

Tentative Rulings for July 21, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

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

12CECG02355 *Weinartner v. Imaging Resources* is continued to Thursday, July 28, 2016 at 3:30p.m. in Department 402.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(19)

Tentative Ruling

Re: ***Figueroa v. Physicians Skin & Weight Centers***
Court Case No. 15CECG01556

Hearing Date: July 21, 2016 (Department 402)

Motion: by plaintiff for sanctions for discovery abuse

Tentative Ruling:

To grant monetary sanctions in the amount of \$5,000, payable by defendant, to plaintiff and her counsel of record on or before August 15, 2016.

To order that defendant provide further responses, under oath, without objections, to the requests for production at issue in the motion by September 1, 2016, as well as produce all responsive documents. Such responses shall be specific to the individual requests, and in full compliance with Code of Civil Procedure section 2031.230. Any documents responsive to Requests Nos. 29, 30, 32, 35, 46, 47, 50, 51, 63, 66, 68, 69, 70, 72, 73, 74, and 79 which contain personal identifying information for an employee other than plaintiff shall have such information redacted. Requests Nos. 5, 6, 14, 15, 16, 17, 18, 19, 20, 22, 36, 37, 38, 42, 43, 45, 56, 57, 58, 59, 60, 71, 77, 78, 80, 81, 82, 83, and 84 are to be read as calling for generic information only and to omit documents which contain personnel identifying information.

To also order a further response to the form and special interrogatories (but for Special Interrogatories Nos. 29 and 30) under oath, without objection by September 1, 2016. In response to Special Interrogatories Nos. 3, 4, 5, and 6, each employee shall be identified by the same number in the interrogatory response; no name shall be listed. No non-supervisory employees need be listed in the response to Special Interrogatories No. 32 and 35. All further responses must comply with Code of Civil Procedure section 2030.230 and shall be specific to the interrogatory answered, without reference to documents unless same are identified by bates stamp page number. Where defendant lacks information, such as a phone number, defendant must so state. Where the form interrogatories are at issue, defendant may not skip the subsections calling for document identification, and must provide a specific, separate answer for each allegation denied and each affirmative defense.

These rulings are made without prejudice to revisiting the need for materials or information which identify individuals at a later time, with consideration and discussion of implementation of procedures discussed in *Pioneer Electronics Inc. v. Superior Court* (2005) 40 Cal. 4th 360, and *Alch v. Superior Court* (2008) 165 Cal. App. 4th 1412.

Lastly, to deem this matter as complex pursuant to California Rules of Court, Rule 3.400 and order that the complex fees be paid by August 15, 2016.

Explanation:

This matter was declared to be complex by moving party in her civil case cover sheet for the complaint on the basis of the large number of parties and a substantial amount of documentary evidence. Additionally, the instant discovery dispute demonstrates there is likely to be extensive motion practice raising difficult or novel issues that will be time-consuming to resolve. The Court therefore formally declares this matter to be a complex case.

The Court finds that no issue, evidence, or terminating sanctions are appropriate prior to class certification. A class action is a device where one person who has the same claims as many can seek to represent them and adjudicate all claims at once. But that person has to prove that her claim is typical of those she seeks to represent, that common issues of fact and law predominate, and give notice to each class members with an opportunity for them to opt out of the class. Absent such proof and such notice, there is no personal jurisdiction over the class members and no due process for them. See *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797. For these reasons, no default judgment can be taken in a class action until after the class has been certified. *Kass v. Young* (1977) 67 Cal. App. 3d 100,105; *Simons v. Horowitz* (1984) 151 Cal. App. 3d 834, 846. Such is in excess of jurisdiction. See also 2 Witkin, California Procedure, "Jurisdiction," sections 301, 314.

Should plaintiff wish to dismiss the class allegations, the Court would reconsider. Should there be further problems with this discovery, plaintiff would need to seek a contempt citation.

In its responses to the Request for Documents, defendant provides one of two answers. One is a statement of inability to comply, on the basis that documents do not exist. The other is a statement that if the documents exist, they will be produced. Code of Civil Procedure section 2031.230 states:

"A representation of inability to comply with the particular demand for inspection shall affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that demand. This statement shall also specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer in the possession, custody, or control of the responding party. The statement shall set forth the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of item."

If all documents in a particular category cannot be produced, defendant is required to provide the other information. The further response ordered must comply with this statute.

Several of the interrogatory responses omit information, such as witness telephone numbers. "The responding party must make a reasonable effort to obtain whatever information is sought, and if unable to do so, must specify why the

information is unavailable and what efforts he or she has made to obtain it." Weil & Brown, Civil Procedure Before Trial (TRG 2016), § 8:1061. If defendant lacks the information, it must so state, under oath.

