

**Tentative Rulings for May 5, 2009**  
**Departments 97A, 97B, 97C & 97D**

---

---

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).)

08CECG02092      *Jerry Fuentes v. James Yates, et al.* (Dept. 97C)

09CECG01193      *Fresno-Madera v. Double H Farms* (Dept. 97D)

---

---

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

07CECG00360      *Jensen v. Lane* (Dept. 97A) Hearing on motion to quash is continued to Thursday, May 7, 2009, at 3:30 p.m. in Department 97A

08CECG01843      *Church v. R&D Mendes Enterprises, Inc.* (Dept. 97D) Hearing on motion to bifurcate is continued to Wednesday, May 6, 2009, at 3:30 p.m. in Department 97D

---

(Tentative Rulings begin at the next page)

(20)

**Tentative Ruling**

Re: ***Feliu v. Phetvixay***  
Superior Court Case No. 09CECG00355

Hearing Date: **May 5, 2009 (Dept. 97A)**

Motion: Defendant's Anti-SLAPP Motion

**Tentative Ruling:**

To grant as to plaintiff's first cause of action for intentional infliction of emotional distress, second cause of action for malicious prosecution and third cause of action for false imprisonment. To deny as to the fourth cause of action for assault and battery. (CCP § 425.16.)

**Explanation:**

Though included in one attachment for Intentional Tort, the complaint attempts to plead four different causes of action for (1) intentional infliction of emotional distress, (2) malicious prosecution, (3) false imprisonment and (4) assault and battery. The first three causes of action are premised on defendant's allegedly false reports to police that resulted in plaintiff's arrest and incarceration for six months. The cause of action for assault and battery is based on the allegation that defendant attempted to run plaintiff over with a car driven by one Christy Vang.

The court finds that defendant has satisfied her burden of showing that the claims based on defendant's reports to the police arise from protected activity under CCP § 425.16(e). (*Chabak v. Kizilbash* (2007) 154 Cal.App.4th 1502, 1511.)

The court must grant the motion if plaintiff fails to produce admissible evidence to substantiate his claim or if defendant shows that plaintiff cannot prevail as a matter of law based on an affirmative defense. (*Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1570.) Having failed to file any opposition, plaintiff has failed to meet his burden of establishing a "probability" that he will prevail on these claims. (CCP § 425.16(b).)

Defendant, however, completely ignores in her motion the claim based on the allegation that defendant attempted to have plaintiff run over with a car. Any such action or activity by defendant is not protected under CCP § 425.16(e). Even though plaintiff has failed no opposition, defendant fails to make a prima facie showing that the cause of action is one arising from protected activity, and accordingly the burden does not shift to plaintiff to show probability of success on



## Tentative Ruling

(17)

Re: ***Diocese of San Joaquin v. Schofield, et al.***,  
Superior Court Case No. 08 CECG 01425

Hearing Date: May 5, 2009 (Dept. 97A)

Motion: Demurrer to First Amended Cross-Complaint

### **Tentative Ruling:**

To sustain the demurrer without leave to amend as to the first cause of action. To sustain the demurrer without leave to amend as to the second cause of action as to the Labor Code section 2802 indemnity. To sustain the demurrer with leave to amend as to the contingent contractual indemnity alleged in the second cause of action. A Second Amended Complaint shall be filed and served within 10 days of service of this order. New allegations shall be in boldface type.

### **Explanation:**

A demurrer is made under Code of Civil Procedure section 430.10, and is used to test the legal sufficiency of the complaint or other pleading. (Weil & Brown, *Civil Procedure Before Trial* (Rutter Group 2007) "Attacking the Pleadings" § 7:5.) The demurrer admits the truth all material facts properly pleaded, but not mere contentions, deductions or conclusions of fact or law. In addition to the face of the pleading, the court may also consider matters judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

#### *First Cause of Action – "Tort of Another"*

On general demurrer, the court determines if the essential facts of any valid cause of action have been stated. (Weil & Brown, *supra*, § 7:39; *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 572; Code Civ. Proc. § 430.10(e).) Leave to amend should be granted if there is a reasonable possibility that plaintiff could state a cause of action. (*Blank v. Kirwan, supra*, 39 Cal.3d at 318.)

"Tort of another" is not itself a tort. It is a doctrine which is a limited exception to the general rule that each party to a lawsuit must party or her own attorney's fees. (See *Gray v. Don Miller & Assoc., Inc.* (1984) 35 Cal.3d 488, 505, 507.) It does not state an independent cause of action:

'Under California law, it is a well-established principle that attorney fees incurred through instituting or defending an action as a direct result of the tort of another are recoverable damages. [citation]' [citation.] Attorney fees in this context are to be distinguished from "attorney's fees qua attorney's fees," such as those the plaintiff incurs in suing the tortfeasor defendant. [citation.] Rather, when a defendant's tortious conduct requires the plaintiff to sue a third party, or defend a suit brought by a third party,

attorney fees the plaintiff incurs in this third party action “are recoverable as damages resulting from a tort in the same way that medical fees would be part of the damages in a personal injury action.” [citation.]

(*Third Eye Blind, Inc. v. Near North Entertainment Ins. Services, LLC* (2005) 127 Cal.App.4th 1311, 1324-1325.)

The “tort of another” doctrine does not permit the recovery of attorney’s fees where there is no tortious conduct or no duty owed. (*Lubner v. City of Los Angeles* (1996) 45 Cal.App.4th 525, 534–535 [attorney fees not recoverable where defendant’s conduct was not a tortious act]; *Sooy v. Peter* (1990) 220 Cal.App.3d 1305, 1313–1314 [attorney fees not recoverable where defendant attorney owed no duty of care to plaintiff].)

Cross-complainants assert that the torts from which the “tort of another” damages depends are fraud and misrepresentation. Paragraph 15 of the First Amended Cross-Complaint alleges that the Episcopal Church and its alter ego falsely and fraudulently misrepresented to the Diocese of San Joaquin and Lamb that they were the true successors in interest of the original Diocese of San Joaquin and Bishop Schofield, causing them to institute the present litigation.

However, funding and instigating litigation is not a tort. “It is well settled the First Amendment creates a privilege from civil liability for actions constituting the exercise of the right to petition the government for redress of grievances [citation] and this right encompasses the act of filing a lawsuit whether it be to vindicate individualized wrongs or draw attention to issues of broad public significance and interest.” (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 820, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68 fn. 5.)

In *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118 the California Supreme Court made it clear there was no tort liability outside of malicious prosecution for inducing, encouraging and supporting a lawsuit involving a “colorable claim.” (*Id.* at p. 1136.) In holding the petition privilege applicable to a defendant who finances litigation the court stated: “It is important to remember what PG&E is trying to achieve through this lawsuit. It seeks to enjoin Bear Stearns from further participation in the lawsuit in order to avert what it considers to be the irreparable harm of an adverse judgment. It is essentially seeking to abort the lawsuit by starving the litigant of funds. In *Sierra Club v. Butz*, [supra], too, there were, doubtless, persons who induced the representatives of the club to bring the action, and who provided financial assistance in support of the lawsuit, but were not named parties. Yet it would defeat the purpose of assuring free access to the courts, and cause a flood of oppressive derivative litigation, to assess tort liability for their activities.” (*Ibid.*) “We are satisfied that the malicious prosecution cases strike the appropriate balance between the right to free access to the court and the interest in being

free from the cost of defending litigation.” (*Id.* at p. 1137.) Let the parties be on notice that this court intends to take judicial notice of the Third Amended Complaint in this case. The court concludes that this complaint presents a “colorable claim.”

Nor have cross-complainants established any sort of fraud or misrepresentation. “To establish a claim for deceit based on intentional misrepresentation, the plaintiff must prove seven essential elements: (1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant made it, or the defendant made the representation recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff reasonably relied on the representation; (6) the plaintiff was harmed; and (7) the plaintiff’s reliance on the defendant’s representation was a substantial factor in causing that harm to the plaintiff.” (*Manderville v. PCG&S Group, Inc.* (2007) 146 Cal.App.4th 1486, 1498.)

Here, the allegedly fraudulent misrepresentations were made to the Diocese of San Joaquin and Lamb, not to cross-complainants. (Cross-Complaint ¶ 15.) Cross-complainants are unable to show reliance on the representations or that cross-defendants intended them to rely on the representations.

Because it is the plaintiff’s (or cross-complainant’s) burden to show that the complaint is capable of amendment, the court sustains the demurrer to this cause of action without leave to amend. There is no possibility of stating a claim for inciting and funding litigation absent an action for malicious prosecution.

### *Second Cause of Action – Contingent Indemnity*

Cross-complainants have two theories of liability in this cause of action. The first is that the Diocese of San Joaquin is liable for Schofield’s attorney’s fees in the main action because of Labor Code section 2802. That section provides, in relevant part:

An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.

(Lab. Code, § 2802, subd. (a).)

