

**Tentative Rulings for May 11, 2016**  
**Departments 402, 403, 501, 502, 503**

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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).)

15CECG03681      *Cintron v. Moreno et al.* (Dept. 403) THIS HEARING WILL GO FORWARD ON THURSDAY, MAY 12, 2016 AT 3:00 PM

10CEPR00244      *In re Cenci Family Trust* (Dept. 502)

16CECG00248      *DMO Harris Bank N.A. v. Gurkamal Singh* (Dept. 502)

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

16CECG00390      *Samsung SDS America, Inc. v. Sam Sang Park* is continued to Thursday May 19, 2016 at 3:30p.m. in Dept. 503.

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(Tentative Rulings begin at the next page)

# Tentative Rulings for Department 402

(2)

## Tentative Ruling

Re: ***Hudson et al. v. County of Fresno et al.***  
Superior Court Case No. 09CECG03295

Hearing Date: May 11, 2016 (**Dept. 402**)

Motion: Petition to Compromise a Minor's Claim

### **Tentative Ruling:**

To grant. Petitioner to submit an order to deposit money into blocked account for signature. Hearing off calendar.

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:     JYH     on   5/10/16  .  
                  (Judge's initials)      (Date)

(19)

## Tentative Ruling

Re: **Maciel v. Bar 20 Dairy LLC**  
Court Case No. 15CECG00475

Hearing Date: May 11, 2016 (Department 402)

Motion: by plaintiffs for class certification and preliminary approval of settlement.

### Tentative Ruling:

To deny without prejudice. To officially designate this matter as a complex case and to require payment of the complex case fees. To set a hearing date on a motion for class certification on August 2, 2016 at 3:30 p.m. in this Department.

### Explanation:

#### 1. Class Certification

The leading case on this issue is *Amchem Products v. Windsor* (1997) 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed 2d 689. "We granted review to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification." (*Id.* at 619.) "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems [citation omitted] for the proposal is that there will be no trial. But other specifications of the rule--those designed to protect absentees by blocking unwarranted or overbroad class definitions--demand undiluted, even heightened, attention in the settlement context." (*Id.* at 620.)"

"The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members." *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 326. That proof need consist of admissible evidence. *Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal. App. 4th 133, 144. See also *Lockhead Martin Corp. v. Superior Court* (2003) 29 Cal. 4th 1096, 1108: "Plaintiffs' burden on moving for class certification, however, is not merely to show that some common issues exist, but, rather, to place substantial evidence in the record that common issues *predominate*." (Emph. in original.)

There is no evidence showing the class here may be ascertained from records held by defendant. While defendant does have a duty to maintain certain records, there is no declaration or discovery response showing it did so. The settlement agreement releases defendant from all liability for failing to have accurate records, so reliance on defendant's records seems ill-advised. (See Settlement at 7:4, "failure to keep accurate payroll records . . .") An ascertainable class has not been proven.

"The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with class or defenses typical of the class; and (3) class representatives who can adequately represent the class." *Lazar v. Hertz Corporation* (1983) 143 Cal. App. 3d 128, 134-135.

Here, there is no admissible evidence of a community of interest. Wage Order No. 14 is the one at issue in this case. It is found at Title 8, California Code of Regulations, section 11140. It only covers certain types of employees, but there is no evidence that only such employees are included in the class here.

The proposed class representatives' declarations say nothing about their jobs, their duties, or whether they experienced any or some or all of the misconduct alleged in the complaint. They offer no wage statements and do not testify as to the problems seen in those statements. There is no evidence that they ever worked overtime, were denied a meal break or a rest period, or that they were not paid promptly after their employment ended. They offer no evidence of any employee who experienced like conditions or of any company policy or lack thereof. There is no admissible evidence of what their individual claims are, or that those claims are typical of others.

The operative pleading includes many job titles in the class. The settlement agreement talks of several different wrongs based on several different types of pay: "1) shift differentials, 2) non-discretionary bonuses, 3) 'Extra Days,' 4) 'Misc Pay,' 5) 'Incentive,' 6) 'Rent', and 7) 'Utilities.'" There is no evidence that either of the class representatives had such pay, or whether the other job titles and class members had them, or which ones. No amount of overtime lost is calculated for either representative, or any class member. There is no discussion of the time that workers were paid salary, or proof that happened, or how it affected class members. There is nothing to show that the class representatives have the claims listed in the pleadings or which (if any) class members have the same claims.

The declarations of counsel are full of inadmissible statements about their clients and the defendant. Lawyers cannot testify for their clients or authenticate purported documents of the client. *Brown & Weil, Civil Procedure Before Trial*, § 10:115 - 10:116; *Norcal Mutual Ins. Co. v. Newton* (2000) 84 Cal. App. 4th 64, 72, fnt. 6; *Rodriguez v. County of LA* (1985) 171 Cal. App. 3d 171, 175.

There is no admissible evidence of the numbers of employees, or that each class member was subject to Wage Order No. 14, or to the same conduct by defendant that is the target of the complaint. Counsel speaks of a company manual, but it is not offered into evidence or authenticated by any discovery responses or declaration under oath by company personnel. "No evidence of common policies or means of proof was supplied, and the trial court therefore erred in certifying a subclass." *Brinker Restaurant v. Superior Court* (2012) 53 Cal. 4th 1004.

No wage statements are provided. In *Pena v. Taylor Farms Pacific, Inc.* (E.D. Cal. 2015) 305 F.R.D. 197, the Court refused to certify a class for failure to provide sufficient evidence of any policy of placing incorrect information on wage statements. The only evidence was a single wage statement from a class representative. The plaintiffs there had "not shown the solitary stub makes the same omission as every paycheck delivered to every non-exempt hourly employee, regardless of position or department, over the relevant multi-year time period. They have not even shown all class members received paystubs. Because the plaintiffs

bear the burden to show common issues exist and predominate, certification of the wage statement subclass is denied." (*Id.* at 224.)

The Court denied the motion for preliminary approval of settlement in *Lusby v. Gamestop Inc.* (N.D Cal. 2013) 297 F.R.D. 400, 405, and of certification of this class for these reasons: "Because it is highly unlikely that all positions and job duties at Defendants' retail stores are identical, and that all Class Members would be seeking the same relief, the Court is not persuaded that there are no dissimilarities in the proposed class that could impede the generation of common answers apt to drive the resolution of the litigation." Here, there is no evidence that all employees who are placed in the class were subject to the same wage order, or the same conduct by defendant, a necessity for determining that they all have the same claims.

Absent admissible evidence of the claims of the two representatives, that their claims are typical of all non-exempt employees or of employees in certain job positions, and that the company had a particular policy applied to all such workers with regard to the alleged misconduct in the Third Amended Complaint, no class certification for settlement may be had.

