

Tentative Rulings for September 27, 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).)

15CECG00474 *Katzenbach v. Xtreme Manufacturing* (Dept. 501)

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

16CECG01445 *Gerica Ramos v. Saint Agnes Medical Center* is continued to Thursday October 20, 2016, at 3:30 p.m. in Dept. 501.

15CECG03951 *Green v. California Department of Corrections and Rehabilitation* is continued to Thursday, October 13, 2016, at 3:30 p.m. in Dept. 403

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

03

Tentative Ruling

Re: **Hernandez v. POM Wonderful Holdings, LLC**
Case No. 16 CE CG 02016

Hearing Date: September 27th, 2016 (Dept. 402)

Motion: POM Wonderful's Motion to Compel Arbitration
Randstad and Hazel Hernandez's Motion to Compel Arbitration

Tentative Ruling:

To grant both motions to compel arbitration of plaintiff's claims. (Code Civ. Proc. § 1281.2.) To stay the pending civil action pending resolution of the arbitration. (Code Civ. Proc. § 1281.4.)

Explanation:

Under Code of Civil Procedure section 1281.2,

On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

...

(c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. (Code Civ. Proc., § 1281.2, subd.'s (a)-(c).)

Also, "If a court of competent jurisdiction, whether in this State or not, has ordered arbitration of a controversy which is an issue involved in an action or proceeding pending before a court of this State, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies." (Code Civ. Proc., § 1281.4.)

Here, defendants have met their burden of showing that there is an agreement to arbitrate, that it covers the plaintiff's claims, and therefore they are entitled to compel plaintiff to arbitrate her claims against them. According to defendant

Randstad, plaintiff signed the arbitration agreement as part of her agreement to work with Randstad. (Exhibit A to Hazel Hernandez decl.) The agreement covers the types of employment claims raised by plaintiff in her complaint, including discrimination, accommodation of a disability, and wrongful termination. (*Ibid.*) Therefore, Randstad has met its burden of showing that there is an agreement to arbitrate plaintiff's claims.

Furthermore, the agreement also clearly covers plaintiff's claim against Hazel Hernandez, as it covers all potential claims against current or former employees of Randstad. (*Ibid.*) Here, plaintiff has alleged that Hernandez was an employee of Placement Pros, which is a dba of Randstad, and was acting in the course and scope of her employment when she defamed plaintiff. (Complaint, ¶¶ 4, 61.) Thus, the agreement also covers the claims against Hernandez, and Hernandez has the right to compel arbitration of plaintiff's claims.

Plaintiff does not dispute that she signed the agreement with Randstad, nor does she claim that the agreement is procedurally or substantively unconscionable. However, she does argue that the agreement is unenforceable as to defendant POM Wonderful because POM was not a party to the agreement. She also contends that, if her claims against POM cannot be arbitrated, it would be inefficient and would lead to potentially conflicting rulings to arbitrate only the claims against Randstad and Hernandez while staying the claims against POM, and consequently the court should deny the motion as to all of the defendants.

It is true that "the general rule [is] that only a party to an arbitration agreement is bound by or may enforce the agreement. [Citations.] ... There are, however, 'exceptions to the general rule that a nonsignatory ... cannot invoke an agreement to arbitrate, without being a party to the arbitration agreement.' [Citation.] One such exception provides that when a plaintiff alleges a defendant acted as an agent of a party to an arbitration agreement, the defendant may enforce the agreement even though the defendant is not a party thereto." (*Thomas v. Westlake* (2012) 204 Cal.App.4th 605, 613–614.)

For example, in *Dryer v. Los Angeles Rams* (1985) 40 Cal.3d 406, the California Supreme Court found that an arbitration agreement could be enforced by a nonsignatory defendant because the plaintiff had alleged that the nonsignatory defendant was an agent of the defendant who did sign the agreement. (*Id.* at p. 418.)