Another interrogatory was answered by referring plaintiff to the entirety of defendant's document production, which plaintiff states numbers over 4,000 pages. Code of Civil Procedure section 2030.230 states:

"If the answer to an interrogatory would necessitate the preparation or the making of a compilation, abstract, audit, or summary of or from the documents of the party to whom the interrogatory is directed, and if the burden or expense of preparing or making it would be substantially the same for the party propounding the interrogatory as for the responding party, it is a sufficient answer to that interrogatory to refer to this section and to specify the writings from which the answer may be derived or ascertained. This specification shall be in sufficient detail to permit the propounding party to locate and to identify, as readily as the responding party can, the documents from which the answer may be ascertained. The responding party shall then afford to the propounding party a reasonable opportunity to examine, audit, or inspect these documents and to make copies, compilations, abstracts, or summaries of them."

"This exception applies only if the summary is not available and the party **specifies** the records from which the information may be ascertained. A broad statement that the information is available from a mass of documents is insufficient." *Deyo v. Kilbourne* (1978) 84 Cal. App. 3d 771, 784 (emp. In original). "Thus, it is not proper to answer by stating, "See my deposition," "See my pleading," or "See the financial statement." (*Id.* at 784-785.)

Code of Civil Procedure section 128.7(b) states that by presenting the answer, defense counsel certified that the denials and the defenses had evidentiary support, or "if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." No such specific identification appears in the answer. For the response to Form Interrogatory 15.1, if defendant has no facts, witnesses, or documents which support a given affirmative defense, it must say so.

It also must provide specific answers pertinent to the specific defenses, not merely copy a generic all-inclusive statement for each. And defendant must state which allegations it denies, and provide the information sought for that specific allegation.

The lack of verification renders the answers the same as no responses. Brown & Weil, Civil Procedure Before Trial, (TRG, 2016) section 8:1113, citing *Appleton v. Superior Court* (1988) 206 Cal. App. 3d 632, 636. A further response under oath in compliance with the Code is required to all discovery at issue in the motion.

Tentative Rulings for Department 403

(6)

Tentative Ruling

Re: **Perkins v. Clovis Unified School District**
Superior Court Case No.: 15CECG00941

Hearing Date: July 21, 2016 (**Dept. 403**)

Motion: By Defendant Clovis Unified School District for judgment on the pleadings

Tentative Ruling:

To grant, with Plaintiff granted 10 days' leave to amend to allege any valid cause of action he can under California law, given the statutory liabilities and statutory immunities that might apply to Defendant Clovis Unified School District and/or its employees. The time in which the complaint can be amended will run from service by the clerk of the minute order. All new allegations in the first amended complaint are to be set in **boldface** type.

Explanation:

Liability of a public entity must be based on a specific statute, or at least creating some specific duty of care. (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1183.) Although Government Code section 815.2, subdivision (a,) makes a public entity vicariously liable for the common-law torts of its employees, when a public entity, not a public employee, breaches a common-law duty, the public entity is not liable unless a statutory ground for liability applies. (*Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1112-1115.) Based on the allegations are currently pleaded, Plaintiff Spencer Perkins' emotional distress damages are barred by the exclusive remedy of workers' compensation laws. (Lab. Code, § 3601.) As the complaint is currently alleged, Defendant Clovis Unified School District ("Defendant") appears to be immune under Penal Code sections 11166, 11165.7, and 11172 subdivision (b), which require it to report suspected child abuse and makes it immune from civil liability for doing so. The immunity applies even when the initial and any subsequent reports are based on a negligent diagnosis or when the report is made recklessly and with malice. (*Thomas v. Chadwick* (1990) 224 Cal.App.3d 813, 819.) The absolute immunity also applies to post-report statements that republish the initial mandated report. (*Id.* at pp. 820-821.) A public entity is not liable for employee torts if the employee is immune. (Gov. Code, § 815.2, subd. (b).)

(23)

Tentative Ruling

Re: **SM2 Properties, LLC v. 37 Hotel Fresno, LLC**
Superior Court Case No. 15CECG00871

Hearing Date: Thursday, July 21, 2016 (**Dept. 403**)

Motion: Plaintiff SM2 Properties, LLC's Motion for Leave to File Second Amended Complaint

Tentative Ruling:

To grant Plaintiff SM2 Properties, LLC's motion for leave to file a second amended complaint. (Code Civ. Proc., § 473, subd. (a)(1).) Plaintiff SM2 Properties, LLC is ordered to file and serve the second amended complaint within 10 calendar days after service of the minute order. All new allegations must appear in **boldface** type.