Cases interpreting section 2802 hold that it “requires an employer to indemnify an employee who is sued by third persons for conduct in the course and scope of his or her employment.” (*Cassady v. Morgan, Lewis & Bockius LLP* (2006) 145 Cal.App.4th 220, 230.) Cross-complainant’s theory is that the





(21)

**Tentative Ruling**

Re: ***Garza, et al. v. Walker, et al.***  
Superior Court Case No. 08 CECG 02514

Hearing Date: Tues., May 5, 2009 (**Dept. 97D**)

Motion: Defendant's Motion to Compel Responses

**Tentative Ruling:**

To GRANT motion to compel responses to Form Interrogatories, Set One. (Code Civ. Proc. §§ 2030.290.)

To GRANT motion to compel responses to Request for Production of Documents, Set One. (Code Civ. Proc. § 2031.300.)

Within 10 days, Plaintiff Monica Garza shall serve initial responses to Form Interrogatories, Set One, and Request for Production of Documents, Set One, without objection, and shall produce all documents in their possession or under their control responsive to the requests for production. All objections are waived.

To impose monetary sanctions in the amount of \$ 236.00 in favor of Defendant Richard Walker and against Plaintiff Monica Garza to be paid to Defendant Richard Walker within 30 days of service of the minute order by the clerk. (Code Civ. Proc. §§ 2023.010, 2023.030, subd. (a), 2033.280, subd. (c).)

Defendant Walker shall pay an additional filing fee of \$ 40.00 to be due and payable to the court clerk within 30 days of service of the minute order by the clerk. (Gov. Code § 70617, subd. (a).)

**Explanation:**

On December 24, 2008, Defendant served his Form Interrogatories, Set One, and Request for Production of Documents, Set One. Plaintiff Garza has not responded to the discovery. (See Motion to Compel, Piekut Decl., ¶¶ 3, 5, 7, 8.) Accordingly, an order compelling Plaintiff Garza to provide initial responses, without objections, is warranted. (Code Civ. Proc. §§ 2030.290, subd. (a), 2031.300, subd. (a).)

The motions are unopposed.

Reasonable sanctions must be imposed on Plaintiff. (Code Civ. Proc. §§ 2023.010, subd. (d), 2023.030, subd. (a).)

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:** DRF **on** 5-1-09.  
(Judge's initials) (Date)

(20)

**Tentative Ruling**

**Re:** *Nshan Minasian v. Club One Casino, Inc.*  
Case no. 08CECG02089

**Hearing Date:** **May 5, 2009 (Dept. 97B)**

**Motions:** By plaintiff for terminating, evidentiary, issue or monetary sanctions

**Tentative Ruling:**

To grant requested evidentiary and issue sanctions. Plaintiff shall submit a revised proposed order omitting terminating sanctions, jury instructions, and monetary sanctions, but including the issue/evidence sanctions regarding the special interrogatories and request for production of documents, within 15 days of the court's order.

**Explanation:**

On 10/3/08 plaintiff served on defendant form interrogatories, special interrogatories, request for production of documents. Defendant served no response. On 2/5/09 the court granted plaintiff's motion to compel initial verified responses within 10 days of service of the order. Defendant served late and unverified responses to the special interrogatories and request for production of documents. No response has been served to the form interrogatories.

On 12/19/08 plaintiff served on defendant request for admissions. No timely response was served, so plaintiff filed motion for deemed admissions, hearing set for 3/3/09. Because defendant served a response on 2/25/09, the motion for deemed admissions was denied. But it turns out the response was unverified, and no verification has yet been provided.

Despite multiple requests for the verifications, none have been provided.

Though defendant provided unverified responses, that is not sufficient to comply with its obligations under the Discovery Act. Responses to interrogatories, inspection demands and requests for admission must be signed under oath by the party to whom they are directed. (CCP §§ 2030.250(a), 2031.250(a), 2033.240(a).) An unverified response is tantamount to no response at all. (*Appleton v. Superior Court* (1988) 206 Cal.App.3d 632, 636.)

Plaintiff requests terminating sanctions, or alternatively evidentiary/issue sanctions. Courts frown upon terminating sanctions for failure to



**Tentative Ruling**

Re: ***Barnes, et al. v. Bessinger, et al.***  
Superior Court Case No. 07 CECG 01464 DRF

Hearing Date: Tues., May 5, 2009 (**Dept. 97 D**)

Motion: Defendant Broadspire Services Inc.'s UNOPPOSED Motion for Leave to File Second Amended Answer.

**Tentative Ruling:**

To GRANT. (CCP 473; CCP 576; CRC 3.1324.)

**Explanation:**

Defendant Broadspire makes a prima facie showing that it is necessary to amend its answer to modify the affirmative defenses alleged therein. Defendant notes correctly that courts should exercise liberality in allowing amendments to answers at any stage of the proceeding, for a defendant denied leave to amend is permanently deprived of a defense. (**Hulsey v. Koehler** (1990) 218 Cal.App.3d 1150, 1159.)

Plaintiff has filed no Opposition. There is no showing of prejudice to Plaintiff if the amendment is permitted.

Pursuant to CRC 3.1312(a) and CCP 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: DRF on 5-1-09  
(Judge's initials) (Date)

(19)

**Tentative Ruling**

Re: ***Yarbrough v. California Capital Ins. Co.***  
Case No.: 08CECG00357

Hearing Date: May 5, 2009 (**Dept. 97A**)

Motions: Motion of Defendant for summary adjudication of claim for breach of the covenant of good faith and fair dealing, and of the claim for punitive damages.

**Tentative Ruling:**

To deny as to both issues.

**Explanation:**

**1. Evidentiary Objections**

Defendant's objections labeled Nos. 1, 2, 3, 4, 12, 13, 14, 15, 16, and 17 are overruled. The experts laid a foundation by relating what they reviewed and that they inspected the home, as well as their qualifications to do so, including prior testimony as experts. It is also permissible for them to give their personal knowledge of the area and the storms that they themselves experienced.

There is no personal knowledge requirement for expert testimony – other than that their conclusions are their own. They may rely on hearsay, papers, roofing repairs they had to make or knew of, etc., to form that opinion. Evidence Code section 801(b), *People v. Thang Van Bui* (2001) 86 Cal. App. 4th 1187, 1196. Further, the materials they relied on or that they dispute are not “hearsay” in that they are not offered to prove the truth of, for example, the report of Independent Roof Inspections, Inc. (“IRI”).

Objection No. 5 is sustained. Objection No. 6 is overruled. Objection No. 7 is sustained, except as to Mr. Yarborough's statement that he was asked no questions by claim adjuster Eastwood or the IRI representative. Objection No. 8 is overruled – that there is conflicting evidence conflicting with other evidence is not a ground for “objection.” Objection No. 9 is overruled. Objection No. 10 is sustained. Objection No. 11 is sustained only as to the hearsay grounds.

Objections Nos. 18, 19, 20, 21, and 23 are sustained. An attorney's opinion of his client's case is not evidence. Objection No. 22, wherein counsel advises as to other information he forwarded to the insurer for its consideration is overruled. An insurer duty of good faith to its insured is not suspended by litigation. *White v. Western Title Ins. Co.* (1985) 40 Cal. 3d 870; *Jordan v. Allstate Ins. Co.* (2007) 148 Cal. App. 4th 1062, 1076, fnt. 7.

## **2. Triable Issues of Fact**

Facts Nos. 5, 8, 13, and 16 are disputed.

On Fact No. 5, the date that the claim was reported is disputed, as Msrs. Eastwood and Yarbrough disagree as to the date in their respective declaration.

On Fact No. 8, there is no evidence to support the statement that the individual from Independent Roof Inspection, Inc. ("IRI") was a "senior inspector," or as to any of his qualifications, namely, whether he was licensed, his experience, etc. The report offered merely says he was an "associate." See Ex. A. The expertise of this associate is disputed by contrary evidence in Ex. C to Eastwood's declaration (noting that the roofing associate said the patio roofing was a year old when in fact, it was over a decade old) and by the declarations of plaintiffs' experts, Staggs, Busby, and Claborn, as well as of plaintiff as to the actual age of the roof.

Fact No. 13 is disputed in that the sole evidence of Eastwood's state of mind is his own verification, and there is evidence that demonstrates there is no basis on which Eastwood could solely rely on the report, as discussed above. Also, defendant's evidence is devoid of information from the claims file- other than the report, two denial letters and a letter from the insured. No communications with IRI are provided, nor is there any summary of what Mr. Eastwood himself saw when he inspected the roof, what conclusions he had, how he found IRI, what he knew about IRI, nor is there any evidence to show what basis, if any, Mr. Eastwood had for relying on IRI or its associate as an "expert" in roofing.