The Court of Appeal in *Thomas* explained the rationale for enforcing the agreement as to both signatory and nonsignatory defendants. "Having alleged all defendants acted as agents of one another, [plaintiff] is bound by the legal consequences of his allegations. [Citation.] And, as the cases cited above hold, a plaintiff's allegations of an agency relationship among defendants is sufficient to allow the alleged agents to invoke the benefit of an arbitration agreement executed by their principal even though the agents are not parties to the agreement. [Citations.] Moreover, it would be unfair to defendants to allow [plaintiff] to invoke agency principles when it is to his advantage to do so, but to disavow those same principles when it is not. [Citations.] We therefore reject [plaintiff's] attempt to limit the legal

effect of his agency allegations to the imposition of tort liability on defendants.” (*Thomas v. Westlake, supra*, 204 Cal.App.4th at pp. 614–615.)

Thus, where the plaintiff has alleged that the defendants were agents of each other, the courts will usually enforce the arbitration agreement as to all parties, as the nonsignatory defendants are not truly “third parties” to the agreement for the purposes of section 1281.2, subdivision (c). (*RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511, 152.)

Here, plaintiff has alleged that the defendants, including POM Wonderful, are all agents and representatives of each other. (Complaint, ¶ 7.) In addition, plaintiff does not merely allege the usual boilerplate conclusion that defendants were agents of each other. She goes beyond this standard allegation and alleges that defendants POM and Randstad were joint employers of her, and that they acted jointly in discriminating against her and terminating her employment. (*Id.* at ¶¶ 5, 11- 19.) Thus, plaintiff has alleged that defendants were acting as agents of each and also as joint employers of plaintiff, and consequently POM can enforce the arbitration clause even though it was not a signatory to the agreement. (*Thomas, supra*, at 613-615, see also *Ronay Family Limited Partnership v. Tweed* (2013) 216 Cal.App.4th 830, 838; *Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1284-1286.)

In her opposition, plaintiff cites to *Barsegian v. Kessler & Kessler* (2013) 215 Cal.App.4th 466, in which the Court of Appeal affirmed the trial court’s denial of a motion to enforce an arbitration agreement because one of the defendants was not a signatory to the agreement. The Court Appeal found that the plaintiff’s “conclusory” and “boilerplate” allegation of agency between the defendants was not enough to establish that the agreement was enforceable by the nonsignatory defendant, as the defendant denied that it was actually an agent of the other defendants. (*Id.* at pp. 451-454.) The court was concerned that, if an arbitration agreement could be enforced by a nonsignatory party based on conclusory allegations of agency, then almost any arbitration agreement could be enforced by a defendant who was not a party to the agreement, no matter how remote their relationship to the other defendants, because such agency allegations are common in almost all multi-defendant cases. (*Id.* at p. 451.) Also, the court believed that the plaintiff’s allegations of agency were not judicial admissions of the fact of agency because they were not accepted by the defendant as true. (*Id.* at pp. 451-452.)

However, *Barsegian* appears to be inconsistent with the weight of authorities, most of which hold that allegations of agency in the complaint are judicial admissions that are binding on the plaintiff and which allow the nonsignatory defendant to enforce the arbitration clause. (*Dryer, supra*, 40 Cal.3d at p. 418; *Thomas, supra*, at pp. 613-615, *Ronay Family Limited Partnership v. Tweed, supra*, 216 Cal.App.4th at p. 838; *Rowe v. Exline, supra*, 153 Cal.App.4th at pp. 1284-1286.) As the court in *Thomas* explained, it would be unfair to allow plaintiff to allege that defendants are agents of each other when it suits her purposes for pleading her claims, but then deny the allegation when it is advantageous of her to do so, such as in opposing a motion to compel arbitration. (*Thomas, supra*, at pp. 614-615.) Also, *Barsegian*’s claim that a plaintiff’s allegations in her own complaint are only binding judicial admissions if the

Tentative Rulings for Department 403

(30)

Re: **David White v. Target Corporation**
Superior Court Case No. 15CECG01252

Hearing Date: Tuesday September 27, 2016 (**Dept. 403**)

Motion: Motion to dismiss (terminating sanction)

Tentative Ruling:

To deny without prejudice to renew the motion should Plaintiff fail to comply with this order.