The Court also orders that, in order to alleviate any prejudice that will be caused by granting the instant motion, Defendants 37 Hotel Fresno, LLC and The Intercoastal Group of Companies may take a second deposition of Sonya Gage.

Explanation:

Plaintiff SM2 Properties, LLC ("Plaintiff") moves the Court for an order granting it leave to file a second amended complaint that adds two new plaintiffs, adds two new causes of action brought by the two new plaintiffs, and changes and adds some factual allegations related to the two new plaintiffs.

Initially, the Court notes that it "has discretion to allow amendments to the pleadings 'in the furtherance of justice.' (Code Civ. Proc., § 473.) This discretion should be exercised liberally in favor of amendments, for judicial policy favors resolution of all disputed matters in the same lawsuit." (*Kittredge Sports Co. v. Superior Court (Marker, U.S.A.)* (1989) 213 Cal.App.3d 1045, 1047.) However, Defendants 37 Hotel Fresno, LLC and The Intercoastal Group of Companies ("Defendants") argue that the instant motion should be denied because they have been prejudiced by Plaintiff's delay since they took Sonya Gage's deposition as a non-party witness rather than as a party plaintiff. In order to alleviate any prejudice caused by granting the instant motion, the Court orders that Defendants may take a second deposition of Sonya Gage.

Therefore, as the proposed amendment is in the interests of justice and the Court has alleviated any prejudice to Defendants, the Court grants Plaintiff's motion for leave to file a second amended complaint.

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

Tentative Rulings for Department 501

(24)

Tentative Ruling

Re: **Rose v. Healthcomp, Inc.**
Court Case No. 15CECG00163

Hearing Date: **July 21, 2016 (Dept. 501)**

Motion: Defendant's Motion for Summary Judgment

Tentative Ruling:

To deny.

Explanation:

The Separate Statement does not include as a material fact that defendant raised preemption as an affirmative defense in its answer. The court's function on summary judgment is to determine from the evidence submitted whether there is a "triable issue as to any material fact." (Code Civ. Proc. § 437c, subd. (c).) To be "material" for summary judgment purposes, the fact must relate to some claim or defense in issue under the pleadings. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 926.)

Affirmative defenses must be pled. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 239-240, *reh'g denied* (Apr. 17, 2013).) A motion for summary judgment or adjudication must be supported by evidence establishing the moving party's right to the relief sought. (*Regents of Univ. of Calif. v. Sup.Ct. (Roettgen)* (1996) 41 Cal.App.4th 1040, 1044.) If defendant did not plead this defense, then it cannot obtain summary judgment based on that defense. (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 380.)

The moving party failed to request judicial notice of its Answer, nor did any Material Fact refer to any allegations of its Answer pleading the affirmative defense of preemption. "This is the Golden Rule of Summary Adjudication: If it is not set forth in the separate statement, *it does not exist.*" (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337 (emphasis in original); *Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1282; *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 173.) Thus, defendant did not establish it was entitled to relief based on this affirmative defense.

Furthermore, the court cannot simply take judicial notice of the Answer on the court's own motion because *there is no Answer residing in this court's file*. The court has examined the entire file and there is no Answer, nor is the filing of an Answer entered in the court's online database. Nor can the court determine, without evidence, if defendant filed it while the case was in Federal court.

Tentative Ruling

Re: ***Banda-Wash v. Wash***
Case No. 15 CE CG 00967

Hearing Date: July 21st, 2016 (Dept. 502)

Motion: Defendant's Motion for an Order Continuing Action and Cross-Action or to Stay Action and Cross-Action

Tentative Ruling:

To deny the defendant's motion for a continuance or stay of the action and cross-action, for lack of a showing of good cause. (Cal. Rules of Court 3.1332, Cal. Code Civ. Proc. § 404.)

Explanation:

Under Rules of Court, Rule 3.1332, subdivision (a), "To ensure the prompt disposition of civil cases, the dates assigned for a trial are firm. All parties and their counsel must regard the date set for trial as certain." Also, "A party seeking a continuance... must make the motion or application as soon as reasonably practical once the necessity for the continuance is discovered." (Cal. Rules of Court, Rule 3.1332, subd. (b).) In addition, under Rule 3.1332, subdivision (c), "continuances of trials are disfavored." Thus, "[t]he court may grant a continuance only on an affirmative showing of good cause requiring the continuance." (Cal. Rules of Court, Rule 3.1332, subd. (c).)

