, 114 Cal.Rptr.2d 470, 36 P.3d 11 (*Ortega*).) This includes a duty to keep the floors safe for patrons' use. (*Tuttle v. Crawford* (1936) 8 Cal.2d 126, 130, 63 P.2d 1128.) To establish an owner's liability for negligence, the plaintiff must prove duty, breach, causation, and damages. (*Ortega,* at p. 1205, 114 Cal.Rptr.2d 470, 36 P.3d 11.)

(*Peralta, supra,* 24 Cal.App.5th at p. 1035.)

> Under California law 'the proprietor of a store who knows of, or by the exercise of reasonable care could discover, an artificial condition upon his premises which he should foresee exposes his business visitors to an unreasonable risk, and who has no basis for believing that they will discover the condition or realize the risk involved, is under a duty to exercise ordinary care either to make the condition reasonably safe for their use or to give a warning adequate to enable them to avoid the harm . . . ' [Plaintiff] was entitled to have the jury so instructed."

(*Williams v. Carl Karcher Ent., Inc.* (1986) 182 Cal.App.3d 479, 488.)

Defendant first contends that it did not know, nor could it have known through exercise of reasonable care, that there was a dangerous condition on the floor. This is based on the testimony that employees passed the spot where plaintiff fell every 60 seconds because the area is part of a highly traveled route. (Chon Decl., ¶ 6; B. Chon Decl., ¶ 6.) No one reported seeing any substance on the floor and if there was a substance it would have been cleaned as soon as it was discovered. (Ibid. at ¶¶ 4-6, 12.) Defendant also points out that in her deposition plaintiff stated that the restaurant was generally clean and well-kept. (Krier Depo., 63:21-24.) Accordingly, defendant contends that the only evidence is that defendants took reasonable steps to insure the safety of their patrons by regularly conduction formal and informal inspections before, during and after their hours of operation.

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In light of the fact that nobody ever actually saw any wet or slippery substance on the floor, and this is a high-traffic area that employees frequently passed through, the court finds that defendant has met its burden.

To create a triable issue regarding whether defendant knew or should have known, plaintiff points to the presumed slippery substance on the floor (which nobody saw but plaintiff assumes was there due to the presence of something wet on her hands and tights), and relies on the declaration of expert witness Zachary Moore, who states in his declaration that the industry standard for high traffic areas where plaintiff fell is to place floor mats or coverings so as to minimize the danger of slippery substances spilled on the floor. Mr. Moore further states that in this instance, the lack of an inspection schedule also created an unreasonable risk of harm for patrons, including plaintiff, who were traversing the only hallway in the Restaurant leading to the restrooms.

Mr. Moore's conclusions are somewhat problematic. For example, he states that *the absence of floor mats or floor coverings* on March 3, 2019, created an unsafe condition in the area where plaintiff fell. (See Moore Decl., ¶ 13.) However, it is not plaintiff's contention that her fall was caused by walking on dry but uncovered floor. The lack of floor covering is not the dangerous condition. The alleged wet slippery spot on the floor is the dangerous condition. Mr. Moore states that it is his opinion that plaintiff slipped on a slippery substance on the floor of the restaurant, apparently because she "a 'slippery substance' on her hands and clothes after she fell." (Moore Decl., ¶ 7) But there is no indication that Mr. Moore took into consideration the fact that plaintiff had *just* washed her hands, where she by necessity got her hands wet, and could easily have gotten her pants wet as well.

Plaintiff does not raise a triable issue of fact based on the fact that there was no specific inspection schedule, especially in light of the fact that this was a high traffic area for both customers and staff, who passed by the area frequently. Mr. Moore does not show that an inspection schedule was necessary for this high traffic area at this particular restaurant.

"The correct rule on the necessity of expert testimony has been summarized by Bob Dylan: 'You don't need a weatherman to know which way the wind blows.' The California courts, although in harmony, express the rule somewhat less colorfully and hold expert testimony is not required where a question is 'resolvable by common knowledge.'" (*Jorgensen v. Beach 'n' Bay Realty, Inc.* (1981) 125 Cal.App.3d 155, 163 citing Bob Dylan, "Subterranean Homesick Blues" from *Bringing It All Back Home* [fn. 2].)

Expert testimony is admissible if it would be helpful to the trier of fact: "The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission; if that were the test, little expert opinion testimony would ever be heard. Instead, the statute declares that even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would 'assist' the jury." (*People v. McDonald* (1984) 37 Cal.3d 351, 367 (overruled on other grounds by *People v. Mendoza* (2000) 23 Cal.4th 896, 914 [expert opinion admissible as to accuracy of eyewitness identification].)