Explanation:

This Court has discretion to "make those orders that are just" if a party fails to obey prior orders. (Code Civ. Proc., § 2031.320; *Pember v. Sup.Ct. (Young)* (1967) 66 Cal.2d 601, 604; *Sauer v. Sup.Ct. (Oak Industries, Inc.)* (1987) 195 Cal.App.3d 213, 228.) But before imposing a "terminating" sanction, courts should usually grant lesser sanctions: e.g., orders *staying* the action until plaintiff complies, or orders declaring matters as *admitted* or *established* if answers are not received by a specified date, often accompanied with costs and fees to the moving party. It is only when a party *persists* in disobeying the court's orders that the ultimate ("doomsday") sanctions of dismissing the action or entering default judgment, etc. are justified. (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 796; *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262; *Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377.) This policy is only disregarded "in egregious cases." (*New Albertsons, Inc. v. Sup.Ct.* (2008) 168 Cal.App.4th 1403, 1434; see also *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 490-491 (disapproved on other grounds in *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478); *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 497.) Additionally, numerous cases hold that severe sanctions for failure to comply with a court order are allowed only where the failure was willful. (*R.S. Creative, supra*, 75 Cal.App.4th at p. 495; *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545; *Biles v. Exxon Mobil Corp.* (2004) 124 Cal.App.4th 1315, 1327.)

Here, Plaintiff has not complied with *one* motion to compel. Monetary sanctions of \$410.00 were previously ordered, and they were apparently not paid. Therefore, the Plaintiff will be granted one further opportunity to comply with this Court's orders: Plaintiff must serve verified responses without objection and pay the previously imposed monetary sanction within thirty (30) days of service of this order. If Plaintiff continues to refuse to comply, the Court will consider further sanctions including dismissal.

A court may, in the exercise of its discretion, dismiss an action for delay in prosecution if it has not been brought to trial or "conditionally settled" within 2 years

(19)

Tentative Ruling

Re: ***Swanegan v. A-1 Shower Door & Mirror Company***
Court Case No. 12CECG00981

Hearing Date: September 27, 2016 (Department 403)

Motion: by plaintiff to amend judgment

Tentative Ruling:

To deny.

Explanation:

1. No Liability for Harold Webb

The award underlying the judgment specifically and expressly finds in favor of Harold Webb. The award is against only A-1 Shower Door and Mirror Company, dba in California A-1 Shower Door and Restoration, Inc., a Nevada corporation. The findings, reduced to a judgment in 2012, are res judicata on the issue of Harold Webb's liability, since that issue was tried in the proceeding below. That means that Harold Webb cannot be added as a judgment debtor, nor can any trust holding Harold Webb's property.

The doctrine of finality of judgments forbids this Court from adding the dismissed Harold Webb back into this case as a judgment creditor. That is true even where there is an argument that there was perjury in the underlying case. See *Buesa v. City of Los Angeles* (2009) 177 Cal. App. 4th 1538, 1545, quoting from *Pico v. Cohn* (1891) 91 Cal. 129. Plaintiff did not appeal the Labor Commissioner's findings, and this Court is therefore precluded from making any change in them.

2. Untimely as to Timothy Webb

Normally, only if plaintiff was unaware of the possibility that Timothy Webb was the alter ego of the corporation prior to entry of judgment would it be appropriate to amend a judgment to include him as an additional judgment debtor. See *Jines v. Abarbanel* (1978) 77 Cal. App 3d 702, 717. Plaintiff does not state at what time she came to believe that Timothy Webb was the alter ego of the corporate entity. Normally, such an issue would have to be raised in the underlying case before the Labor Commissioner, just as the claim was made against Harold Webb. There is no showing in the papers before the Court that new information was obtained about Timothy Webb after the underlying case was concluded.

(24)

Tentative Ruling

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

Hearing Date: **September 27, 2016 (Dept. 501)**

Motion: Plaintiff's Motion to Appoint Successor in Interest for Deceased Plaintiff

Tentative Ruling:

To grant.

Explanation:

Code of Civil Procedure section 377.21 provides: "A pending action or proceeding does not abate by the death of a party if the cause of action survives." (*Id.*, emphasis added.) Code of Civil Procedure section 377.31 states, "On motion after the death of a person who commenced an action or proceeding, the court shall allow a pending action or proceeding that does not abate to be continued by the decedent's personal representative or, if none, by the decedent's successor in interest." (*Id.*, emphasis added.)