"Circumstances that may indicate good cause include: (1) The unavailability of an essential lay or expert witness because of death, illness, or other excusable circumstances; (2) The unavailability of a party because of death, illness, or other excusable circumstances; ... (6) A party's excused inability to obtain essential testimony, documents, or other material evidence despite diligent efforts..." (Cal. Rules of Court, Rule 3.1332, subd. (c)(1), (2), (6).)

Here, defendant claims that the trial date should be continued, or the entire case stayed, because (1) he has a back injury that prevents him from sitting through the entire trial, (2) one of his witnesses is unavailable, (3) he has been unable to complete discovery through no fault of his own, and (4) there are other pending cases that must be coordinated with the present case, thus requiring a stay of the action until the other cases are resolved.

However, with regard to defendant's claimed back injury, he provides no doctor's declaration or note to substantiate the nature and severity of the injury, or anything other than his own declaration to support his claim that his injury is severe

enough to prevent him from attending or participating in the trial. Since plaintiff is not a medical professional, he is not qualified to opine on his own medical condition or whether he will be able to sit through and participate in the trial. Without a declaration or note from a medical doctor regarding defendant's back condition and its effect on his ability to participate in the trial, there is no evidence to support the request for a stay or continuance of the trial based on defendant's medical condition.

Also, while defendant claims that one of his witnesses, Orion Wash, has been deployed out of the country by the military, and thus is unavailable to testify at trial, defendant does not explain why he did not attempt to take the witness's deposition before he left so that his testimony could be preserved for trial. (Code Civ. Proc. § 2025.620.) Presumably, defendant was aware of the fact that the witness, who is his own son, was in the military and might be deployed at any time. Defendant does not offer any excuse for his failure to preserve the witness's testimony, and it appears that his failure to take the witness's deposition was not diligent or reasonable if he believed that the witness had relevant testimony to offer. Therefore, the court does not intend to continue or stay the trial simply because one witness is unavailable.

In addition, while defendant asserts that he has been unable to complete discovery due to no fault of his own, he does not explain exactly what discovery he has yet to complete, or why he has not completed it. He does not point to any outstanding discovery requests or depositions that have not yet been completed, or which witnesses he might still need to depose. Nor does he explain why he has not already completed discovery despite the discovery cutoff date having passed and trial being less than a month away. Although he states that plaintiff has served an allegedly defective expert witness list, he does not state whether he has objected to the expert list or what further information he needs to complete expert discovery. Also, while defendant contends that the pleadings are not yet set because he has a demurrer to plaintiff's first amended answer to the cross-complaint pending, the pendency of a demurrer should not prevent defendant from serving discovery and receiving responses to it. It appears that any failure to complete discovery is due to defendant's own lack of diligence in serving discovery and obtaining responses, not due to factors beyond defendant's control. Therefore, defendant has not shown that the unavailability of discovery warrants a continuance of trial.

Next, although defendant contends that the pendency of a related case, *Wash v. Wash*, case no. 09 CE CG 00933, warrants a stay or continuance of the present case, defendant has not shown that the other action is so closely related to the issues of the present case that a stay or continuance of this case is warranted. The related action was for partition of the real property on which defendant and plaintiff still reside and do business, so there is some relationship between the cases. However, the question of whether or not the judgment in the earlier case is upheld on appeal does not appear to be likely to have an impact on the claims in the present case, which largely allege torts arising out of conduct that occurred after the last case was decided. Regardless of the outcome of the appeal in the earlier action, the parties here will still have to litigate their disputes in the present case. Also, there is no way to know how long the appeal in the earlier case will take to resolve, and it may be years before the appeal is decided. There does not appear to be any reason to postpone the present case for

months or years to wait for a resolution of the appeal, especially in light of the tenuous relationship between the two cases.

Defendant claims that the actions need to be consolidated under Code of Civil Procedure sections 404 and 404.5. However, section 404 only provides for a filing of a petition for coordination of "complex" actions that share common issues of law or fact that are pending in different courts. Here, as discussed above, the two actions do not share enough common issues of law or fact to warrant coordination, nor does it appear that either action is "complex."

Under Rule of Court 3.400, "A 'complex case' is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel." (Cal. Rules of Court, Rule 3.400, subd. (a).)

"In deciding whether an action is a complex case under (a), the court must consider, among other things, whether the action is likely to involve: (1) Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve; (2) Management of a large number of witnesses or a substantial amount of documentary evidence; (3) Management of a large number of separately represented parties; (4) Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; or (5) Substantial postjudgment judicial supervision." (Cal. Rules of Court, Rule 3.400, subd. (b).)