Civil Code section 437c(e) permits the Court to disregard evidence of state of mind if the sole evidence is statement of the person whose state of mind is in issue. The absence of supporting evidence from the claim file brings Evidence Code section 412 into play, as does the fact that the exhibits to Mr. Eastwood's declaration tend to show that the standard used to evaluate the pending insurance issue is contrary to the standard legally required in California since 1963. Such insurance standard would be known to the adjuster, not the IRI associate. There is also evidence from plaintiff and his experts that raises questions as to the roof damage location on the house, which differs from defendants.

Fact No. 16 is in dispute for the same reasons as Nos. 8 and 13. Further, there is no evidence that Mr. Eastwood contacted his chosen expert for review of the new information, which then makes it impossible for him to rely on that expert in again denying the claim after the new information was submitted. Exhibits C and D reflect this dispute.

## **3. Legal Analysis**

### a. Standards to be Applied

Plaintiffs would be charged with proving unreasonable conduct by defendant at trial. But California law differs from federal law in that California requires positive evidence be produced by moving party on summary judgment, even if at trial the opposing party would have the burden of production. “While this state of evidence could have a bearing on whether real parties can prove their case at trial, it is irrelevant to the outcome of a motion under 437c, where the burden of proof is on the moving defendant, not plaintiff.” *Chevron USA v. Superior Court* (1992) 4 Cal. App. 4<sup>th</sup> 544 (overruled on other grounds in *Camargo v. Tiaarda Dairy* (1992) 25 Cal. 4th 1235, 1242).

“The defendant has shown that the plaintiff cannot establish at least one element of the cause of action by showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence: The defendant must show that the plaintiff **does not possess** needed evidence, because otherwise the plaintiff might be able to establish the elements of the cause of action; the defendant must also show that the plaintiff **cannot reasonably obtain** needed evidence, because the plaintiff must be allowed a reasonable opportunity to oppose the motion.”

*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal. 4th 826, 854, emphasis in original.

Where the moving party fails to meet its evidentiary burden, the burden never shifts to the other side and the motion for summary judgment must be denied. *Consumer Cause v. Smile Care* (2001) 91 Cal. App. 4<sup>th</sup> 454, 468; *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal. App. 4<sup>th</sup> 832, 840. Defendants’ recitation of an argument that “plaintiff must prove” is simply not correct at this point in the case. Further, the addition of new evidence with the reply must be ignored. Later offered, “corrected” evidence is not permitted. *Haney v. Aramark Uniform Services, Inc.* (5<sup>th</sup> Dist., 2004) 121 Cal. App. 4th 623, 636 - 638 (rev. denied); *Mills v. Forestex Co.* (5<sup>th</sup> Dist. 2003) 108 Cal. App. 4th 625, 640-641; *Belton v. Comcast Cable Holdings, LLC* (2007) 151 Cal. App. 4th 1224, 1244.

### b. Basic Rules for First Party Coverage Disputes

#### i. Introduction

Since this is a “first party” claim, the issue is whether the wind or something else was the “efficient proximate cause” of the damage. The policy here excludes damage caused “by rain . . . unless the building or structure first sustains wind or hail damage to its roof or walls through which the rain . . . enters . . .” The policy also states that if there are two causes of loss, one covered and one not, then the insurer will pay for the damage attributable to the covered cause.

There is more than one asserted cause of loss here. The first is wind, asserted by plaintiffs, and admitted to be secondary by the defendant's expert. The other causes are stated to be the age of the roof, and a bad installation on the "one year old patio roof" – which was, based upon the evidence proffered in this motion, actually a rolled material roof installed over the patio at the same time as the wood shake roof installed on the house more than a decade ago. The question is, pursuant to very long-established California law, which of those causes set in motion the chain of events that led to the loss, namely, the water intrusion into the home. As both roofs were there during prior storms without leaking, a jury could reasonably find that the cause which "set in motion the chain of events" was the wind. Only when the wind tore off tiles and tore holes in the underlying felt was there a leak.

A discussion of the "efficient proximate cause" analysis follows:

**(ii) Pertinent Statute**

"An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause." Insurance Code section 530. An insurance policy automatically includes, by operation of law, Insurance Code section 530, or any other Insurance Code statute. And any policy language which contradicts such provisions is void. *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal. 4th 747, *Galanty v. Paul Revere Life Ins. Co.* (2000) 23 Cal. 4th 368.

**(ii) Pertinent Case Law**

In *Sabella v. Wisler* (1963) 59 Cal. 2d 21, the homeowner's policy excluded "cracking" and "settling." The home at issue was built on improperly compacted fill, and when a sewer pipe began to leak, the fill settled badly, cracking the home's walls and foundation. The sewer pipe itself cracked because of settling of the fill. The Court found that the fill settled a lot faster than it would have under normal conditions due to the additional problems.

The Supreme Court found that the contractor was negligent in not compacting the fill. The Sabellas sued their homeowner's insurance company for not paying their damage claim. They argued that it was the sewer pipe break that was the efficient proximate cause of the damage. There was no exclusion for damage due to a broken sewer pipe or for damage due to contractor negligence.

The Court went back to its finding in *Brooks v. Metropolitan Life* (1945) 27 Cal. 2d 305, wherein a claim was made (and denied) under an accidental death policy that excluded deaths which were not direct and independent of all other causes, such as illness. The insured in that case died in his bed during a fire. He was confined to bed due to his cancer and narcotics he took for the pain. The Court

ruled that there was coverage, because the fire was the prime or moving cause of the death, or the “efficient proximate cause,” or the one that set in motion the chain of events resulting in the death. And it did so despite the “directly and independently” language.

The *Sabella* court also looked to *Norwich Union Fire Ins. Soc. V. Board of Comm.* (1944) 141 F. 2d 600, where corn in storage rotted. The policy excluded loss due to deterioration. But the cause of the rotting was a fire that destroyed a machine that aired the corn and prevented rotting. So coverage was found, under the same analysis. *Sabella* found coverage due to Insurance Code section 530, as although “excluded peril immediately brings about damage, where the operation of the excluded peril is caused by a peril insured against.” (See *Sabella*, *supra*, 59 Cal. 2d at 33.)

The California Supreme Court reconfirmed that this was the law with regard to first-party claims in *State Farm Fire & Casualty Co. v. Von Der Lieth* (1991) 54 Cal. 3d 1123 and *Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal. 3d 395. It referred to the “predominate cause” in those case. Each of these cases involved an exclusion for earth movement along with coverage for contractor negligence, both of which were involved in the damage.<sup>1</sup>

There are numerous other cases that follow these rules. In *Howell v. State Farm Fire & Casualty Co.* (1990) 218 Cal. App. 3d 1446 (*rev. denied*), the insurer had an exclusion that tried to bar coverage where any link in the causation chain was related to earth movement. The Howell’s home was damaged by a landslide, which was in turn caused by a fire that destroyed the trees holding the slope in place. The Court refused to follow the exclusion’s language as it violated Insurance Code section 530, as found in *Sabella* and *Garvey*, in that it tried to exclude even damage caused by a covered peril so long as an excluded peril was also involved.

Accord *Palub v. Hartford Underwriters Ins. Co.* (2001) 92 Cal. App. 4th 645 – weather (a covered peril) caused the earth movement (an excluded peril) which damaged the home – coverage required.

In *Sauer v. General Ins. Co.* (1964) 225 Cal. App. 2d 275, the insurer denied a claim where a foundation had settled, the settling being caused by water pipe’s leaking. The trial court entered judgment in favor of the insurer, but the Court of Appeal reversed, based on Insurance Code section 530, and found that it was the covered water leak that was the efficient proximate cause of the damage. The policy there purported to exclude damage so long as settling even “contributed to” the problem.

---

<sup>1</sup> Defendant’s case of *Safeco Ins. Co. v. Guyton* (9<sup>th</sup> Cir. 1982) 692 F.2d 551, 554, decided 27 years ago, notes that “California courts have found coverage where an included peril sets in motion a ‘chain of events’ that includes the occurrence of an excluded peril and ultimately results in the loss.”

*Garvey, Sabella, Howell, and Sauer* were all cited by the California Supreme Court in 2005 in *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal. 4th 747, 753 for the proposition that: "Policy exclusions are unenforceable to the extent that they conflict with section 530 and the efficient proximate cause doctrine."

Based upon the evidence submitted and given the existence of all factors referenced by IRI, it seems, but for an unusually destructive storm, it would be difficult to find that anything other than the wind storm set the "chain of events leading to the loss" in motion. Under the appropriate standard, the only applicable standard, it would be difficult for a jury to find that there was no coverage. Under these circumstances, it simply does not matter what is the "primary" or "secondary" cause.