There are four distinct kinds of privacy invasions recognized by courts: 1) Intrusion upon the plaintiff's seclusion or solitude or into his private affairs; 2) Public disclosure of embarrassing private facts; 3) Publicity which places the plaintiff in a false light in the public eye; and 4) Appropriation for the defendant's advantage, of the plaintiff's name and likeness. (*Lugosi v. Universal Pictures* (1979) 25 Cal.3d 813, 819—Appropriation claim; decedent's right to publicity did not survive his death (rule in *Lugosi* since abrogated by Civil Code § 3344.1, not applicable here).)

Decedent's causes of action are based on invasion of privacy (the first tort listed above). The first cause of action states the privacy invasion claim, and the second is a claim under the unfair competition law ("UCL"), Business and Professions Code sections 17200, *et seq.* The UCL claim "borrows" the privacy invasion claim, and thus it "stands or falls" with the underlying claim. (*Krantz v. BT Visual Images, L.L.C.* (2001) 89 Cal.App.4th 164, 177; *Whiteside v. Tenet Healthcare Corp.* (2002) 101 Cal.App.4th 693, 706.)

Defendant argues that decedent's privacy cause of action does not survive because as to any of the four types of privacy claims, courts agree that a plaintiff's right to privacy is a personal one and cannot be asserted by anyone other than the person whose privacy has been invaded. (*Werner v. Times-Mirror Co.* (1961) 193 Cal.App.2d 111, 116, disapproved on another point in *Kapellas v. Kofman* (1969) 1 Cal.3d 20, 35, *fn* 17) Therefore, courts have also stated that because this right is a purely personal one, it "does not survive but dies with the person." (*Hendrickson v. California Newspapers, Inc.* (1975) 48 Cal.App.3d 59, 62; *Kelly v. Johnson Pub. Co.* (1958) 160 Cal.App.2d 718, 721; *Metter v. Los Angeles Examiner* (1939) 35 Cal.App.2d 304, 310.)

Under former law, actions for personal torts such as personal injury and wrongful death abated on the death of either the injured party or the tortfeasor. But legislation adopted in 1949 provided for survival of personal injury and wrongful death actions. (See *Cort v. Steen* (1950) 36 Cal.2d 437, 440; *Grant v. McAuliffe* (1953) 41 Cal.2d 859, 862.) However, this still left it uncertain as to other types of personal torts, such as false imprisonment, malicious prosecution, defamation, or invasion of privacy. But, as the *Witkin, Summary* treatise puts it, "These issues were resolved in 1961 when the Legislature abolished the classification of survivable and nonsurvivable causes of action, and made all survive. (See former Prob.C. 573.)" (5 *Witkin, Summary* 10th Torts § 23 (2005), emphasis added.) Now, the death of the injured party does not abate the action. (Code Civ. Proc. § 377.20, subd. (a).) Under this analysis, plaintiff's privacy claim survives, and thus so does her UCL claim.

The accuracy of the comment in *Witkin, supra*, appears to be supported by the 1997 Supreme Court opinion, *Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288 ("*Sullivan*"). The Court was considering the issue of whether pain and suffering damages could be recovered where judgment was rendered when plaintiff was alive, but he died during the pendency of an appeal from that judgment. (*Id.* at p. 292.) Thus, the Court surveyed the history of legislative revisions to the survival statutes, also at issue on this motion. In doing so, it noted the following in relation to the 1961 legislative change, and it is pertinent to the analysis here:

First, the [Law Revision] commission recommended that the survival statute be expanded to include actions for personal torts that do not result in physical injury (e.g., malicious prosecution, false imprisonment, **invasion of privacy**, defamation), reasoning that "The failure of these actions to survive at common law appears to rest in large part on nothing more than the continued application of the **ancient maxim that 'personal actions die with the person.'** This maxim merely states a **largely meaningless conclusion**, has no compelling wisdom on its face, is of obscure origin, and **appears to be of questionable application to modern conditions.**" (1961 Law Revision Com. Rep., *supra*, at p. F-6, fn. omitted.) **The Legislature adopted this recommendation**, providing in the first paragraph of former section 573 that "**no cause of action shall be lost by reason of the death of any person**" (*italics added*).

(*Sullivan, supra*, 15 Cal. 4th at pp. 298-299, emphasis added.)