## **2. Settlement**

"[I]n the final analysis it is the Court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing litigation. The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement." *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4<sup>th</sup> 116, 129.

There exists "a high procedural standard for settlements that, like the one at issue here, occur without a certified class." *In re Bluetooth Headset Products Liab. Litig.* (9<sup>th</sup> Cir. 2011) 654 F. 3d 935, 938. "[S]ettlement class actions present unique due process concerns for absent class members." *Hanlon v. Chrysler Corp.* (9<sup>th</sup> Cir. 1998) 150 F. 3d 1011, 1026.

One concern here is the lack of discovery and the relatively short time that the case has been pending. In *Dunk v. Ford Motor Company* (1996) 48 Cal. App. 4<sup>th</sup> 1794, the Court of Appeal discussed the extensive discovery undertaken by class counsel, which included defeating a motion by defendant for a protective order, and in which class counsel engaged in "discovery, including form and special interrogatories, document production, inspection of vehicles, and depositions . . ."

"[T]o protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished . . . [therefore] the factual record must be before the . . ."

court must be sufficiently developed.” (*Kullar, supra*, 168 Cal. App. 4<sup>th</sup> at 130.) *Kullar* rejected any “presumption” of fairness in class action settlements as a general rule, and particularly with regard to the one in front of it (at page 129, emphasis added):

“Class counsel asserted that information had been exchanged informally and during the course of the mediation session, but their declarations provided no specificity. The only specific was the repeated reference in the moving papers to several employee manuals that had been produced stating company policy simply as follows: Rest breaks and meal periods are scheduled based on business levels, hours worked and applicable state laws. Whatever information may have been exchanged during the mediation, **there was nothing before the court to establish the sufficiency of class counsel's investigation other than their assurance that they had seen what they needed to see.** The record fails to establish in any meaningful way what investigation counsel conducted or what information they reviewed on which they based their assessment of the strength of the class members' claims, much less does the record contain information sufficient for the court to intelligently evaluate the adequacy of the settlement.”

Counsel here talks of an expert, but no declaration from that expert is provided. The Court is not made aware of Mr. Woolfson's credentials or the exact nature of the work he did, but is instead urged to accept a hearsay summary of his alleged findings as related by counsel.

There are damages figures, but there is no firm discussion of how those damage figures were determined. While there is some discussion of sample information being provided, there is no expert declaration showing such sample was a proper sample likely to result in a verifiable reasonable result reflective of the damages actually at issue for each of the job classifications that plaintiffs wish to include in their proposed class. *Duran v. U.S. Bank Nat'l. Assn.* (2014) 59 Cal. 4<sup>th</sup> 1.

The dramatic discounting of the claims for settlement, by almost 90%, from a potential of over \$4,000,000 to \$450,000, is not adequately justified. The *Brinker* decision came down in April of 2012, about 15 months after the start of the class period here, which then extends some four years thereafter. Under moving parties' analysis, that case might provide a defense to penalties for something over 1/5 of the class period, but no more.

Counsel state that defendant supplied evidence that class members did not work over 10 hours a day or six days a week, but none of that evidence is before the Court. Perhaps if admissible evidence were presented, it would support the nearly 90% discount. There is no evidence of the claimed “average wage.”

The argument that attorney's fees payable by the class would be significant after trial is also of concern. That would be true for certain claims (rest periods and meal breaks) under *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal. 4<sup>th</sup> 1244.

However, attorneys' fees would be payable by defendant to class counsel if the class prevails on overtime claims under Labor Code sections 218.5 and 1194.

The claimed fear that plaintiffs could be forced to pay defendant's attorneys' fees is unfounded. *Ling v. P.F. Chang's Bistro, Inc.* (2016) 246 Cal. App. 4th 1242 found that an award of attorney's fees to an employer on an overtime claim or one for missed meal or rest periods was a violation of public policy announced in Labor Code section 1194, which it described as a "one-way fee shifting provision." The award was made under Labor Code section 218.5, the same statute discussed by counsel Spivak in paragraph 55 of his declaration. Counsel's claim there was such a danger rested on unpublished decisions he did not attach. Labor Code section 218.5 requires a finding that the employee brought the action in bad faith. See *USS-POSCO Industries v. Case* (2016) 244 Cal. App. 4th 197, finding that the statutory language in place at the time of the award was the one that governed. That version of Section 218.5 will govern this case.

### **3. Specific Problematic Issues With Settlement Forms and Terms**

#### **a. Use of Claim Forms**

The proposed form is Exhibit 2 to the settlement agreement. The settlement requires a claim form, but the need for one is never discussed by the parties. As noted by moving parties, defendant is required to maintain records of its employees and their work hours, and the claim forms state that the employer's records will be binding absent proof from the employee.

Paragraph 25 on page 5 of the settlement agreement reveals that the settlement terms include a reversion clause. It states that "The 'Guaranteed Minimum Payment' shall be 60% of the Net Settlement Amount. . ." See also 13:26 – 14 of the settlement. That means the \$256,250 allotted for paying class members can be reduced to as little as \$153,750.

"[W]e require district courts to look for subtle signs that class counsel have allowed pursuit of their own self-interests to infect the negotiations. We went on to identify three such subtle signs: (1) when counsel receive a disproportionate distribution of the settlement; (2) when the parties negotiate a 'clear sailing' arrangement (i.e., an arrangement where defendant will not object to a certain fee request by class counsel); and (3) when the parties create a reverter that returns unclaimed fees to the defendant."

*Allen v. Bedolla* (9th Cir. 2015) 787 F.3d 1218, 1224 (internal citations and quotes omitted). In that case, only 14,947 class members of a total of 210,224 were willing to

complete the claim form process. Here, the “clear sailing” clause for plaintiff's fees and costs is found at 15:22-26 of the parties' agreement.

The additional requirements on the claim form that an individual release of claims be signed – before and whether or not final approval is granted -- is inappropriate. Until and unless there is a final settlement approval, no claims will be released. There is no basis to require a signature under penalty of perjury to claim **settlement** funds; and such may well deter agricultural workers fearful of the meaning of the release and a demand for sworn testimony.

Lastly, the expense of the administrator (\$15,000) appears largely due to the use of claim forms. Mailing of notice to 267 persons is not that expensive, and a subsequent mailing of checks and tallying of opt-outs – without the claim process -- would lower the administration costs. The Court requires a substantial reason for using a claims process in this matter. The settlement agreement places no cap on administration costs, but requires that any extra money sought by the Administrator be deducted settlement fund. See the settlement at 17:23-26. A sum certain need be stated.