### c. Standard for Evaluating Bad Faith

As noted in one of the cases cited by defendant, "[A]n insurer's bad faith is ordinarily a question of fact to be determined by a jury by considering the evidence of motive, intent and state of mind . . ." *Dalrymple v. United Serv. Auto. Assn* (1995) 40 Cal. App. 4th 497, 511 (*review denied*). "It is apparent that whether an insurer's denial of a claim is **unreasonable** is dependent upon the **facts** in each case. The issue remains a question of fact unless only one inference may be drawn from the evidence." *Paulfrey v. Blue Chip Stamps* (1983) 150 Cal. App. 3d 187, 194, emphasis in original. "[T]he matter of good faith/bad faith may in specific instances be treated as an issue of law . . . but will ordinarily be one of fact." *Walbrook Ins. Co. Ltd. v. Liberty Mutual Ins. Co.* (1992) 5 Cal. App. 4th 1445 at 1456-1467. Accord another of defendant's cases, *Chateau Chamberay Homeowners Ass'n v. Associated International* (2001) 90 Cal. App. 4th 335, 346.

One of the ways that an insurer breaches the covenant of good faith and fair dealing is failure to investigate the claim thoroughly. In *Egan v. Mutual Of Omaha Insurance Co.* (1979) 24 Cal. 3d 809, the Supreme Court noted that insurance of this type is purchased not for commercial gain, but for peace of mind. "To protect these interests it is essential that an insurer fully inquire into possible bases that might support the insured's claim." (*Id.* at 819.)

Another way an insurer breaches the covenant is by seeking "expert" opinion via a question which does not set forth the proper standard for coverage to guide that expert. Use of an improper standard is also evidence of bad faith. See *Moore v. American United Life Ins. Co.* (1984) 150 Cal. App. 3d 610, where a verdict of compensatory damages for bad faith and contract breach and \$2,500,000.00 in punitive damages was affirmed on appeal. There, the insurer relied on its own policy language, "language [that] misstated California law as it has existed since 1942." (*Id.* at 612.) The law on the efficient proximate cause standard has been in effect since at least 1963 – 43 years at the time the claim at issue was denied.

See also *Little v. Stuyvesant* (1977) 67 Cal. App. 3d 451. In that case, the insurer withheld information from the physician whose opinion it used to deny the claim. The insurer made an argument that reliance on the opinion defeated the bad faith claim as a matter of law. The Court there said "jury fully justified in finding defendant's conduct outrageous." (*Id.* at 462).

"Defendant urges that it did nothing more than decline to pay a disputed claim relying upon the opinions of the reputable physicians to whom it sent plaintiff for examination and that this it was privileged to do [citation omitted] That is one possible view of the evidence. Viewing the evidence most favorably to plaintiff . . . however, reasonable inferences may be drawn that defendant purposely ignored the great bulk of the . . . information it had and withheld that information from the [experts] it selected to examine plaintiff and that it sought only to justify its predetermined course of discontinuing disability benefit payments justly due plaintiff under the policy."

(*Id.* at 461-462.)

#### **d. Bad Faith Appears To Be a Jury Issue**

The question for the Court on a motion for summary adjudication of a bad faith cause of action is whether a reasonable jury could view the evidence in a fashion that supported a bad faith finding. See *Neal v. Farmers Ins. Exchange* (1978) 21 Cal. 3d 910, 921: "While some of the evidence was to the effect that Farmers did no more here than assert its legal position reasonably and in good faith, the jury herein clearly concluded to the contrary." There are four grounds presented by the arguments and evidence that could furnish a basis for a possible bad faith finding.

The first is that the insurer refused to follow its own policy language and expert, in that it refused to pay any part of the claim although its expert said there were roof shakes torn off by wind. The policy states that any part of damage attributed to a covered cause would be paid for by the insurer.

The second is the evidence that the insurer used a clearly erroneous standard for evaluating whether the claim was covered. That same evidence permits an inference that the insurer gave only that erroneous standard to its expert. Where there is a covered cause of loss and an excluded cause of loss, the question is not which cause was "primary." The standard is whether the covered cause "sets in progress the chain of events leading directly" to the loss. In short, would the loss have occurred absent the covered cause? It is the insurer, not the roofing company, that is charged with evaluating claims under the proper standard. The use of a "primary/secondary" analysis where the law has called for a different

standard for over 43 years would also allow a jury to find that defendant acted in bad faith.

The third is the evidence of a refusal to perform a thorough investigation. While there was an inspection, there is no evidence of any discussion of the storm or loss with the insureds, no evidence of any queries as to whether there had been any leaks before the high winds, no evidence of any discussion with the roofer hired by the plaintiffs, and no evidence of any investigation of the qualifications of the company or of person used to provide the opinion on which the defendant relies. Nothing from the claim file is presented except for the denial letters, the letter from the insured, and the IRI report.

“All of the challenged documentary evidence came from Employers' file. In deciding the basic issue of the case -- whether Employers acted in good faith . . . the jury was entitled to be advised as to exactly what information was in defendant's file, aside from the privileged communications with Employers' counsel. How else could they have properly determined whether Employers acted fairly and in good faith in its handling of the claim?”

*Richardson v. Employers Liab. Assur. Corp.* (1972) 25 Cal. App. 3d 232, 242.<sup>2</sup> There, the insurer there had argued that no such evidence was pertinent. While one would not need every document in the file, the absence of almost all documents from the claim file in this instance, where there is questionable behavior by the insurer, means that the insurer cannot meet its burden to show it acted in good faith as a matter of law for purposes of this motion.

#### **e. Punitive Damages**

The absence of almost all materials from the claim file also cause a problem here, where the insurer was required to disprove the existence of clear and convincing evidence of fraud, malice, or oppression. At trial, it will be the other way around, but it is not on summary adjudication. There is positive evidence that could allow a reasonable jury to find punitive damages liability.

The denial letter of February 2, 2006 (Ex. B to the Eastwood Decl.) says there is “no coverage applicable” because the roof “had signs of age and deterioration” and because the patio roof “appears to have been improperly installed and was not properly bonded or transitioned to the adjacent wood shake roof.” As noted, those conditions (if they existed at all), existed throughout several prior storms over a period of years, without causing any loss. Further, on page 5, the insurer falsely states that “there was no physical storm damage to the roof structure.” The IRI report stated there was indeed such damage – shakes blown off.

---

<sup>2</sup> Overruled as to finding there must be several emotional distress to allow damages for distress in *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal. 3d 566, 580, fnt. 10.

The insurer's adjuster does not mention any other information he has, what he saw when he did the inspection, nor does he say reference the "efficient proximate cause" in any fashion. He uses IRI opinion, which fails to identify the actual standard, and then misrepresents that standard to the insureds. Failure to state the proper standard is also fraud, as seen in the *Moore* case.

When the insurer gets more information (Ex. C to Eastwood Decl.), that conflicts with that stated by the IRI report (such as the age of the patio roof), with the damage to an area not connected to the patio, with the temporary repair which the IRI report called the "cause of damage" (and which the insureds stated actually stopped further damage), the insurer still does no investigation, does not talk to the insureds, does not pass the info along to IRI, and instead responds that it has all it needs to know and then denies the claim again. (Ex. D to Eastwood Decl.)

In this 2<sup>nd</sup> denial letter, the factual conflicts are not mentioned. Instead, the insurer refers the IRI report's assessment of the "primary" cause – but not the required standard, namely, of whether the wind was the cause that started the chain of events in motion that led to the loss. The insurer did admit that there was some wind damage this time, but calls it a "secondary contributory" factor. The insurer again appears to misrepresent the IRI report again, this time stating that IRI found that the "source and causes of the leaks" was "not an opening made by wind and hail." (See Ex. D at p. 3.)

In fact, the IRI report states that it felt that the installation problem was the "primary source of the reported interior water incursion . . ." but also that "secondary wind displacement of the wood shake material are possible secondary causes." The insurer refused to acknowledge the fact that the patio roof was not new – a fact which raises questions as to the quality of its "expert" and whether it was reasonable to rely on the IRI report – matters which the insurer was required to investigate thoroughly.

The type of fraud at issue for punitive damages does not necessarily constitute a cause of action for fraud. In *Pistorius v. The Prudential Ins. Co. of America* (1981) 123 Cal. App. 3d 541, 556, a failure to investigate was also at issue. The Court there found that "[A]n act of trickery or deceit, intentional misrepresentation, concealment or nondisclosure" will do for punitive damages liability. There is no requirement that the insured rely on the misstatement. Such misrepresentation need not even be to the insured – in *Pistorius*, the falsehood was conveyed to the Department of Insurance by the insurer.

In *Moore v. American United Life Ins. Co.*, *supra*, 150 Cal. App. 3d 610, 620, the insurer misrepresented the standard of total disability, "i.e., that a disability must prevent the insured from engaging in any occupation or employment for compensation, profit, or gain." A factor in upholding a punitive damages verdict



## Tentative Ruling

Re: ***Nurse Immigration Services, Inc. v. Corazon M. Banaag, etc., et al.***  
Superior Court Case No. 08CECG03696

Hearing Date: May 5, 2009 (Dept. 97A)

Motion: Motion to Set Aside Default and Default Judgment

### **Tentative Ruling:**

To grant defendant's motion to set aside the default entered on January 20, 2009 and the default judgment entered on February 3, 2009. To order defendant's attorney to pay the Law Offices of Stephen M. Denning, APC, a fee of \$933.75 for incurred legal fees and costs, which is payable within 30 days from the date of this order.