Mr. Moore's declaration is not relevant or helpful on the question of what caused plaintiff to fall. Mr. Moore says he saw a picture of plaintiff's shoes and inspected the premises, but says nothing of the likelihood of plaintiff falling on that floor while wearing those shoes if there was no slippery substance on the floor. This is a very simple question of fact, and the expert declaration is of no use in resolving that factual question. There is no need for expert testimony on this issue, and Mr. Moore's declaration offers no useful conclusions as to how plaintiff fell.

Plaintiff's deposition testimony makes clear that she only assumes that she slipped on a wet spot on the floor because after the fall there was some wet substance on her hands and tights.

> To meet its burden of proof, a "'plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.' " (*Ortega, supra*, 26 Cal.4th at pp. 1205–1206, 114 Cal.Rptr.2d 470, 36 P.3d 11.)

(*Peralta v. Vons Companies, Inc.* (2018) 24 Cal.App.5th 1030, 1035.)

> Mere conjecture, however, is "legally insufficient to defeat summary judgment." (*Buehler v. Alpha Beta Co.* (1990) 224 Cal.App.3d 729, 734, 274 Cal.Rptr. 14.) The mere *possibility* that there was a slippery substance on the floor does not establish causation. Absent any evidence that there was a foreign substance on the floor, or some other dangerous condition created by or known to Vons, Peraltas cannot sustain their burden of proof.

(*Peralta, supra*, 24 Cal.App.5th at p. 1036.)

Here, there is no direct evidence that there was any slippery substance on the floor. Nobody saw anything on the floor, either before or after the fall. Plaintiff assumes the floor was wet because there was a wet substance on her hand and tights after she fell. But it is noteworthy that plaintiff went to the restroom specifically and only to wash her hands. She was walking back to her table from the restroom, where she had *just* washed her hands, when she fell and then discovered that there was something on her hands and tights. It is possible that the substance came from the floor onto which plaintiff fell. But it is equally plausible, based on the evidence before the court, that her hands were still wet from washing, and she got a little water on her tights while washing her hands.

In light of the evidence that nobody saw any wet substance on the floor, the court concludes that that defendant met its burden of showing there was no dangerous condition. Plaintiff cannot show that it is more likely than not that she slipped on a wet substance on the floor. She only raises the mere possibility that she could have, which is not enough.

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 12/13/2021 .
(Judge's initials) (Date)

(35)

Tentative Ruling

Re:	***Barron v. Athenix Body Sculpting Institute et al.*** Superior Court Case No. 20CECG02887
Hearing Date:	December 16, 2021 (Dept. 501)
Motion:	by defendant Kevin F. Ciresi, M.D. for demurrer to the complaint by defendant Kevin F. Ciresi, M.D. to strike exemplary damages from the complaint by defendants Athenix Body Sculpting Institute, Athenix Physicians Group, Inc., and Andre Marshall, M.D. to strike portions of the complaint

Tentative Ruling:

To find the demurrer and both motions to strike as moot and take off calendar.

Explanation:

A party may amend its pleading any time after a demurrer or motion to strike is filed but before the demurrer or motion to strike is heard if the amended pleading is filed and served no later than the date for filing an opposition. (Code Civ. Proc. § 472, subd. (a).)

In the instant case, plaintiff untimely filed a first amended complaint on December 13, 2021, in lieu of opposition to the instant demurrer and motions to strike, set for hearing on December 16, 2021. The court exercises discretion to consider late filed papers and considers plaintiff's first amended complaint in lieu of an opposition. (Cal. Rules of Court, Rule 3.1300(d).) The court finds that plaintiff exercised her right to file an amended pleading in lieu of an opposition, and finds the present demurrer and motions to strike moot. (*Barton v. Khan* (2007) 157 Cal.App.4th 1216, 1221 [holding that, despite filing an amended pleading three days prior to hearing, a plaintiff has a right to amend her pleading at any time up to the time of hearing under Code of Civil Procedure section 472].)

Accordingly, the present demurrer and motions to strike are taken off calendar as moot, as the filing of a First Amended Complaint renders challenges to the original Complaint moot. (*State Compensation Ins. Fund v. Super. Ct.* (2010) 184 Cal.App.4th 1124, 1131.)

All parties are reminded that, should any challenges arise from the First Amended Complaint, both the Code of Civil Procedure and Fresno County Superior Court Local

Rules, Rule 1.1.4, define "meet and confer" to require either a telephone conference, or an in-person exchange. (Code Civ. Proc. § 430.41, subd. (a), (a)(3); *id.*, § 435.5, subd. (a), (a)(3).)

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 12/13/2021.
(Judge's initials) (Date)