Defendant is correct that privacy torts are personal to the plaintiff and must be asserted by the plaintiff. (*Werner v. Times-Mirror Co.* (1961) 193 Cal.App.2d 111, 116; *Association for Los Angeles Deputy Sheriffs v. Los Angeles Times Communications LLC* (2015) 239 Cal.App.4th 808, 821.) But this does not mean a successor cannot be appointed to stand in the shoes of the deceased plaintiff to continue prosecution of her claims.

Moreover, the cases cited by defendant holding that the right of privacy "does not survive but dies with the person" are not dispositive, especially considering the

Tentative Rulings for Department 502

(17)

Tentative Ruling

Re: ***Martinez-Sanchez v. Savon Financial, Inc.***
Court Case No. 10 CECG 00873

Hearing Date: September 27, 2016 (Dept. 502)

Motion: Code of Civil Procedure § 384 Hearing

Tentative Ruling:

The proposed Amended Judgment will not be signed.

Explanation:

Code of Civil Procedure section 384 provides, in relevant part:

The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court shall amend the judgment to direct the defendant to pay the sum of the unpaid residue, plus interest on that sum at the legal rate of interest from the date of entry of the initial judgment, to nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent. The court shall ensure that the distribution of any unpaid residual derived from multistate or national cases brought under California law shall provide substantial or commensurate benefit to California consumers.

(Code Civ. Proc., § 384, subd. (b).)

On March 28, 2016, the Court issued the Final Order and Judgment approving the class settlement and Settlement Agreement. On April 25, 2016, Kurtzman Carson Consultants, LLC ("KCC"), the class administrator, issued and mailed settlement checks to the 72 class members in a total amount of \$76,061.13. (Rogan Decl. ¶ 3.) As of August 22, 2016, only 29 checks totaling \$22,732.98 have been cashed. (Rogan Decl. ¶ 4.) Thus, 43 checks with a gross amount of \$53,328.15, are still outstanding. (*Ibid.*)

The KCC seeks permission to pay the remaining fund balance of \$53,328.15 as follows: \$45,681.71 to Kemnitzer, Barron & Krieg, LLP for the remainder of their attorney's fees and costs; \$427.36 to KCC for unpaid class administration expenses; and \$7,419.08 to defendant to "offset class administration fees paid to date." (Rogan Decl. ¶ 6.)

(17)

Tentative Ruling

Re: ***Garcia v. Suburban Propane, L.P.***
Court Case No. 16 CECG 00418

Hearing Date: September 27, 2016 (Dept. 502)

Motion: Defendant's Motion to Amend Class Action Complaint

Tentative Ruling:

To deny without prejudice.

Explanation:

"The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading." (Code Civ. Proc. § 473; see also, § 576.) There is generally a strong policy in favor of allowing a plaintiff to amend the complaint. (*Glaser v. Meyers* (1982) 137 Cal.App.3d 770, 776-777.) Judicial policy favors resolution of all disputed matters between the parties in the same lawsuit. Thus, the court's discretion will usually be exercised liberally to allow amendment of the pleadings. (*Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939; *Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 596.)

A motion to amend must also comply with California Rule of Court rule 3.1324. Under this rule, a motion to amend must: (1) include a copy of the proposed amendment, (2) state what allegations in the previous pleading are proposed to be deleted, if any, and where, by page, paragraph, and line number, the deleted allegations are located, and (3) state what allegations are proposed to be added to the previous pleading, if any, and where, by page, paragraph, and line number, the additional allegations are located. (Cal. Rule of Court, Rule 3.1324, subd. (a).) Moreover, a separate declaration must accompany the motion which specifies: (1) the effect of the amendment, (2) why the amendment is necessary and proper, (3) when the facts giving rise to the amended allegations were discovered, and (4) the reasons why the request for amendment was not made earlier. (Cal. Rule of Court, Rule 3.1324, subd. (b).)

This motion is substantially in compliance with rule 3.1324.

Ordinarily, a trial court will not consider the validity of a proposed amended pleading because grounds for demurrer or motion to strike are premature. (*Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048.) But it is not an abuse to deny leave to amend where the proposed amendment fails to state a cause of action. (*Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 230 [proposed amendment barred by statute of limitations and no basis for relation back doctrine].)