### **Explanation:**

California Code of Civil Procedure (CCP) section 473 (b) provides the court with broad discretion to set aside defaults and default judgments where they have been obtained through the party's or her attorney's mistake, inadvertence, surprise, or excusable neglect. Furthermore, CCP § 473 (b) adds, that if the party requesting the relief submits an "attorney affidavit / declaration of fault," then granting the relief is mandatory. This is due to the fact that the law favors disposition of cases on the merits, any doubts about applying CCP § 473 should be resolved in favor of the one seeking relief. (*Carli v. Superior Court* (1984) 152 Cal.App.3d 1095, 1099; *Flores v. Board of Supervisors* (1970) 13 Cal.App.3d 480, 483; *Waite v. Southern Pacific Co.* (1923) 192 Cal. 467, 470-471.)

Where the mandatory provisions of the statute are invoked, the court must grant relief, if the application is: 1) timely (i.e. within 6 months of the entry of the default and/or judgment); 2) in proper form (meaning, it includes a copy of the proposed pleading to be filed); and, 3) accompanied by an attorney's sworn affidavit/declaration attesting to his mistake, inadvertence, surprise, or neglect.

The attorney's mistake, inadvertence, surprise, or neglect need not be "excusable" (as would be necessary under the discretionary provisions); relief must be granted even where the default resulted from excusable neglect. (*Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1604; *Graham v. Beers* (1994) 30 Cal.App.4<sup>th</sup> 1656, 1660; Weil and Brown, Cal. Practice Guide: Civ.

Proc. Before Trial (Rutter 2008) Defaults, §§ 5:295, p. 5-72, and 5:328, p. 5-86.) Nor is the court concerned with the reasons for the attorney's mistake. (See, Weil and Brown, Cal. Practice Guide: Civ. Proc. Before Trial (Rutter 2008) Defaults, §§ 5:295, p. 5-72.) As long as the attorney's action or omission has a causal link to the entry of default, the mandatory relief is available.

In the instant case, all necessary prongs are met for granting the relief requested under the mandatory provisions of CCP § 473 (b).

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:** \_\_\_\_\_ **AMC** \_\_\_\_\_ **on** \_\_\_\_\_ **May 1, 2009** \_\_\_\_\_.  
(Judge's initials) (Date)

(21)

**Tentative Ruling**

Re: ***Kahn v. Clear Creek Oil & Gas, Inc, et al.***  
Superior Court Case No. 08 CECG 02414

Hearing Date: Tuesday, May 5, 2009 (**Dept. 97D**)

Motion: Plaintiff's Demurrer to the First Amended Answer

**Tentative Ruling:**

To SUSTAIN, with leave to amend, demurrer to the first and twenty-second affirmative defenses. (Code Civ. Proc. § 430.20, subd. (a) and (b).)

To OVERRULE demurrer to the second, third, seventh, eighth, ninth, twelfth, thirteenth, fourteenth, fifteenth, seventeenth, eighteenth, nineteenth, twentieth and twenty-first affirmative defenses. (Code Civ. Proc. § 430.20, subd. (a) and (b).)

Defendants are granted 10 days' leave to file the Third Amended Answer. The time in which the answer may be amended will run from service by the clerk of the minute order. All new allegations in the Third Amended Answer are to be set in **boldface** type.

**Explanation:**

**1. First Affirmative Defense**

Defendants have not pleaded facts sufficient to constitute an affirmative defense for negligence. Defendants have not alleged the negligent act and the causal connection. (*Courtell v. McEachen* (1959) 51 Cal.2d 448, 465-466. See also 5 Witkin, Cal. Proc. (5th ed. 2008) Pleading § 1103.)

**2. Second Affirmative Defense**

Defendants have pleaded facts sufficient to constitute an affirmative defense for mitigation. The duty of care may be alleged by stating that the act was negligently done. (*Rannard v. Lockheed Aircraft Corp.* (1945) 26 Cal.2d 149, 157. See also 4 Witkin, *supra*, Pleading § 596.) The pleader must indicate the acts or omissions, which were negligently performed. (*Guilliams v. Hollywood Hospital* (1941) 18 Cal.2d 97, 101.)

### **3. Third, Twelfth, Thirteenth, Twentieth and Twenty-First Affirmative Defenses**

Defendants have pleaded facts sufficient to constitute the affirmative defense of mitigation. (See *Green v. Smith* (1968) 261 Cal.App.2d 392, 397.)

Defendants have not pleaded facts sufficient to constitute the affirmative defenses for release (twelfth), ratification (thirteenth), forced business necessity and economic conditions (twentieth), and interference (twenty-first). However, the court overrules the demurrer to these affirmative defenses because the facts pleaded are duplicative to the affirmative defense for mitigation. (See *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38-39.)

Should Defendants file a Third Amended Answer, Defendants may omit the duplicate affirmative defenses or amend the facts to plead the intended affirmative defenses.

### **4. Seventh Affirmative Defense**

Defendants have pleaded facts sufficient to constitute an affirmative defense for assumption of risk. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 326.)

### **5. Eighth Affirmative Defense**

Defendants need not plead specific facts to support the affirmative defense for failure to plead facts sufficient to constitute a cause of action.

### **6. Ninth Affirmative Defense**

Defendants have pleaded facts sufficient to constitute an affirmative defense for laches. (See *Fry v. Board of Education* (1941) 17 Cal.2d 753, 761.)

### **7. Fourteenth Affirmative Defense**

Defendants have pleaded facts sufficient to constitute an affirmative defense for contributory negligence of a third party. (*Rannard v. Lockheed Aircraft Corp.* (1945) 26 Cal.2d 149, 157. See also 4 Witkin, *supra*, Pleading § 596.)

### **8. Fifteenth Affirmative Defense**

Defendants have pleaded facts sufficient to constitute an affirmative defense for standing. Plaintiff brings this action on the purchase of Clear Creek stock. (Complaint, ¶¶ 13, 22, 30, 37, 45, 54, 61, 70.)

"Shareholders have no direct cause of action against persons who have harmed the corporation; but, through the vehicle of the derivative suit, they may 'secondarily ' or '*derivatively*' enforce the corporation's rights and redress its injuries where management fails or refuses to do so (usually because management is alleged to have inflicted the harm).)

(Friedman, Cal. Practice Guide: Corporations (The Rutter Group 2008) ¶ 6:603. See Corp. Code § 800.)

### **9. Seventeenth Affirmative Defense**

Defendants have pleaded facts sufficient to constitute an affirmative defense for superseding events.

### **10. Eighteenth, Nineteenth and Twentieth Affirmative Defenses**

Although Defendants identify the eighteenth affirmative defense as privilege, the court finds that Defendants have pleaded facts sufficient to constitute an affirmative defense for the business judgment rule. (*Burt v. Irvine Co.* (1965) 237 Cal.App.2d 828, 851-852.)

Defendants have not pleaded facts sufficient to constitute the affirmative defenses for forced business necessity and economic conditions (nineteenth) and consent (twentieth). However, the court overrules the demurrer to these affirmative defenses because the facts pleaded are duplicative of the affirmative defense for the business judgment rule. (See *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38-39.)

Should Defendants file a Third Amended Answer, Defendants may omit the duplicate affirmative defenses or amend the facts to plead the intended affirmative defenses.

### **11. Twenty-Second Affirmative Defense**

Defendants have not pleaded facts sufficient to constitute an affirmative defense for the statute of limitations pursuant to Code of Civil Procedure sections 337 and 338. The statute of limitations period is: (1) four years for an action upon any contract (Code Civ. Proc. § 337); and (2) three years for an action upon, *inter alia*, fraud (Code Civ. Proc. § 338).

### **12. Code of Civil Procedure § 431.30, subd. (g)**

Code of Civil Procedure section 431.30, subdivision (g) is not a proper ground for demurrer. (Code Civ. Proc. § 430.20.)

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:** DRF **on** 5-3-09.  
(Judge's initials) (Date)

**Tentative Ruling**

(RA#24)

Re: **Pro Drywall Systems, Inc. v. Rod Musson, et al.**  
Court Case No. 08CECG03956

Hearing Date: **May 5, 2009 (Dept. 97A)**

**Motion:**

- 1) Rod Musson's Petition to Compel Arbitration
- 2) Rod Musson's Motion for Order to Stay Proceedings in Pending Action Until Arbitration Completed

**Tentative Ruling:**

Both motions are ordered off calendar per the Stipulation and Order signed on May 4, 2009.

An arbitration status conference hearing is set for Sept. 17, 2009 at 3:30 p.m. in Dept. 97A.