**b. Opt Out Form**

There is no problem with furnishing a form, but the form here demands information a class member who does not want to participate may well not want to give. It requires a telephone number and part of the social security number. If that form is not completely filled out, it will not count. It also deems itself an opt-out from the “settlement” only, which is not permitted. The proposed class member opts out of the case, not the relief, and is therefore not bound by the judgment entered on the settlement. The form needs to substitute “case” for the word settlement.

The opt-out form also demands that the person “certify” they read the class notice. There is no such requirement. A person can merely dislike class litigation, or lawyers, or not want to be involved. They are not required to read anything in order to opt out. The form need simply state that the person wishes to opt out of the case and list the name and case number.

A space for name and address is fine, along with Part III. It can also be signed and dated. The other information demanded appears designed to discourage opt-outs by demanding private or improper information and “certification.”

**c. Restriction on Attorney-Client Contact**

At 18:12-16, the settlement contains an agreement by proposed class counsel that they will not speak to their clients about anything other than administering the settlement. That is an agreement which is against public policy. An attorney has a fiduciary duty of full disclosure, and cannot agree to have the attorney/client relationship molded by a party antagonistic to the client. In fact, Professional Rules of Conduct, Rule 1-500, bars a member from entering into a settlement agreement which restricts his right to practice law. Rule 3-500 requires that counsel keep the client informed and respond to all reasonable requests for information. The settlement agreement's demand that class counsel refrain from “communications with individuals

contained in the Database [of class members] for any purpose other than administration of the settlement . . ." is rejected by the Court.

**d. Objector Appearances**

The settlement agreement, at 20:15-17, and the notice to class, require that one who files an objection must also file a separate notice to appear. There is no basis for that; a notice of objection is sufficient to permit an appearance.

**e. Uncashed Checks**

The settlement agreement, at 24:1-3, calls for payment of uncashed checks to a certain entity. The parties, and the Court, are required to follow the procedure set forth in Code of Civil Procedure section 384.

**f. Extension of Time for Administrator**

Page 24:6-9 of the settlement places counsel in control of the administrator's requests for extra time to complete tasks. The Administrator works for the class, and must report to the Court, as well as seek extensions of time from the Court.

**g. Unknown Claims**

26:15-18 of the settlement agreement contends that each class member makes a waiver "and does so understanding the significance of that waiver . . ." referring to Civil Code section 1542. There is no basis for that statement. The class members are unsophisticated farm workers, and such a finding is not supported by the record.

**h. Media Silence**

At 31:12-20, the settlement agreement requires that the parties refrain from discussing the settlement with the media, press, or advertising it in any fashion other than through the notice to class. There is no advantage to the class members in this provision, and the restriction could result in some class members not finding out about their rights. Given the gravity of claims to be released, wide dissemination of information about the settlement is proper to ensure class member participation.

**i. Attorneys' Fees Provision**

At 33:23-25, the settlement agreement provides that if there is any action to enforce the settlement, the losing side will have to pay the winner's attorney's fees. The class members appear to be low-wage personnel who might shy from attempted enforcement for fear of such a provision, or capitulate on valid concerns due to the threat of a fee award. Such a provision is not supported in this context.





(29)

**Tentative Ruling**

Re: ***Maria Barbosa Avila, et al. v. Tos Farms, Inc., et al.***  
Superior Court Case No. 16CECG00086

Hearing Date: May 11, 2016 (Dept. 402)

Motions: Defendants Four Warns Corporation and Numark Transportation,  
Inc.'s motion to strike

**Tentative Ruling:**

To grant, with leave to amend. (Code Civ. Proc. §436.)

**Explanation:**

**Motion to Strike:**

To survive a motion to strike punitive damages, ultimate facts showing entitlement to such relief must be pleaded by plaintiff. (*Blegen v. Superior Court* (1981) 125 Cal. App. 3d 959, 962–963; *G.D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.2d 22, 29.) Mere legal conclusions of oppression, fraud or malice are insufficient to support a claim for punitive damages, and therefore may be stricken. (See, e.g., *Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864; *Cyrus v. Haveson* (1976) 65 Cal.App.3d 306; *G.D. Searle, supra*, 49 Cal.App.3d 22.) A complaint may adequately plead a basis for a punitive damages award by specifically setting forth the reprehensible conduct that caused the injury (*Bergevin v. Morger* (1955) 130 Cal.App.2d 590); by specifying that the defendants were guilty of oppression, fraud, or malice, and specifically alleging the details of such (*James v. Herbert* (1957) 149 Cal.App.2d 741); or the defendant's malicious intent to cause injury to the plaintiff (*Menzies v. Geophysical Service, Inc.* (1953) 116 Cal.App.2d 419).

**Punitive Damages:**

There is no cause of action for punitive damages; rather, punitive damages are a remedy available to a plaintiff who can plead and prove facts and circumstances as set forth in Civil Code section 3294, which authorizes an award of punitive damages in noncontract actions "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice". (Civ. Code §3294(a); see also *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d910, 922; *Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6-7.)

"Malice" is defined in the statute as conduct "intended by the defendant to cause injury to plaintiff, or despicable conduct that is carried on by the defendant with a willful and conscious disregard for the rights or safety of others." (Civ. Code §3294(c)(1); *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725.) "Oppression" is defined as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code §3294(c)(2).)



# **Tentative Rulings for Department 403**

(29)

## **Tentative Ruling**

Re: **Rene Trejo v. Borga Steel Buildings and Components, Inc., et al.**  
Superior Court Case No. 16CECG00111

Hearing Date: May 11, 2016 (Dept. 403) **IF ORAL ARGUMENT IS REQUESTED, IT WILL BE HELD ON THURSDAY, MAY 12, 2016 AT 3:00 PM**

Motions: Demurrers (3)

### **Tentative Ruling:**

To sustain all three demurrers, with leave to amend. (Code Civ. Proc. §430.040(e), (f).)

### **Explanation:**

#### Joint Employers

California's Fair Employment and Housing Act ("FEHA") has the same nature and purpose as Title VII of the federal Civil Rights Act, thus California courts may look to federal case law for guidance in interpreting FEHA. (*Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1316–1317; see also *Horne v. District Council 16 International Union of Painters and Allied Trades* (2015) 234 Cal.App.4th 524, 533.) Two corporations may be treated as a single employer for purposes of liability under Title VII. (*Morgan v. Safeway Stores, Inc.* (9th Cir.1989) 884 F.2d 1211, 1213.) The Ninth Circuit employs a four-part test in determining whether two entities are an integrated enterprise for purposes of Title VII coverage: "(1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control." (*Kang v. U. Lim America, Inc.* (9th Cir. 2002) 296 F.3d 810, 815; see *Baker v. Stuart Broadcasting Co.* (8th Cir. 1977) 560 F.2d 389, 392.)