Here, the present case does not involve difficult or novel legal issues that will be time consuming to resolve, there should not be a large number of witnesses or documents, there are only five parties to the action, and substantial postjudgment judicial supervision should not be required. There is only one potentially related action on appeal, but the issues are not so intertwined with the present case as to require coordination. As a result, the court does not intend to order a stay of the present case until the appeal in the related case is resolved.

In addition, while defendant contends that the case should be designated as a "Plan 3" case under Local Rule 2.1.7, which would mean that it should be resolved within 24 months, defendant does not give any reasons why the case ought to be considered complex enough to warrant additional time for resolution. Again, the issues of the case, the number of parties and witnesses, the amount of evidence, and the amount of postjudgment judicial supervision do not weigh in favor of declaring the case to be complex, so the court does not intend to redesignate the case as a Plan 3 action.

Finally, defendant mentions that he intends to bring a motion to add new cross-claims against Maria based on new alleged acts of interference and stalking that she has committed against defendant since the filing of the last cross-complaint, and that he will need a continuance to amend the cross-complaint to add the new cross-claims. However, defendant has not yet filed a motion to amend (or more properly to

Tentative Rulings for Department 503

(20)

Tentative Ruling

Re: ***Fowler Packing Co., Inc. v. Evans, III, et al.***, Superior Court
Case No. 13CECG01301

Hearing Date: **July 21, 2016 (Dept. 503)**

Motion: (1) Sun Pacific's Motion for Leave to File Cross-Complaint
(2) Sun Pacific's Motion to Strike Portions of Fowler Packing's
Expert Designations or for Protective Order

Tentative Ruling:

To deny both motions.

Explanation:

Defendants Berne Evans, III, Sun Pacific Shippers, LP, Sun Pacific Marketing Coop., Inc., and Evans Ag GP, Inc. (collectively, "Sun Pacific") move for leave to file a cross-complaint against Paramount Citrus LLC, and to strike the expert witness designations by plaintiff Fowler Packing Company, Inc., or alternatively for a protective order.

Motion for Leave to File Cross-Complaint

Sun Pacific seeks leave to file a cross-complaint against Paramount Citrus LLC, Paramount Citrus Packing Company LLC, and Sarpoa, Inc. Sun Pacific contends that its proposed cross-claim is based on new information and evidence obtained during the deposition of Dennis Parnagian in January 2016, which confirm that the Paramount entities would share in the liability for any damages Fowler may recover against Sun Pacific.

However, these claims are not based on new evidence. Sun Pacific does not dispute that Fowler Packing's original complaint filed on April 26, 2013, alleged that "Berne Evans on behalf of Sun Pacific and Stewart Resnick on behalf of Paramount Citrus agreed that Fowler Packing would be rebated two-thirds of its marketing assessments" (Complaint ¶ 23.) Attached to the Complaint is a letter dated November 10, 2011, from Berne Evans (Sun Pacific's President and CEO), acknowledging the 2/3 agreement: "Because Stewart, not I, is reneging on the agreement, I cannot justify payment by me (by Sun Pacific) of part of the marketing/advertising costs which otherwise would be payable by you (by Fowler Packing). I am not at fault. Stewart is." (Complaint Ex. A].) Also attached to the Complaint is an email from Berne Evans to Fowler Packing's financial officer, Jim Bates,

in which Evans again acknowledges the 2/3 Agreement and Paramount's relation to that agreement: "Because Paramount refuses to honor the agreement, SP is 'stuck in the middle' of a dispute between Paramount and Fowler. Paramount wants the full \$0.26. Fowler wants to pay only 1/3 of the full \$0.26 unless and until Paramount honors the August agreement-unless and until Stewart keeps his word." (Complaint Ex. K.) Those factual allegations have not changed and remain in the operative pleading, Fowler Packing's Fourth Amended Complaint. (4AC ¶¶ 18-24 & Exs. I & J thereto.)

Sun Pacific was on notice of Paramount's potential liability from the outset, and should have pursued asserting this claim against Paramount much earlier. "Even if a [proposed pleading] is in proper form, unwarranted delay in presenting it may, of itself, be a valid reason for denial." (*P&D Consultants Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1345.) Courts are much more critical of proposed pleadings when offered "after long unexplained delay, or on the eve of trial, or where there is a lack of diligence, or there is prejudice to the opposing party." (*Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1159-1160.)

Sun Pacific has not offered a justifiable explanation for the delay, and has not shown that it has been diligent in seeking to assert this claim. Given the proximity of the trial date, which would have to be continued a substantial amount of time to allow Paramount to pursue discovery, the motion should be denied.

Motion to Strike Expert Witness Designations

Sun Pacific move to strike Fowler Packing's expert witness designations to the extent that they indicate that the experts will testify on "the economic value of the Cuties Brand and trademark as well as the value of Fowler Packing's 10% interest in the Cuties Brand."