**Explanation:**

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), and Code of Civil Procedure section 1019.5, 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:** AMC **on** May 1, 2009.  
(Judge's initials) (Date)

(6)

**Tentative Ruling**

Re: ***Webb v. Frankenger***  
Superior Court Case No.: 08CECG02411

Hearing Date: May 5, 2009 (**Dept. 97C**)

Motion: Demurrer to complaint by Defendants David Frankenger and Ericksen, Arbuthnot, Kilduff, Day & Lindstrom, Inc.

**Tentative Ruling:**

To overrule, with Defendants granted 10 days' leave to answer. The time in which the complaint can be answered will run from service by the clerk of the minute order. The court intends to deny Defendants' request for judicial notice.

**Explanation:**

The complaint for legal malpractice, and negligent misrepresentation, alleges that Plaintiff Harold Webb ("Plaintiff") was served with a summons and complaint on or about September 14, 2005, in Fresno County Superior Court Case No. 05CECG02883. The complaint in that action alleged, among other things, that Plaintiff was engaged in doing business as A1 Building Ceramic Tile. In fact, Plaintiff was not engaged in that business and had not been affiliated with that business for several years and had not entered into any business in that name for several years or been involved in any of the transactions alleged in that complaint. (Complaint, ¶¶1-8.)

Plaintiff contacted Defendant David Frankenger, who was at that time working for Defendant Ericksen, Arbuthnot, Kilduff, Day & Lindstrom, Inc. ("Defendants"), and Defendants undertook Plaintiff's defense, as Plaintiff's attorney, in the other case. Defendants failed to file a timely response to the lawsuit and/or failed to timely move to have any default or default judgment which had been entered set aside and/or failed to appear at any hearings on such a motion and further, failed to timely appeal from the order denying relief from the default judgment, which resulted in a judgment being entered against Plaintiff in the amount of 61,289.05. (Complaint, ¶¶9-10.)

In the course of the litigation, and while time remained to rectify and set aside any default or default judgment, Defendants Michael Braa dba Michael Braa, a Professional Corporation (the "Braa Defendants"), assumed Plaintiff's defense from Defendants. The Braa Defendants likewise failed to act or move in a timely fashion to have any default or default judgment set aside and file a

responsive pleading on Plaintiff's behalf, also failed to timely appeal from the entry of the order denying the motion to set aside the default. As a result of the negligence of Defendants and the Braa Defendants, a final judgment was entered against Plaintiff which he should not have been liable for. (Complaint, ¶¶11-13.)

The second cause of action for negligent misrepresentation alleges that Defendants as well as the Braa Defendants each assured Plaintiff that they would take all necessary steps to protect his interests and to have any default or default judgment set aside or vacated, Plaintiff relied on their representations and did not seek other counsel to represent his interests, and in making the representations, Defendants and the Braa Defendants knew or should have known they would not perform their obligations to Plaintiff. As a consequence of their negligent misrepresentations, Plaintiff has suffered economic and non-economic damages. (Complaint, ¶¶14-18.)

Defendants demur to both the first cause of action for legal malpractice, as well as the second cause of action for negligent misrepresentation, both generally and specially. (Code Civ. Proc. §430.10, subds. (e), (f).) Defendants contend that because the complaint alleges that Plaintiff was served with the summons and complaint in the prior action, case no. 05CECG02883, "on or about September 14, 2005," that any legal malpractice would have occurred sometime between October 17, 2005, the date default was entered, and December 15, 2005, the date that Plaintiff filed his first motion to set aside the default in the prior action (when he was allegedly acting in pro per, see points and authorities p. 7:20-21).

Defendants contend that Plaintiff has not alleged the establishment or existence of an attorney-client relationship, that any specific act or omission fell below the standard of care, and that the alleged acts or omissions were the legal cause of Plaintiff's injury.

Defendants also contend the second cause of action for negligent misrepresentation is barred by the statute of limitations, in that any representations Defendants allegedly made to have any default or default judgment that had been entered against Plaintiff set aside or vacated must have occurred by October 14, 2005, 30 days after Plaintiff was served with the complaint in the prior action.

Defendants ask the court to judicially notice the complaint in this action, a portion of the "docket sheet" from this action, the complaint in the prior action, and a declaration of Timothy Webb filed in the prior action. The court denies the requests, as explained below.

The first request for judicial notice, the complaint in this action, shows the date the complaint was filed, on July 17, 2008. The second request for judicial

notice, the “docket sheet” from this action, indicates that “bad check monies” on the filing of the complaint in this action were collected on February 25, 2009. The second request for judicial notice is the complaint in the prior action, *Hamburger v. Webb*, Fresno Superior Court Case No. 05CECG02883, which shows it was filed on September 13, 2005. The final request for judicial notice is a declaration of Timothy Webb in the prior action, *Hamburger v. Webb*, Fresno Superior Court Case No. 05CECG02883, and it shows that it was filed in that case on April 17, 2006.

Defendants ask the court to take judicial notice of these matters to show that the matter is barred by the statute of limitations. The court cannot take judicial notice of these four items for the purpose intended by Defendants. Of the first three items sought to be judicially noticed, the court cannot accept the truth of factual matters that might be deduced from the thing judicially noticed. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1062.) The most the court could do is notice the existence of the act, not that what asserted in the act, or deducible from the act is true. (*Cruz v. County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134.) Thus, while the court could judicially notice the dates certain things occurred in the prior action, the court cannot deduce from these items the “fact” that the accrual of Defendants’ alleged legal malpractice, if any, would have necessarily occurred sometime between October 17, 2005, the date default was entered against Plaintiff in Case No. 05CECG02883, and “approximately” December 15, 2005, the date that pro per Plaintiff filed his first motion to set aside default in the prior action. (Points and authorities, page 7:17-20.) A demurrer is not the appropriate procedure for determining the truth of disputed facts or what inferences should be drawn when competing inferences are possible. (*Crosstalk Productions, Ltd. v. Jacobson* (1998) 65 Cal.App.4th 631, 635.)

Nor can the court take judicial notice of the facts contained in Timothy Webb’s declaration. “There exists a mistaken notion that taking judicial notice of court records means taking judicial notice of the existence of facts asserted in every document of a court file, including pleadings and affidavits. However, a court cannot take judicial notice of hearsay allegations as being true, just because they are part of a court record or file. A court may take judicial notice of the existence of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments.” The court cannot properly take judicial notice of the truth of statements made in a declaration. (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564-1565.)

Allegations that an event occurred “on or about” a date crucial for the statute of limitations overcome a general demurrer. (*Childs v. State of California* (1983) 144 Cal.App.3d 155, 160.) Here, the only date alleged in the complaint is September 14, 2005, the date “[o]n or about” Plaintiff was served with the summons and complaint in the prior action. (Complaint, ¶8.)

That the running of the statute of limitations cannot be deduced from the complaint or anything judicially noticeable is further supported by the law which provides that resolution of when actual injury occurs for statute of limitations purposes in a legal malpractice action is generally a question of fact. While the face of damage, rather than its amount is the relevant consideration, the character or quality of the injury must be manifest and palpable. Mere breach of a professional duty causing only nominal damage, speculative harm, or the threat of not-yet-realized future harm is insufficient. (*Adams v. Paul* (1995) 11 Cal.4th 583, 589.) Thus, while the default may have been entered against Plaintiff in the underlying action on October 17, 2005, it is a question of fact as to whether he had, at that point, suffered appreciable harm.

Further complicating the statute of limitations question is the possible tolling of the statute of limitations while an attorney continues to represent the client, which is also a question of fact. (3 Witkin, Cal. Procedure (5th ed. 2008) Actions, §643, pp. 847-850.) In addition to the already-discussed considerations, the complaint doesn't allege when the Defendants' representation of Plaintiff ended and when the Braa Defendants' representation began. The complaint doesn't allege when the time within which all the attorney Defendants' time to either rectify the default or default judgment by moving to set either one aside, or the time to appeal from the entry of judgment denying the motions to set either or both aside, expired. The causes of action for legal malpractice and negligent misrepresentation are otherwise properly pleaded. (Code Civ. Proc. §430.10, subd. (e).) The demurrer must be overruled.

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 A.M. Simpson** **5-1-09**  
**Issued By:** \_\_\_\_\_ **on** \_\_\_\_\_  
(Judge's initials) (Date)





(23)

**Tentative Ruling**

Re: ***Azario Lopez and Desiree Robles v. Spirit Halloween, Inc., et al.***

Superior Court No. 08 CECG 03230

Hearing Date: Tuesday, May 5, 2009 (**Dept. 97D**)

Motion: Defendants Shanda Pierce's and Onehalloweennight, Inc. dba Spirit Halloween Superstores' Demurrer to Plaintiff's Complaint

**Tentative Ruling:**

To OVERRULE Defendant's demurrer to Plaintiff's third and fourth causes of action pursuant to Code of Civil Procedure § 430.10(a).