#### Exhaustion of Administrative Remedies

It is a plaintiff's burden to plead and prove the timely exhaustion of administrative remedies to support his or her FEHA claim, which may be done by showing that a complaint was filed with the state Department of Fair Employment and Housing ("DFEH"), and a subsequent right to sue letter was issued. (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336; Gov. Code §12965.)

It has been held that where a defendant in a civil action was not named in the administrative complaint filed with the DFEH, this is a sufficient ground to sustain a demurer brought for failure to exhaust available administrative remedies, in a subsequent action. (*Medix Ambulance Service, Inc. v. Superior Court* (2002) 97 Cal.App.4th 109, 118; see also *Cole v. Antelope Valley Union High School Dist.* (1996) 47

Cal.App.4th 1505, 1511.) However, it has also been held that where a supervisory employee was named in the body of the DFEH complaint, though not as a charged party, and learned of the charges and participated in the administrative investigation, it was error to dismiss the claims against the employee on the ground of failure to exhaust the administrative remedy. (*Martin v. Fisher* (1992) 11 Cal.App.4th 118, 122; *Saavedra v. Orange County Consolidated Transportation etc. Agency* (1992) 11 Cal.App.4th 824, 827; see also *Sosa v. Hiraoka* (9th Cir. 1990) 920 F.2d 1451, 1458-1459; *Chung v. Pomona Valley Community Hospital* (9th Cir. 1982) 667 F.2d 788, 792.) Of note is that the format of the DFEH complaint form has changed through the years, such that the cases deciding whether failure to include a party's identity in the caption of the administrative complaint is fatal to a plaintiff's civil action against that party, are based on various versions of the DFEH form.

### Demurrers

#### *Defendant Borga Steel Buildings and Components, Inc.*

Defendant Borga Steel Buildings and Components, Inc. ("BSBC"), demurs on the ground that each of Plaintiff's causes of action fails to state sufficient facts, and is uncertain because Plaintiff fails to plead facts establishing that Defendant BSBC and Defendant Borga, Inc., are joint employers. The point is well taken. The complaint is devoid of any facts supporting this allegation, despite the fact that each cause of action is alleged as against an employer. Accordingly, Defendant BSBC's demurrer is sustained, with leave to amend.

#### *Defendant Borga, Inc.*

Defendant Borga, Inc., demurs on the grounds that this Court lacks jurisdiction because Plaintiff has failed to exhaust his administrative remedies as against this defendant, and that Plaintiff has failed to establish that Defendants Borga, Inc., and BSCS are joint employers as alleged. The complaint states that Plaintiff "timely filed complaints of discrimination with the California Department of Fair Employment and Housing..." (Compl. ¶19, bold added), indicating a possibility that more than one complaint was filed. A copy of one DFEH complaint, dated December 10, 2013, has been submitted by both parties (Plaintiff's RJN, Exh. C; Borga, Inc., demurrer, Exh. B), along with the corresponding right to sue letter dated December 9, 2014, and naming Defendant BSCS only (Plaintiff's RJN, Exh. C; Borga, Inc., demurrer, Exh. C). It is unclear whether the copies of the DFEH form submitted by the parties reflect Plaintiff's entire DFEH complaint, or only selected pages. As such, the Court is unable to determine what the requirements were with regard to identifying the parties alleged to have engaged in discriminatory acts. It is also unclear whether Plaintiff in fact filed a DFEH complaint against Defendant Borga, Inc., or whether Defendant Borga, Inc., knew of the charges and participated in the DFEH investigation. Plaintiff has failed to show that he exhausted his administrative remedies against Defendant Borga, Inc., prior to filing the instant action. As discussed above, Plaintiff has insufficiently supported his allegation that Defendants Borga, Inc., and BSCS were joint employers. Defendant Borga, Inc.'s, demurrer is sustained, with leave to amend.



# **Tentative Rulings for Department 501**

(28)

## **Tentative Ruling**

Re: **Platinum Capital Properties, LLC v. Jacob**

Case No. 14CECG03683

Hearing Date: May 11, 2016 (Dept. 501)

Motion: By Defendant George Jacob, demurring to the Fourth Amended Complaint brought by Plaintiff Platinum Capital Properties, LLC, dba Nantucket Square.

### **Tentative Ruling:**

To sustain the demurrers to the Third and Fourth Causes of Action without leave to amend, unless Plaintiff can make an offer of proof of facts to show some other ground for tolling the statute of limitations.

To overrule the demurrer as to the Sixth Cause of Action.

To sustain the demurrer to the Seventh Cause of Action unless Plaintiff can make an offer of proof that a declaratory relief action would govern the future relationship between the parties.

### **Explanation:**

A general demurrer admits the truth of all material allegations and a Court will "give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context." (*People ex re. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300.) The standard of pleading is very liberal and a plaintiff need only plead "ultimate facts." (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.) However, a plaintiff must still plead facts giving some indication of the nature, source, and extent of the cause of action. (*Semole v. Sansoucie* (1972) 28 Cal.App.3d 714, 719.)

### *Demurrer as to the Third and Fourth Causes of Action on Statute of Limitations Grounds*

Defendant has demurred to the Third Cause of Action for Inducing Breach of Contract and the Fourth Cause of Action for Intentional Interference with Contractual Relations on the grounds of statute of limitations. The parties appear to concede that the two-year statute of limitations applies to both causes of action. (*King v. Strycula*

(1965) 231 Cal.App.2d 809, 811-812 (inducement); *McFadden v. H.S. Crocker Co., Inc.* (1963) 219 Cal.App.2d 585, 591 (interference).)

Plaintiff does not contest Defendant's assertion that the claims for Interference and Inducement accrued as of September, 2013. Thus, Plaintiff would have had to file an operative complaint containing these causes of action, or pleading facts which would allow for relation back, prior to September, 2015.

These causes of action were first included in the Second Amended Complaint, filed in June, 2015. The parties subsequently stipulated to Plaintiff filing a Third Amended Complaint. The Third Amended Complaint, filed August 15, 2015, did not contain these causes of action.

After initially filing a motion for leave to amend, which was subsequently withdrawn and refiled, this Court granted leave to file the Fourth Amended Complaint on November 30, 2015.

Defendant is correct that an amended pleading will supersede any prior pleading. (*Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4<sup>th</sup> 929, 946.) Thus, although the Second Amended Complaint was never ordered stricken, it was superseded by the Third Amended Complaint. As a result, the causes of action are beyond the scope of the statute of limitations unless they can relate back to the earlier operative complaint. (Plaintiff did cite to cases setting forth the general rule for relation back doctrine, and so the Court will deem the argument having been made. (See Opposition, p. 10).)