Code of Civ. Proc. § 436 is inapplicable, as the expert witness designations are not pleadings. (See Code Civ. Proc. § 422.10.)

To the extent the motion is brought pursuant to Code of Civ. Proc. §§ 2034.250 or 2034.300, the motion would ordinarily be subject to Local Rule 2.1.17. Sun Pacific has not complied with that procedure.

However, the parties' stipulated order to refer discovery proceedings to a referee essentially exempts the parties from complying with Local Rule 2.1.17, at least where the procedure set forth therein has been followed. (See Exh. C to Fowler Pacific's RJN.) Since the parties have stipulated to submit all disputes regarding expert discovery to discovery referee, Sun Pacific shall follow the procedures set forth in that order.

Finally, to the extent Sun Pacific intends to treat this as a motion in limine, it is premature. Such a motion should be presented at the trial readiness hearing pursuant to Local Rule 2.6.2(D).

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(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** **7/20/16.**
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Dhaka Hoteliers, LLC v. Uddin and Ahmed***
Superior Court Case No. 15 CECG 00120

Hearing Date: July 21, 2016 **(Dept. 503)**

Motion: By Defendants seeking to vacate the entries of default and default judgments

Tentative Ruling:

To grant the motion. The Clerk is instructed to vacate the defaults entered on April 16, 2015 against Uddin and Ahmed and to set aside the **three** default judgment entered on May 19, 2016.

Defendants must file their Answers within 10 days of notice of the ruling. Notice runs from the date that the Clerk serves the Minute Order plus 5 days for service by mail. See CCP § 1013(a). In addition, Defendants must pay an additional filing fee of \$ 60.00 and payable to the court clerk within 30 days of service of the minute order by the clerk. (Gov. Code § 70617, subd. (a).)" Counsel neglected to pay a filing for fee for the additional Defendant.

To grant all requests for judicial notice pursuant to Evidence Code § 452(d)(1).

To sustain the Plaintiff's objection to ¶ 6 of the Declaration of Ahmed and Exhibit A on grounds of relevancy. To overrule Plaintiff's objection to ¶ 4 of the Declaration of Uddin regarding Billah's statement to him on the grounds that the statement is not hearsay. To disregard the remainder of the objections on the grounds that they are not directed to matters that the Court has considered in ruling on the motion.

Explanation:

Motion of Defendant Shafi Ahmed

Timeliness

Ahmed brings his motion pursuant to CCP § § 473.5 entitled "Motion to set aside default and for leave to defend action." It states:

(a) When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action. The notice of motion shall be served and filed within a reasonable time, but in no event exceeding the earlier of:

- (i) two years after entry of a default judgment against him or her; or
- (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered.

(b) A notice of motion to set aside a default or default judgment and for leave to defend the action shall designate as the time for making the motion a date prescribed by subdivision (b) of Section 1005, and it shall be accompanied by an affidavit showing under oath that the party's lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect. The party shall serve and file with the notice a copy of the answer, motion, or other pleading proposed to be filed in the action. (c) Upon a finding by the court that the motion was made within the period permitted by subdivision (a) and that his or her lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect, it may set aside the default or default judgment on whatever terms as may be just and allow the party to defend the action.

It has been held that the 180-day period is not triggered if the plaintiff serves notice of entry of judgment on the defendant at an address at which the plaintiff knew the defendant did not reside. [*Olvera v Olvera* (1991) 232 CA3d 32, 39 fn.8.] Also, a defendant must act diligently in seeking relief under CCP §473.5. Even if the defendant applies for relief within two years after entry of the default judgment, a judge may deny relief when there has been a substantial delay between the defendant's discovery of the default and the filing of the motion for relief, and the defendant fails to show a reasonable excuse for the delay. [*Schenkel v Resnik* (1994) 27 CA4th Supp 1, 4.]

In the case at bench, the motion is timely. No proof of service of the judgment nor the entry of default was filed. Therefore, the two year limit applies. The judgment was entered on May 19, 2016. The motion was filed on June 8, 2016. Plaintiff may argue that Defendant was served with the request for entry of default on April 16, 2016. While this is correct, it was served at the same address used for service of summons—the Motel in Modesto. See proof of service attached to the Request for entry of default. As stated in *Olvera v. Olvera*, supra, use of the same defective address does not comply with the statute.