**Explanation:**

The Defendants demur to the Plaintiff's third and fourth causes of action pursuant to Code of Civil Procedure § 430.10(a). The Defendants contend that the Court has no jurisdiction over the Plaintiff's third and fourth causes of action because both causes of action are covered by the exclusive remedy of workers' compensation. "A party may demur to a complaint on the basis that the trial court 'has no jurisdiction of the subject of the cause of action alleged in the pleading.' Subject matter jurisdiction is the power of the court over a cause of action or to act in a particular way. By contrast, the lack of subject matter jurisdiction means the entire absence of power to hear or determine a case; i.e. an absence of authority over the subject matter." (*Miller-Leigh LLC v. Henson* (2007) 152 Cal. App. 4th 1143, 1148-49.) "Where the complaint affirmatively alleges facts indicating coverage by the workers' compensation laws, if it fails to state additional facts negating application of the exclusive remedy provision, no civil action will lie and the complaint is subject to a general demurrer." (*Roberts v. Pup 'N' Taco Driveup*, 160 Cal. App. 3d 278, 284.)

Workers' compensation provides the exclusive remedy "when the misconduct attributed to the employer involves actions that are a normal part of the employment relationship, such as demotion, promotions, criticism of work practices, and frictions in negotiations involving grievances." (*Cole v. Fair Oaks Fire Protection District* (1987) 43 Cal. 3d 148, 160.) Normal employer actions causing injury do not fall outside the scope of the exclusivity rule merely by attributing to the employer a sinister intention, but actions by employers that have no proper place in the employment relationship cannot be made into a normal employer action by artful pleading. (*Fermino v. Fedco, Inc.* (1994) 7 Cal. 4th 701, 717-18.) "What matters, then, is not the label that might be affixed to the

employer conduct, but whether the conduct itself, concretely, is of the kind that is within the compensation bargain.” (*Fermino v. Fedco, Inc.* (1994) 7 Cal. 4th 701, 718.)

The Defendants argue that the Plaintiff’s third cause of action for negligence and Plaintiff’s fourth cause of action for negligent infliction of emotional distress are preempted by workers’ compensation law because negligence-based claims are always barred by the Workers’ Compensation Act. However, in both of Plaintiff’s causes of action for negligence and negligent infliction of emotional distress, the Plaintiff alleges that his injuries are caused by the Defendants’ sexual harassment. California law is clear that “discrimination in employment is *not* a normal incident of employment” and “sexual harassment is a form of sex discrimination.” (*Accardi v. Superior Court* (1993) 17 Cal. App. 4th 341, 347-48.) Consequently, Plaintiff’s third and fourth causes of action are not preempted by the exclusivity provisions of workers’ compensation law.

For this reason, the Court overrules the Defendants’ demurrer to the Plaintiff’s third and fourth causes of action pursuant to Code of Civil Procedure § 430.10(a).

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:** DRF **on** 5-3-09 .  
(Judge’s initials) (Date)

(21)

**Tentative Ruling**

Re: ***Hess, et al. v. Copper Beech Townhomes Communities  
Fourteen, LLC, et al.***  
Superior Court Case No. 07 CECG 00627

Hearing Date: Tuesday, May 5, 2009 (**Dept. 97C**)

Motion: Judgment on the Pleadings on the Cross-Complaint

**Tentative Ruling:**

To GRANT, with leave to amend, the motion for judgment on the pleadings to the first, second, third and fourth causes of action. (Code Civ. Proc. § 438, subd. (c).)

Cross-Plaintiff is granted 30 days' leave to file the First Amended Cross-Complaint. (Code Civ. Proc. § 438, subd. (h)(2).) The time in which the answer may be amended will run from service by the clerk of the minute order. All new allegations in the First Amended Cross-Complaint are to be set in **boldface** type.

**Explanation:**

This court, in its discretion, considers Cross-Plaintiff's late-filed opposition. (Cal. Rules of Court, rule 3.1300(d).)

Cross-Plaintiff is a contractor. (Bus. & Prof. Code § 7026.) The subcontract required that Cross-Plaintiff be licensed. (Bus. & Prof. Code § 7031, subd. (a).) Cross-Plaintiff has not alleged that is a licensed contractor. (*Ibid.* See also 1 Witkin (10th ed. 2005) Contracts § 491.)

Nothing on the face of the Cross-Complaint shows that owner-builder exception applies to Cross-Plaintiff. (Bus. & Prof. Code § 7031, subd. (a) & (b).) Cross-Plaintiff improved the subject property by constructing 23 buildings. (Cross-Complaint, Exhibit 1, "Subcontract," Exhibit E, ¶ 1. See also, *id.* at Exhibit C.) The owner-builder exception does not apply in this instance. (*Moon v. Goldstein* (1945) 69 Cal.App.2d Supp. 800, 803.)

As an unlicensed contractor, Cross-Plaintiff may not claim recovery for Cross-Plaintiff's alleged breach of contract. (*Pac. Custom Pools v. Turner Constr. Co.* (2000) 79 Cal.App.4th 1254, 1266.)





(6)

**Tentative Ruling**

Re: ***Avila v. McCaffrey Development, L.P.***  
Superior Court Case No.: 06CECG02707

Hearing Date: May 5, 2009 (**Dept. 97B**)

Motion: By Defendants, McCaffrey Development, L.P., and McCaffrey Construction, Inc., to enforce contractual judicial reference provision

**Tentative Ruling:**

To grant, in part, referring Plaintiffs David Baeseler, Roger L. Cianton and Robert Gomez, John Cullington, Mary French, Cheng K. Hy, Don Kim and Sengphlane, Robert Lang and Marsha Lang, Steven J. Lowe, Rudy Lucio and Mary Lucio, Patricia Mack, Gilbert Rodriguez and Linda S. Rodriguez, and Andrew Thomas and Ethel Thomas, only, to litigate issues of law and fact with Defendant McCaffrey Development, L.P., only. The parties are directed to comply with the terms of their contract(s) regarding judicial reference set forth at §12 of the purchase and sale agreement.

**Explanation:**

Neither procedural nor substantive unconscionability is shown. (*Trend Homes, Inc. v. Superior Court* (2005) 131 Cal. App. 4th 950, 955.)

Cases dealing with the waiver of arbitration clauses do not apply to cases dealing with waiver of judicial reference clauses. (*Spear v. California State Automobile Association* (1992) 2 Cal.4th 1035, 1043; *Trend Homes, Inc. v. Superior Court, supra*, 131 Cal. App. 4th 950, 964.) In any event, under the circumstances presented no waiver is shown.

Defendant McCaffrey Construction, Inc., was not a signatory to the sale/purchase agreement. It simply signed the agreement on behalf of McCaffrey Development, LP. Thus, it cannot enforce the judicial reference provision against Plaintiffs.

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**                      **DSB**                      **5-4-09**  
**Issued By:** \_\_\_\_\_ **on** \_\_\_\_\_.

(Judge's initials)                      (Date)

(23)

**Tentative Ruling**

Re: ***Rebecca and Victorino Baquiran v. Steven D. Mahlum, et al.***

Superior Court Case No. 05 CECG 01609

Hearing Date: Tuesday, May 5, 2008 (**Dept. 97C**)

Motion: Defendants La Jolla Group II's, David B. Hovannisian's, and Linda R. Hovannisian's Motion for Order Declaring the Rights and Obligations of Litigant Parties Pursuant to an Executed Settlement Agreement and for Entry of Judgment and for Attorneys' Fees, all Pursuant to Code of Civil Procedure § 664.6.

**Tentative Ruling:**

To DENY the Defendants' Motion for Order Declaring the Rights and Obligations of Litigant Parties Pursuant to an Executed Settlement Agreement and for Entry of Judgment and for Attorneys' Fees, all Pursuant to Code of Civil Procedure § 664.6.

**Explanation:**

Code of Civil Procedure § 664.6 provides that

If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.

Plaintiffs and Defendants entered into a "Mutual Release and Settlement Agreement." (See Exhibit A, Defendants' Motion for Entry of Judgment.) The Plaintiffs and Defendants were parties to pending litigation at the time that they entered into the Agreement. The Agreement is written and is signed by all of the parties to the lawsuit. The Court has jurisdiction to enforce the settlement and enter judgment because the action has not been dismissed and the parties explicitly stated in the Agreement that the Court retained jurisdiction to enforce the Agreement pursuant to Code of Civil Procedure § 664.6.