An amended complaint relates back to the original complaint if it: (1) rests on the same general set of facts; (2) involves the same injury; and (3) refers to the same instrumentality as the original one. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4<sup>th</sup> 383, 409-409.)

Here, the original complaint only states a cause of action for breach of contract and unjust enrichment: there is no discussion of Defendant's actions regarding any other lease holder on or near the property. The claims for Inducement and Interference do not involve the same facts, injury, or instrumentality. Therefore, the relation-back doctrine does not apply.

The Court sustains the demurrer without leave to amend as to the Third and Fourth Causes of Action unless Plaintiff can make an offer of proof as to whether some other facts exist which would toll the statute of limitations.

#### *The Demurrer to the Sixth Cause of Action*

Defendant demurs to the Sixth Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing on the grounds that the claim fails to state facts sufficient to constitute a cause of action. Defendant contends that the Sixth Cause of Action simply does not do anything other than plead another breach of lease.

In order to plead a breach of the covenant of good faith and fair dealing, the implied term will be found if “the implication either arises from the contract’s express language or is indispensable to effectuating the parties’ intentions; (2) it appears that the implied term was so clearly within the parties’ contemplation when they drafted the contract that they did not feel the need to express it; (3) legal necessity justifies the implication; (4) the implication would have been expressed if the need to do so had been called to the parties’ attention; and (5) the contract does not already address completely the subject of the implication.” (*In re Marriage of Corona* (1999) 172 Cal.App.4<sup>th</sup> 1205, 1222.)

Plaintiff refers to Paragraph 10.1 of the Agreement which states that Defendant “will not use or permit the use of the Premises in a manner that adversely affects other tenants’ use of their leased premises.”

It seems likely that a party to this agreement would have understood that this provision would reach alleged actions that might constitute harassment of the kind set forth in the Fourth Amended Complaint. Further, Paragraph 10.1 does not explicitly cover the harassment alleged, since it encompasses actions that appear to go beyond the direct use of “the Premises.” Therefore, the Court finds that the Implied Covenant of Good Faith and Fair Dealing encompasses this alleged behavior and therefore overrules the demurrer.

#### *The Demurrer to the Seventh Cause of Action*

Defendant demurs to the Seventh Cause of Action for Declaratory Relief on the grounds that there is no reason for Plaintiff to be entitled to the relief.

The Cause of Action seeks a declaration as to whether Defendant was “justified in breaching his lease.”

A declaratory relief action “operates prospectively, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them.” (*Osseous Technologies of America, Inc. v. DiscoveryOrtho Partners, LLC* (2010) 191 Cal.App.4<sup>th</sup> 357, 367.) Thus, a Court may abuse its discretion when the claim is merely for breach of contract and would not govern the future rights of the parties. (*Id.* (quoting *Travers v. Loudon* (1967) 254 Cal.App.2d 926, 927-29).)

Here, there appears to be no future conduct between the parties that may be governed by a declaratory relief action. Therefore, the Court sustains the demurrer as to the Seventh Cause of Action without leave to amend unless the Plaintiff can proffer some facts to show that a declaratory relief action would govern the future conduct of the parties.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The



(28)

**Tentative Ruling**

Re: **Integrated Voting Solutions, Inc. v. Barrett**

Case No. 16CECG00373

Hearing Date: May 11, 2016 (Dept. 501)

Motion: By Specially Appearing Defendant Brett Barrett to quash service of the complaint or, in the alternative, for dismissal because of forum non conveniens.

**Tentative Ruling:**

To grant the motion to quash for lack of personal jurisdiction. The motion for dismissal on the grounds of forum non conveniens is therefore moot. The matter is ordered dismissed without prejudice.

**Explanation:**

In making a motion to quash service for failure of personal jurisdiction under Code of Civil Procedure §418.10, subdivision (a)(1), the burden of proof is on the plaintiff to demonstrate that minimum contacts exist between defendant and the forum state to justify imposition of personal jurisdiction. (*Mihlon v. Superior Court* (1985) 169 Cal.App.3d 703, 710.) Plaintiff must meet this burden by a preponderance of the evidence. (*Ziller Electronics Lab GmbH v. Superior Court* (1988) 206 Cal.App.3d 1222, 1232.)

First, Plaintiff in this action has not filed a proof of service, which, presumably, Plaintiff would have done had it served defendant in the state of California thus rendering jurisdiction proper. (*Marriage of Fitzgerald & King* (1995) 39 Cal.App.4th 1419, 1426.)

Second, Plaintiff has not filed any employment contract with the Court, so the Court can assume that there is no "forum selection" clause indicating that California is a proper forum. (*National Equip. Rental, Ltd. v. Szukhent* (1964) 375 US 311, 315-316; *Miller-Leigh LLC v. Henson* (2997) 152 Cal.App.4th 1143, 1149.)

Finally, Plaintiff concedes that Defendant is a non-resident of California.

Therefore, the question for the Court to consider is whether Defendant, as a non-resident, has "minimum contacts," which is to say, that the relationship between the non-resident and the forum state is such that the exercise of jurisdiction does not offend

“traditional notions of fair play and substantial justice” under the U.S. Constitution’s Fourteenth Amendment Due Process Clause. (*International Shoe Co. v. Washington* (1945) 326 US 310, 316.)

In determining whether there are sufficient “minimum contacts,” a court will look at the following factors:

- The extent to which the lawsuit relates to defendant’s activities or contacts with California;
- The availability of evidence and the location of witnesses;
- The availability of an alternative forum;
- The relative costs and burdens of litigating in California rather than elsewhere;
- Any state policy in providing a forum for this particular litigation.

(*World-Wide Volkswagen Corp. v. Woodson* (1980) 444 US 286, 292; *Fisher Governor Co. v. Superior Court* (1959) 53, 222, 225-26.)

Here, the evidence presented by the parties indicates that Defendant engaged in negotiations with Plaintiff, knowing that Plaintiff was located in California, and flew to California to negotiate the employment contract with Plaintiff. However, it is unclear the extent to which the claims for fraud and breach of oral contract have to do with California.

There is no evidence that the oral contract which underlies the complaint was made with the Plaintiff in California. Neither is there evidence indicating where the lawsuit that led to the purported fraud was filed. Further, although the evidence shows that Defendant was employed by Plaintiff and that Plaintiff has an office in California, there is no evidence as to what Defendant’s employment entailed insofar as what his ongoing connection with California was. Therefore, Plaintiff has not borne its burden of showing that the lawsuit relates to Defendant’s activities or contacts with California.