The Labor Code Private Attorneys General Act of 2004 ("PAGA") permits an "aggrieved employee" —that is, an employee against whom a violation of a provision

of the Labor Code was committed (Lab. Code, § 2699, subd. (c))—to bring an action “on behalf of himself or herself and other current or former employees” to recover civil penalties for violations of other provisions of the Labor Code (*id.*, § 2699, subds. (a), (g)). (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1003.) California courts construing Labor Code section 2699, subdivision (a), have concluded that an aggrieved employee suing under PAGA must bring the claim as a representative action on behalf of “*himself or herself* and other current or former employees” (Lab. Code, § 2699, subd. (a), italics added). (See also *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 650-651 [Under PAGA at least one Labor Code violation must have been committed against the representative plaintiff].) Thus, the administrative exhaustion requirements of PAGA must be satisfied by representative plaintiffs.

The administrative exhaustion procedures are set out in Labor Code section 2699.3. (See *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 375–76.) They include giving written notice to the California Labor and Workforce Development Agency (“LWDA”) and the defendants via certified mail. (Lab. Code, § 2699, subd. (a)(1).) To properly introduce a PAGA cause of action, a party must plead compliance with the pre-filing notice and exhaustion requirements. (See *Caliber Bodyworks, Inc.*, *supra*, 134 Cal.App.4th at p. 385; *Thomas v. Home Depot USA Inc.* (N.D. Cal. 2007) 527 F.Supp.2d 1003, 1007.)

Here, the proposed First Amended Complaint alleges that proposed representative Fernandez sent her PAGA notices by registered mail on April 26, 2016. (See Proposed First Amended Class Action Complaint (“FAC”) at ¶ 66; Ex. 1.) However, the PAGA claim is nonetheless time-barred.

California Code of Civil Procedure section 340, subdivision (a) establishes a one-year statute of limitations in “[a]n action upon a statute for a penalty or forfeiture, if the action is given to an individual, or to an individual and the state, except if the statute imposing it prescribes a different limitation.” (Code Civ. Proc., § 340.) “The civil penalties that Plaintiff seeks to recover under PAGA are a ‘penalty’ within the meaning of [section] 340(a).” (*Thomas v. Home Depot USA Inc.*, *supra*, 527 F. Supp. 2d at p. 1007.) (See FAC ¶ 68 [seeking civil penalties under PAGA].) Thus, while there are no California cases squarely holding that PAGA is subject to a one year statute of limitations, there are numerous federal cases that do. (*Thomas v. Home Depot USA Inc.*, *supra*, 527 F. Supp. 2d at p. 1008; *Baas v. Dollar Tree Stores* (N.D. Cal. June 18, 2009) No. C07-03108 JSW, 2009 WL 1765759 at *5; *Moreno v. Autozone, Inc.* (N.D. Cal June 5, 2007) No. C05-04432 MJJ, 2007 WL 1650942 at *2.)

Accordingly, “ ‘[c]ourts have interpreted the interplay of the statute of limitations with the administrative exhaustion requirements of PAGA to require that a plaintiff file notice with the LWDA within the applicable statute of limitations, namely one year.’ ” (*Slay v. CVS Caremark Corp.* (E.D. Cal., May 4, 2015) No. 1:14-CV-01416-TLN, 2015 WL 2081642, at *5, citing *Soto v. Castlerock Farming & Transp. Inc.* (E.D. Cal. Apr.16, 2012) No. CIV-F-09-0701 AWI, 2012 WL 1292519, at *5.) Here, proposed representative plaintiff Fernandez’ last day of employment with defendant was April 14, 2015. (FAC at ¶¶ 21-22.) Thus, the notices sent on Fernandez’ behalf to the LWDA and defendant on April

Tentative Rulings for Department 503

(29)

Tentative Ruling

Re: ***Eligio Cubangbang v. Zhora Piliposyan, et al.***
Superior Court Case No. 16CECG01110

Hearing Date: September 27, 2016 (Dept. 503)

Motion: Default

Tentative Ruling:

To deny without prejudice.

IN THE EVENT THAT ORAL ARGUMENT IS REQUESTED THEY WILL BE HELD ON TUESDAY, OCTOBER 4, 2016 AT 3:30 IN DEPT. 503.