Authority

The Court has authority under CCP §473.5 to set aside a default or default judgment when service of the summons has not given the defendant actual notice in time to defend the action. CCP §473.5(a); *Anastos v Lee* (2004) 118 Cal.App.4th 1314, 1319; *Olvera v Olvera* (1991) 232 Cal.App.3d 32, 39. "Actual notice," within the meaning of CCP §473.5, means genuine knowledge by the defendant, and has been strictly construed. Relief is liberally granted so that cases may be resolved on their merits. *Ellard v Conway* (2001) 94 Cal.App.4th 540, 547-548; *Olvera v Olvera* (1991) 232 Cal.App.3d 32, 39. Imputed or constructive notice is not considered actual notice. *Tunis v Barrow* (1986) 184 Cal.App.3d 1069, 1077.

Here, the Declaration of Ahmed is offered in support of the motion. He states that since 2010 his personal and business address has been 3907 Marathon Street, Apt. #3, Los Angeles, CA 90029. See Declaration at ¶ 2. He further states that he has never maintained a personal residence address or a business office address at 1525 McHenry, Modesto, CA 95350. Id. at ¶ 3.

He also offers a copy of an email received from Mohammed Billah, one of the other members of the Plaintiff LLC. He states that he did not give his permission for the use of his name in the lawsuit and that he does not want any of the monies obtained in judgment. See Exhibit A attached to the Declaration of Ahmed. The Plaintiff has submitted an objection to this exhibit and ¶ 6 of the Declaration of Ahmed. The objection is brought on several grounds. It will be sustained on grounds of relevancy.

In opposition, the Plaintiff submits the Declaration of Galen Gregg, a paralegal for Plaintiff's attorney. He states that he searched LexisNexis for the name of "Shafi Ahmed" in Modesto, CA and found that he was named as a member of United Resorts, LLC. The address of this LLC is the Motel in Modesto. The same information is listed for the judgment liens and debts of this LLC. However, closer examination reveals that the incorporation was filed on January 14, 2013 and the status of the LLC is now suspended. Moreover, the address listed for an LLC is not the equivalent of an address for service of summons on an individual. As for the newspaper article regarding the unpaid debts of the LLC with a quote from Ahmed, this is irrelevant. The Declaration of Asad Zaman is also offered in support of opposition. But, he simply states that he has personal knowledge that Ahmed owned a share of the motel, managed it and conducted business from there. Again, this is not the equivalent of providing an address for service of summons.

It is important to note that the summons was served via substituted service. As a matter of law, there must be a good faith effort at personal service first. In other words, there must be a showing that the summons "*cannot with reasonable diligence be personally delivered*" to the individual defendant. [CCP § 415.20(b)] If defendant challenges this method of service, the burden is on plaintiff to show that *reasonable attempts were made* to serve defendant personally before resorting to substitute service. If defendant establishes that he or she was available for personal service, plaintiff will have to show why such personal service could not be effected. [Evaritt v. Sup.Ct. (Kelleff) (1979) 89 Cal.App.3d 795, 801] The Declaration of Due Diligence of Cheryl Smoke indicates that no attempts were made at Ahmed's residence. Indeed, the Declaration states that Smoke was told three times that Ahmed was "out of the country" yet she continued to attempt service at that address.

A defendant is under no duty to respond in any way to a defectively served summons. It makes no difference that defendant had actual knowledge of the action. Such knowledge does not dispense with statutory requirements for service of summons. [Kappel v. Bartlett (1988) 200 Cal.App.3d 1457, 1466; Ruttenberg v. Ruttenberg (1997) 53 Cal.App.4th 801, 808] Notably, the Complaint in this action states at ¶ 3 that "Shafi Ahmed is an individual residing in Los Angeles, Ca...." Accordingly, the members of the Plaintiff LLC and their former attorney knew that Ahmed lived in Los Angeles but decided to serve him at a motel in Modesto. This does not comply with CCP §

415.20(b). The motion will be granted. [*Ellard v Conway* (2001) 94 Cal.App.4th 540, 547-548.]

Motion of Defendant Khondoker Imteaz Uddin

Timeliness

A motion for relief from a default judgment based on extrinsic fraud or mistake is **not** governed by any statutory time limit (e.g., the 6-month time limit for a motion under CCP §473(b), but instead is based on the judge's inherent equity power to grant relief from a judgment obtained by extrinsic fraud or mistake. [*Division of Labor Standards Enforcement v Davis Moreno Constr., Inc.* (2011) 193 Cal.App.4th 560, 570.] Such a motion may be filed at any time. See *Manson, Iver & York v Black* (2009) 176 Cal.App.4th 36, 42, 47; *Warga v Cooper* (1996) 44 Cal.App.4th 371, 376. However, a judge may deny the motion if the defendant has not exercised diligence in seeking relief after discovering the extrinsic fraud or mistake and if the plaintiff has been prejudiced by this lack of diligence. See *Rappleyea v Campbell* (1994) 8 Cal.4th 975, 983-984; *Falahati v Kondo* (2005) 127 Cal.App.4th 823, 833.