The other factors all seem to indicate no preference for a choice between California and Washington as possible fora for this lawsuit. Therefore, it appears that Plaintiff has not borne its burden of showing that general jurisdiction is appropriate.

Plaintiff argues, however, that “limited” or “specific jurisdiction” is appropriate and asserts that Defendant has “purposefully availed” himself of the forum. In order to show “limited” personal jurisdiction, a plaintiff must show (1) that the out of state defendant purposefully established contacts with the forum state; (2) that Plaintiff’s cause of action “arises out of” or is “related to” defendant’s contacts with the forum state; and (3) that the forum’s exercise of personal jurisdiction would comport with “fair play and substantial justice.” (*Burger King Corp. v. Rudzewicz* (1985) 471 US 462, 477-78.)

Here, the only evidence of activity aimed at California provided by Plaintiff is the negotiations that led to Defendant’s employment. However, Plaintiff has provided no evidence that either the purported fraud or the oral agreement occurred directed to, or at the time Defendant was located in, the State of California. As stated above, Plaintiff has not described what the nature of Defendant’s employment was and



# **Tentative Rulings for Department 502**

(30)

## **Tentative Ruling**

Re: ***Villaggio Shopping Center, LLC v. Dekopash, Inc.***  
Superior Court Case No. 15CECG 01527

Hearing Date: May 11, 2016 (Dept. 502)

Motion: Default hearing

### **Tentative Ruling:**

To deny.

### **Explanation:**

#### Notice

Defaulting parties have a constitutional right to adequate notice of the maximum judgment that may be assessed against them. It is "fundamental to the concept of due process that a defendant be given notice of the existence of a lawsuit and notice of the *specific relief* which is sought in the complaint served on him." [emphasis added] (*Marriage of Lippel* (1990) 51 Cal.3d 1160, 1166.) The prayer provides such notice by setting the ceiling on default judgments. (*Barragan v. Banco BCH* (1986) 188 Cal.App.3d 283, 305.) If no specific amount of damages is demanded, the prayer cannot insure adequate notice of the demands made upon the defendant. (*Becker v. S.P.V. Const. Co., Inc.* (1980) 27 Cal.3d 489, 494 citing *Ludka v. Memory Magnetics International* (1972) 25 Cal.App.3d 316, 323.) However, specific damage allegations in the Complaint may provide notice to the defendant of the amounts being sought and thus cure a defective prayer. (*National Diversified Services, Inc. v. Bernstein* (1985) 168 Cal.App.3d 410, 418; *Greenup v. Rodman* (1986) 42 Cal.3d 822, 829-830.) But, relief not demanded in the Complaint cannot be granted by default judgment, even though such relief would otherwise have been proper. (Code Civ. Proc., §580(a)—"The relief granted to the plaintiff if there is no answer, cannot exceed that which he or she shall have demanded in his or her complaint..." )

Here, Plaintiff requests judgment against Defendants Dina and Jose Virrueta jointly and severally in the amount of \$49,264.97 and against Dekopash, Inc. in the amount of \$277,748.94. However, in the Complaint, Plaintiff only specifically prayed for damages in the amount of \$3,756.57 (Complaint, p6 ¶1), and implicitly requested damages (as part of the body of the Complaint) in the amount of \$23,850.72 (Complaint, ¶ 21). Therefore, Plaintiff is not entitled to more than \$27,607.29. If Plaintiff decides to pursue additional damages, it must amend and reserve its Complaint.



(19)

## **Tentative Ruling**

Re: ***Davis v. Fresno Unified School District***  
Court Case No. 12CECG03718

Hearing Date: May 11, 2016 (Department 502)

Motion: by defendant Fresno Unified School District for judgment on the pleadings

### **Tentative Ruling:**

To deny.

### **Explanation:**

#### Introduction

This case arises out of a Site Lease and Facilities Lease (collectively "the Lease-Leaseback Agreement") entered into between defendant, Fresno Unified School District ("FUSD"), and defendant, Harris Construction ("Harris"), for the construction of the Rutherford B. Gaston Sr. Middle School Phase II Project ("Gaston Middle School"). Plaintiff brings this lawsuit as a taxpayer challenging the Lease-Leaseback Agreement.

The matter returns to this court after an appeal by plaintiff of the court's sustaining of FUSD's demurrer to the First Amended Complaint. After plaintiff elected not to amend and appealed, that order was partially affirmed and partially reversed by the Court of Appeal in *Davis v. Fresno Unified School District* (2015) 237 Cal. App. 4<sup>th</sup> 261 (*rev. denied*)("Davis").

After the ruling of the Court of Appeal, four causes of action remain: (1) a claim that a conflict of interest existed between Harris and FUSD (the "Conflict Claim"); (2) and (3) claims that the Lease-Leaseback Agreement did not comply with the statutory requirements of the Education Code (the "Lease-Leaseback Claims"); and (4) a derivative claim for declaratory relief.

FUSD now moves for judgment on the pleadings on the single ground that plaintiff's allegation that he sues as a taxpayer fails to adequately allege standing to bring any of the remaining claims. More particularly, FUSD argues: (1) plaintiff has no standing under either Government Code section 1090 or the common law as codified in Code of Civil Procedure section 526a to bring the Conflict Claim; (2) plaintiff has no standing to bring the Lease-Leaseback Claims because neither Education Code sections 17400-17429 nor Public Contract Code sections 20100 et seq., pursuant to which plaintiff alleges the Lease-Leaseback Agreement was improper, authorize a validation claim and thus do not confer plaintiff with standing; and (3) since it is derivative of plaintiff's other claims, the Declaratory Relief claim also fails for lack of standing.

## The Conflict Claim

In *Davis*, the Court of Appeal stated:

*The term “any party” is not restricted to parties to the contract. Defendants did not base their demurrer on the ground Davis lacked standing to bring the conflict of interest claim under Government Code section 1090 since it is recognized that either the public agency or a taxpayer may seek relief for a violation of section 1090. (E.g., Thomson v. Call (1985) 38 Cal. 3d 633 [taxpayer suit successfully challenged validity of land transfer from city council member through intermediaries to city]; see Kaufmann & Widiss, The California Conflict of Interest Laws (1963) 36 So. Cal. L. Rev. 186, 200.)*

(*Davis, supra*, 237 Cal. App. 4<sup>th</sup> at 297, fn. 20). Though generally “when an appellate court states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout the case’s subsequent progress,” (*People v. Barragan* (2004) 32 Cal. 4<sup>th</sup> 236, 246), as the *Davis* court acknowledged, defendants did not base their demurrer on the ground that plaintiff lacked standing. Indeed, in part because the issue had not been raised, *Davis* has been criticized for its finding regarding standing under Government Code section 1090. (*San Bernadino County v. Superior Court* (2015) 239 Cal. App. 4<sup>th</sup> 679, 687, fn. 5 (“*San Bernardino*”).) Because the issue of standing was not raised by the parties, *Davis*’ statement regarding plaintiff’s standing is not “law of the case” which must be adhered to in this proceeding.