Explanation:

No request for court judgment has been filed. This must be done on Judicial Council form CIV-100, and is a separate step from the application for default, even though the same form is used. (Code Civ. Proc. §585(b.) Without this form, the Court may not proceed with a default prove-up.

Also, Plaintiff has produced no supporting evidence for the judgment sought. (See *Taliaferro v. Hoogs* (1963) 219 Cal.App.2d 559, 560.) Fresno County Superior Court prefers to hear default prove-ups via declaration, even when a court judgment is sought. (See Superior Court of Fresno County Local Rules, rule 2.1.14.) When submitting a matter for default judgment on declarations, the parties must comply with California Rules of Court, rule 3.1800, and submit the required material together as a single packet. (Ibid.) Default packets should be filed with the clerk's office at least ten court days before the hearing. (Superior Court of Fresno County Local Rules, rule 2.1.14.)

Pursuant to California Rules of Court, rule 3.1312 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 09/20/16
(Judge's initials) (Date)

(29)

Tentative Ruling

Re: ***Terry Rodriguez v. Del Rey Farming, LLC, et al.***
Superior Court Case No. 15CECG02120

Hearing Date: September 27, 2016 (Dept. 503)

Motion: Summary judgment or adjudication

Tentative Ruling:

The Court declines to rule on the instant motion, as jurisdiction appears to properly be with the Workers' Compensation Appeals Board. (Lab. Code §5300.)

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.

**IN THE EVENT THAT ORAL ARGUMENT IS REQUESTED THEY WILL BE HELD ON TUESDAY,
OCTOBER 4, 2016 AT 3:30 IN DEPT. 503.**

Tentative Ruling

Issued By: A.M. Simpson on 09/26/16
(Judge's initials) (Date)

(28)

Tentative Ruling

Re: ***Manmohan, et al. v. Anheuser-Busch, et al.***

Case No. 14CECG03039

Hearing Date: September 27, 2016 (Dept. 503)

Motion: By Defendant Donaghy Sales to Seal Court Records.

Tentative Ruling:

To continue the motion to October 13, 2016 at 3:30 p.m. in Department 503. Defendant Donaghy may file an amended declaration specifically enumerating the facts to be withheld and the specific reasons for withholding them for purposes of the motion to seal court records by October 4th, 2016. Any objection to this Declaration must be filed by October 11th, 2016.

IN THE EVENT THAT ORAL ARGUMENT IS REQUESTED THEY WILL BE HELD ON TUESDAY, OCTOBER 4, 2016 AT 3:30 IN DEPT. 503.

Explanation:

[Note- As of September 23, 2016, no opposition to this motion appears in the Court's files.]

Defendant Donaghy Sales, Inc. is moving to seal certain portions of Court records concerning Plaintiffs' motion for class certification. Co-Defendant Anheuser-Busch has filed a joinder in this motion.

It appears that the parties have followed the procedures set forth in California Rule of Court 2.551.

California Rule of Court 2.550 delineates the findings that must be made for a court to order records filed under seal:

- (a) The existence of an overriding interest that overcomes the right of public access to the record;
 - (b) The overriding interest supports sealing the record;
 - (c) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
 - (d) The proposed sealing is narrowly tailored;
 - (e) No less restrictive means exist to achieve the overriding interest.
- (Cal. Rule of Court 2.550, subd. (d).)

Generally speaking, one example of an "overriding interest" would be to protect trade secrets. (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 300.)

However, a moving party must present "specific enumeration of the facts to be withheld and the specific reasons for withholding them." (*H.B. Fuller Co. v. Doe* (2007) 151 Cal.App.4th 879, 894.) The declaration in support of the motion merely states that that the information sought to be sealed constitutes trade secret protected information. However, there is nothing in the declaration to indicate that Defendant has made any efforts to protect the information or that the information is not currently in the public domain. (*E.g., Providian, supra*, 96 Cal.App.4th at 304.) This declaration does not therefore meet the threshold requirement regarding "specific enumeration of the facts to be withheld [or] the specific reasons for withholding them."

Therefore, the hearing is continued two weeks, to provide Defendant the chance to file an amended declaration meeting the requirements of *H.B. Fuller* and *Providian*.

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 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 09/26/16
(Judge's initials) (Date)