Here, the judgment was entered on May 19, 2016. The motion was filed on June 8, 2016. Therefore, Uddin has been diligent in seeking relief.

Authority

The Court has discretion to vacate a default judgment on equitable grounds, even if statutory relief is unavailable. [*Rappleyea v Campbell* (1994) 8 Cal.4th 975, 981; *Lee v An* (2008) 168 Cal.App.4th 558, 566.]

Extrinsic fraud arises when the defendant has been denied a fair adversary hearing because the defendant was deliberately kept in ignorance of the action or in some way fraudulently prevented from presenting a defense. [*Hopkins & Carley v Gens* (2011) 200 Cal.App.4th 1401, 1416; *Division of Labor Standards Enforcement v Davis Moreno Constr., Inc.* (2011) 193 Cal.App.4th 560, 570; *Manson, Iver & York v Black* (5th Dist.2009) 176 Cal.App.4th 36, 47.]

For example, inducing the defendant not to contest the action by misrepresenting the facts and falsely promising to dismiss or settle the action. See *Aheroni v Maxwell* (1988) 205 Cal.App.3d 284, 291-292. See also *Manson, Iver & York v Black, supra*, 176 Cal.App.4th at 47 (keeping defendant away from court or making a false promise of a compromise are also examples of extrinsic fraud). Inducing the defendant not to retain an attorney by assuring the defendant that the matter will not proceed (and then it does proceed). *Division of Labor Standards Enforcement v Davis Moreno Constr., Inc., supra*, 193 Cal.App.4th at 570; *Sporn v Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1300.

In the case at bench, Uddin indicates in his declaration that shortly after he was served with the complaint in this action (February 11, 2015), he spoke with Mohammed Billah, a member of the Plaintiff LLC. Billah stated to Uddin that the lawsuit would not be

prosecuted because all members were in agreement that they wanted the motel sold. See ¶ 4. Uddin also states that he received an email from Billah on February 9, 2016, reiterating that selling the property was the No. 1 goal. See ¶ 7 and Exhibit A attached thereto. Uddin was also provided with a "Purchase and Sale Agreement" for the property dated February 9, 2016. See ¶ 8 and Exhibit B. Finally, Uddin attaches another email from Billah indicating that the Sale Agreement has been signed and the property would be placed in escrow. See Exhibit C.

Uddin has made a "prima facie" case of extrinsic fraud in support of his motion given his statement that Billah informed him that the lawsuit would not be prosecuted. [*Division of Labor Standards Enforcement v Davis Moreno Constr., Inc., supra*, 193 Cal.App.4th at 570.] Plaintiff argues that Uddin did not act diligently in filing his motion given that he was properly given notice of the request to enter default and the request for court judgment. This is correct. See request for entry of default filed on April 16, 2015 and request for entry of court judgment filed on September 23, 2015 and March 14, 2016. However, under the authority for vacating a default judgment on grounds of extrinsic fraud, the moving party need only show that he acted diligently upon discovery of the entry of default judgment. See *Manson, Iver & York v Black* (2009) 176 Cal.App.4th 36, 49.

Plaintiff's objection to ¶ 4 of Uddin's Declaration regarding Billah's statement on grounds of hearsay will be overruled. The statement is not hearsay. It is not offered to show the truth of Billah's statement but to show the "good faith" or "reasonableness" of the recipient's conduct. See *Wiz Technology v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 13 [in breach of contract action by plaintiff computer software company against defendant auditing firm, declaration of defendant's partner that he learned that plaintiff had breached condition of parties' agreement from plaintiff's securities attorney or its chief financial officer was properly admitted; it was not hearsay, as it was offered to show that defendant's resignation as auditor for plaintiff was reasonable]

As for the other objections, the Court declines to rule on them because they are not necessary for a determination of the motion. The motion will be granted. Uddin has established that he did not respond to the lawsuit because one of the members of the Plaintiff LLC told him that the case would not be prosecuted and later informed him that the property at the heart of the disputes among the members was being sold. The Court will exercise its discretion and set aside the default and the default judgment. [*Rappleyea v Campbell* (1994) 8 Cal.4th 975, 981; *Lee v An* (2008) 168 Cal.App.4th 558, 566.]

Pursuant to California Rules of Court, Rule 391(a) and Code of Civil Procedure § 1019.5, subd. (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** 7/20/16.
(Judge's initials) (Date)