Nevertheless, *Davis*’ statement is in accord with the great weight of authority on this subject. (See, e.g., *Gilbane Building Co. v. Superior Court* (2014) 223 Cal. App. 4<sup>th</sup> 1527, 1532, *Finnegan v. Schrader* (2001) 91 Cal. App. 4<sup>th</sup> 572, *San Diegans for Open Government v Har Construction, Inc.* (2015) 240 Cal. App. 4<sup>th</sup> 611 and *Torres v. City of Montebello* (2015) 234 Cal. App. 4<sup>th</sup> 382, 398-399.) *Davis* has also very recently been discussed approvingly in *McGee v. Balfour Beatty Construction, LLC* (Cal. Ct. App., April 12, 2016, No. B262850) 2016 WL 1449591 (“*McGee*”), recently ordered published, which found standing under section 1090 in a very similar case, and, even if *Davis*’ statement is not “law of the case,” would appear to be binding on this court. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 450, 455 [“Decisions of every division of the District Courts of Appeal are binding upon ... all superior courts of this state”].)

*McGee* also distinguished *San Bernardino*, upon which FUSD places principal reliance:

*Davis* is closer to this case than *San Bernardino*. As in *Davis*, this case involved a validation action in which the court had authority to set aside void contracts. A contract in violation of section 1090 is void. (*Klistoff v. Superior Court, supra*, 157 Cal.App.4<sup>th</sup> at p. 481.) In contrast, in *San Bernardino*, plaintiffs’ challenge to the agreement was barred by a prior

validation judgment. (*San Bernardino, supra*, 239 Cal.App.4th at p. 688.) Additionally, in contrast to *San Bernardino*, this case did not involve a decision by former school board members, but was brought shortly after the District approved the contracts.

(*McGee, supra* [p. 7].)

*Thomson v. Call* (2985) 38 Cal. 3d 633 ("*Thompson*") is the Supreme Court case on which the Courts of Appeal have relied to find standing on the part of citizens to challenge contracts allegedly rendered void by conflict of interest laws. The plaintiffs there were also taxpayers, seeking to declare void a land purchase which directly benefited a member of the city council that made the purchase. The Court found that the lawsuit was a proper remedy under Government Code section 1090 to force the city council member to disgorge the sale price back to the city. The *Thompson* court "could not have concluded a contract was invalid in violation of section 1090 without implicitly concluding that the taxpayers challenging it had standing. (Citation.)" (*McGee, supra*, [p. 6].)

The *Thompson* court relied on its prior decision in *Stigall v. City of Taft* (1962) 58 Cal. 2d 565, 568, where a taxpayer brought a suit to deem a contract void under the conflict of interest statutes. The *Stigall* court specifically cited the language of Government Code section 1092 asserted by FUSD to bar a taxpayer suit, yet found that such suit was proper. If such could be called *dicta*, it is very persuasive *dicta*. (*Diamond Benefits Life Ins. Co. v. Troll* (1998) 66 Cal. App. 4th 1, 13, fnt. 4.)

"To say that *dicta* are not controlling does not mean that they are to be ignored; on the contrary, *dicta* are often followed. As a statement that does not possess the force of a square holding may nevertheless be considered highly persuasive, particularly when made by an able court after careful consideration, or in the course of an elaborate review of the authorities, or when it has been long followed." (9 Witkin, Cal. Proc 5<sup>th</sup> (2008) Appeal, section 511 at pp. 575 – 576.)

Further, to read the statute as FUSD would, that only parties to a void contract can seek to invalidate it, would render the statute intermittently effective, depending on whim of the government agency. That would conflict with the purpose of the statute, and give hope to those who seek to profit where there is a conflict of interest – the result the Legislature wanted to avoid:

"The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation."

(*Thomson, supra*, 38 Cal. 3d at 648.)

Defendant's interpretation would thus defeat the purpose of the statutory scheme – to deter any contracts where a conflict of interest was involved, whether made in good faith or through fraud. That would violate the canon of statutory construction discussed in *Lakin v. Watkins Assoc. Ind.* (1993) 6 Cal. 4<sup>th</sup> 644, 659 (internal citations omitted):

"The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. An interpretation that renders related provisions nugatory must be avoided; each sentence must be read not in isolation but in the light of the statutory scheme."

The court thus finds plaintiff has adequately alleged standing to assert the Conflict Claim and denies the motion for judgment on the pleadings as to that claim.

#### The Lease-Leaseback Claims

FUSD argues plaintiff has no standing to assert the Lease-Leaseback Claims because the Legislature has not declared claims under Education Code sections 17400-17429 and Public Contract Code sections 20100 et seq. to be subject to the validation statutes, Code of Civil Procedure sections 863, et seq. Plaintiff argues that pursuant to Government Code section 53511 the validation statutes apply to "an action to determine the validity of [a local agency's] bonds, warrants, contracts, obligations, or other evidences of indebtedness. FUSD counters that the Lease-Leaseback claims do not challenge any instrument or evidence of "indebtedness."

FUSD cites *Kaatz v. City of Seaside* (2006) 143 Cal. App. 4<sup>th</sup> 13 and *SCOPE v. Abercrombie* (2015) 240 Cal. App. 300 in support of its claim that the contract in question is not a proper subject of a validation statute because it is not one evidencing indebtedness. However, *Davis* found that the Legislature permitted the lease/leaseback arrangement due to specific factors:

(1) [A] constitutional provision that prohibited counties, cities and school districts from incurring any indebtedness or liability exceeding the amount of one year's income without the assent of two-thirds of its voters and (2) the California Supreme Court's determination that leases do not create an indebtedness for the aggregate amount of all installments, but create a debt limited in amount to the installments due each year. (See *City of Los Angeles v. Offner* (1942) 19 Cal. 2d 843.)

(*Davis, supra*, 237 Cal. App. 4<sup>th</sup> at 278.)





(24)

**Tentative Ruling**

Re: **2012-1 CRE Venture, LLC v. Linmar-Shaw, LLC**  
Court Case No. 15CECG01448

Hearing Date: **May 11, 2016 (Dept. 502)**

Motion: Motion for Order Authorizing Receiver to Sell Property in the Receivership Estate Free and Clear of All Existing Ownership Interests, Liens, Charges, and Encumbrances

**Tentative Ruling:**

To deny without prejudice.

**Explanation:**

Hiring of attorney:

The Ex Parte Order Appointing Receiver dated May 13, 2015, does include authorization for the Receiver to hire counsel without prior court order, and this order was incorporated into the Order Appointing Receiver filed on June 3, 2015. Therefore, this is approved. However, the court notes that plaintiff did not utilize Paragraph 20 of the Judicial Council form of order devoted expressly to this issue, as it should have. While this is certainly no fault of the Receiver, the court instructs both plaintiff and the Receiver, in future, to use this paragraph for that purpose, so it is abundantly clear to the court that this additional authority is sought.

Written consent of plaintiff:

The Order Appointing Receiver filed on June 3, 2015, expressly provides, "No sale shall be made without the written consent of Plaintiff." (Attachment 8, p.4, subparagraph (i).) The Receiver has merely noticed a motion and plaintiff has not opposed it. It would be an abuse of discretion to allow the Receiver to proceed without a showing that he has followed this express condition.

Receiver's receipt of 1% "disposition fee":

*Melikian v. Aquila, Ltd.* (1998) 63 Cal.App.4th 1364 ("Melikian") does not support the Receiver's request. In *Melikian* the appellate court found no abuse of discretion in the trial court approving that the receiver's fees would include compensation of \$125 per hour plus the sum of 4% of the purchase price of the subject property. It found the record amply supported this order, since the trial court had found "the parties seem to have agreed to the formula for the referee's fees in advance." The receiver had previously filed a petition for instructions wherein he sought approval of his fee calculation, which was not opposed by either plaintiff or defendant, and the order confirmed the arrangement. (*Id.* at pp. 1367-1368.) While the trial court noted it was



# **Tentative Rulings for Department 503**

(6)

## **Tentative Ruling**

Re: ***Murshed v. HSBC Bank USA, National Association, as Trustee for Merrill Lynch Mortgage Investors Trust, Series 2006-A4***  
Superior Court Case No.: 15CECG02839

Hearing Date: May 11, 2016 (**Dept. 503**)

Motion: Demurrer to first amended complaint by Defendants HSBC Bank USA, National Association as trustee for Merrill Lynch Mortgage Investors Trust, Series 2006-A4, Mortgage Electronic Registration Services, Inc., and PHH Mortgage Corporation

### **Tentative Ruling:**

To sustain the demurrer, without leave to amend, and to strike, on the Court's own motion, the second amended complaint filed on May 6, 2016, which was filed without leave of court. All future hearing dates, including trial, are vacated.

The prevailing party is directed to submit directly to this Court, within 7 days of service of the minute order, a proposed judgment dismissing the action as to the demurring defendant.

The Court intends to deny the request for judicial notice. (Evid. Code, §456.)

### **Explanation:**

At the outset, the Court strikes the second amended complaint filed by Plaintiff Wally Murshed ("Plaintiff") without leave of court on May 6, 2016. (Code Civ. Proc., §436.) A party may amend the pleading *just once* without leave of court, at any time before the answer or demurrer is filed, or after a demurrer is filed but before the demurrer is heard. (Code Civ. Proc., § 472, subd. (a).)

The first, second, and third causes of action all fail to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

As to the first cause of action for declaratory relief, the cause of action attempts to correct a past wrong, the trustee's sale which admittedly took place in 2015. (First amended complaint, ¶4.2.) Since declaratory procedure operates prospectively and not merely for redress of past wrongs (Code Civ. Proc. § 1060), the demurrer to the first cause of action is sustained, without leave to amend.

Here, the complaint alleges that the corporate assignment of the deed of trust for the property, which Plaintiff alleges that Defendants attempted to place into the

Merrill Lynch Investor Trust, Series 2006-A4, on or about October 2014, some eight years after the fact, when the trust closed sometime in 2006, occurred. (First amended complaint, ¶1.3.)

Here, there are no *factual allegations* as to why Plaintiff believes the foreclosure-related documents are forged and/or fraudulent, just conclusions that each document is “forged and/or fraudulent.” (See complaint, ¶¶1.3 [corporate assignment of the deed of trust]; 1.4 [same]; ¶3.1 [multiple documents including substitution of trustee, attorney-in-fact document, corporate assignment of deed of trust]; ¶3.2 [corporate assignment of deed of trust, making “all of the other alleged documents...fraudulent”]; ¶3.4 [corporate assignment of deed of trust]; ¶4.3 [limited power of attorney, corporate assignment of deed of trust, substitution of trustee, notice of default, notice of trustee's sale], ¶6.2 [forged and fraudulent corporate assignment of deed of trust, substitution of trustee, notice of default, notice of trustee's sale, and trustee's deed].

In California, a complaint or cross-complaint shall contain both of the following: (1) A statement of the facts constituting the cause of action, in ordinary and concise language; and (2) A demand for judgment for the relief to which the pleader claims to be entitled. (Code Civ. Proc., § 425.10.) What this means is that the cause of action must allege every fact which the plaintiff is required to prove in order to allege the facts, or elements, necessary to constitute a cause of action. Every fact essential to the claim or defense should be stated or the pleading is subject to demurrer. (Code Civ. Proc. §425.10, Code Commissioners' Note.)

This is Plaintiff's second attempt to plead. He was granted leave to file a first amended complaint to state any valid causes of action he had after the demurrer of these Defendants was sustained, and he amended the complaint in immaterial ways, sticking to the same four causes of action and changing a few allegations in minor ways. He has failed to oppose this demurrer. The burden is on the plaintiff to show in what manner he or she can amend the complaint, and how that amendment will change the legal effect of the pleading. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.) By failing to oppose the demurrer, Plaintiff has failed to meet that burden.

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: A.M. Simpson on 5/9/16 .  
(Judge's initials) (Date)

(24)

**Tentative Ruling**

Re: **Call v. Verdegaal Brothers, Inc.**  
Court Case No. 14CECG02140

Hearing Date: **May 11, 2016 (Dept. 503)**

Motion: Motion by Defendant Verdegaal Brothers, Inc. to Tax Costs

**Tentative Ruling:**

To grant the unopposed motion to tax the costs for "Expert Fees" for Dr. Alan Thompson in the total amount of \$3,135.00 (at Paragraph 8(b) of Cost Memorandum form), as such costs are not authorized where prevailing party has not served an offer to compromise under Code of Civil Procedure section 998. (Code Civ. Proc. §§ 1032, subd. (b), 1033.5, subd. (b)(1), and 998.)

In the event that oral argument is requested, it will be heard Tuesday, May 17, 2016, at 3:30pm in Department 503.

**Explanation:**

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

**Tentative Ruling**

Issued By: A.M. Simpson on 5/10/16 .  
(Judge's initials) (Date)