The Plaintiffs contend that the Court should deny the Defendants' motion to enforce the settlement because if the inspection of the subject property is not a term of the settlement agreement, then there is no enforceable agreement between Plaintiffs and Defendants. The Court has power to determine disputed factual issues, such as whether there was a settlement and to interpret and apply the terms of the settlement agreement, for purposes of ruling on a Section 664.6 motion. (See, *Fiore v. Alvord* (1985) 182 Cal.App.3d 561, 566; *Skulnick v. Mackey* (1992) 2 Cal.App.4th 884, 889; Weil & Brown, *California Practice Guide: Civil Procedure Before Trial* (The Rutter Group) "Settlement Procedures" § 12:977-978.) At the hearing, the trial judge may receive oral testimony, or may determine the matter upon declarations alone. (*Corkland v. Boscoe* (1984) 156 Cal.App.3d 989, 994.) "The 664.6 procedure allows a mini-trial on the enforceability of the settlement agreement". (Weil & Brown, *supra*, § 12:976.) On a motion to enforce the settlement, the trial court acts as a trier of fact and determines whether the parties have entered into an enforceable settlement agreement and upon what terms they have agreed. (*Osumi v. Sutton* (2007) 151 Cal.App.4th 1355, 1360.)

Specifically, the Plaintiffs argue that the Settlement Agreement signed by the Plaintiffs was only forwarded to Defendants' counsel to facilitate the scheduling of the property inspection and was, in fact, a rejection of the Settlement Agreement and a counter-offer to agree to the Settlement Agreement with the added term of an inspection of the subject property. The Plaintiffs state that because Defendants refused to allow inspection of the property, the Defendants rejected the counter-offer and no settlement agreement was truly reached.

As with all contracts, a settlement requires mutual consent. "The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe." (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811 (citing *Meyer v. Benko* (1976) 55 Cal.App.3d 937, 942-943).) A settlement agreement is not specifically enforceable unless the terms are sufficiently certain to make the precise act that is to be done clearly ascertainable. (*Id.* at p. 811-812.)

Here, no enforcement settlement agreement was reached between the Plaintiffs and Defendants. Rather, the Plaintiffs rejected the original settlement agreement and attempted to make a counteroffer. While it is perplexing that the Plaintiffs signed the settlement agreement, the Plaintiffs kept the original settlement agreement and only forwarded an electronically imaged copy of the agreement to the Defendants' attorney by e-mail. (Bruce Decl. ¶ 4.) Further, Daniel Bruce, Plaintiffs' attorney, sent a letter to the Defendants' counsel, which was included in the e-mail of the imaged copy of the signed settlement agreement. In the November 13, 2007 letter, Bruce stated: "Attached please find

a copy of the Mutual Release & Settlement Agreement ... which has been signed by my clients. Once my clients have done a walk-through of the property, and they are satisfied there is no major damage to the interior of the house, my office will forward the original executed Agreement.” (Bruce Decl., Exhibit B.) While there is no clause or term about any walk-through of the property in the settlement agreement, the Plaintiffs explicitly conditioned the forwarding of the original settlement agreement on a walk-through being done and finding no major damage to the interior of the house. This language establishes that the Plaintiffs made a counteroffer, and did not accept the terms of the Agreement when they signed the Agreement.

For this reason, the Court finds that the Plaintiffs and Defendants did not mutually consent to the terms of the Agreement, and, thus, there is no enforceable settlement agreement. Consequently, the Court denies the Defendants’ motion.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 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 A.M. Simpson 5-4-09**  
**Issued By:** \_\_\_\_\_ **on** \_\_\_\_\_  
(Judge’s initials) (Date)

**Tentative Ruling**

Re: **Menchaca v. Yates, et al.**  
Superior Court Case No. 08 CECG 01653 DRF

Hearing Date: Tues., May 5, 2009 (**Dept. 97 D**)

Motion: Demurrer of Defendants Yates and Igbinosa to the Complaint.

**Tentative Ruling:**

To OVERRULE the demurrer.

**Explanation:**

Defendants argue and present extensive evidence to establish that Plaintiff failed to comply with the claims presentation requirement of the Tort Claims Act. (Gov. Code 900, et seq.) However, Plaintiff has alleged at paragraph 9 of his form complaint that he has complied with the claims filing requirement. At the demurrer stage, the court may only entertain challenges to defects that appear on the face of the pleading. No other extrinsic evidence may be considered. (Blank v. Kirwan (1985) 39 Cal.3d 311, 318.)

Furthermore, the evidence offered by Defendants is not a proper subject of judicial notice under Evidence Code sections 451 or 452. The evidence does not consist of state or local laws, rules of professional conduct, rules of pleading, practice or procedure or the meaning of English or legal words or phrases. (Evid. Code 451.) The evidence does not consist of federal or state laws or regulations, official acts of federal or state government, acts of Congress, state or federal court records, rules of court, or laws of nations. The evidence does not concern facts and propositions of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute. The evidence does not concern facts and propositions that are NOT REASONABLY SUBJECT to dispute. (Evid. Code 452.) Defendants may offer extrinsic evidence on a motion for summary judgment or at trial, but not on a demurrer.

Pursuant to CRC 3.1312(a) and CCP 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: DRF on 5-3-09.  
(Judge's initials) (Date)

## Tentative Ruling

(17)

Re: ***Diocese of San Joaquin v. Schofield, et al.***,  
Superior Court Case No. 08 CECG 01425

Hearing Date: May 5, 2009 (Dept. 97A)

Motion: Summary Adjudication

### **Tentative Ruling:**

To grant.

### **Explanation:**

In ruling on a motion for summary judgment or summary adjudication, the court must “consider all of the evidence’ and all of the ‘inferences’ reasonably drawn therefrom and must view such evidence and such inferences ‘in the light most favorable to the opposing party.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) In making this determination, courts usually follow a three-prong analysis: identifying the issues as framed by the pleadings; determining whether the moving party has established facts negating the opposing party's claims and justifying judgment in the movant's favor; and determining whether the opposition demonstrates the existence of a triable issue of material fact. (*Lease & Rental Management Corp. v. Arrowhead Central Credit Union* (2005) 126 Cal.App.4th 1052, 1057-1058.)

The court's sole function on a motion for summary judgment is issue-finding, not issue-determination. The court must determine from the evidence submitted whether there is a ‘triable issue as to any material fact.’ (Code Civ. Proc. § 437c(c); *Zavala v. Arce* (1997) 58 Cal.App.4th 915, 926.) “A plaintiff moving for summary adjudication of a cause of action must establish each element of the cause of action. . . . If the moving party satisfies its initial burden, the burden shifts to the opposing party to set forth “specific facts showing that a triable issue of material fact exists. The court must view the evidence and reasonable inferences from the evidence in the light most favorable to the opposing party, as on a motion for summary judgment.” (*Syngenta Crop Protection, Inc. v. Helliker* (2006) 138 Cal. App. 4th 1135, 1154-55.)

### ***First Cause of Action for Declaratory Relief***

The first cause of action for declaratory relief alleges, in relevant part:

101. Defendants take the position that defendant Schofield was authorized to revise the articles of “The Protestant Episcopal Bishop of San Joaquin, a corporation sole” in 2006 and 2008, and that defendant Schofield may continue as the incumbent of “The Protestant Episcopal Bishop of San Joaquin, a corporation sole” and as President of the

Episcopal Foundation and the Investment Trust after leaving the Episcopal Church and being deposed.

102. Plaintiffs contend to the contrary, that the purported amendments to the articles of the corporation sole were ultra vires, invalid and void, and that defendant Schofield may not continue as the incumbent of “The Protestant Episcopal Bishop of San Joaquin, a corporation sole,” or as President of the Episcopal Foundation or the Investment Trust, after leaving the Episcopal Church and being deposed.

Secular courts, when resolving church property disputes, must not entangle themselves in disputes over church doctrine or infringe the free exercise of religion. (*In re Episcopal Church Cases* (2009) 45 Cal.4th 467, 478-479.) In *In re Episcopal Church Cases* (2009) 45 Cal.4th 467, the California Supreme Court held that we must apply the “neutral principles of law” approach to resolving church property disputes in a hierarchical church organization.

In doing so, “State courts must not decide questions of religious doctrine; the court must defer to the position of the highest ecclesiastical authority that has decided the point. But to the extent the court can resolve a property dispute without reference to church doctrine, it should apply neutral principles of law. The court should consider sources such as the deeds to the property in dispute, the local church’s articles of incorporation, the general church’s constitution, canon, and rules, and relevant statutes, including statutes specifically concerning religious property, such as Corporations Code section 9142.” (*In re Episcopal Church Cases*, *supra*, 45 Cal.4th at p. 485.)

A hierarchical church is one in which individual churches are organized as a body with other churches having similar faith and doctrine, and with a common ruling convocation or ecclesiastical head vested with ultimate ecclesiastical authority over the individual congregations and members of the entire organized church. (*New v. Kroeger* (2009) 167 Cal.App.4th 800, 815.) In a hierarchical church, an individual local congregation that affiliates with the national church body becomes a member of a much larger and more important religious organization, under its government and control, and bound by its orders and judgments. In contrast, a congregational church is defined as one strictly independent of other ecclesiastical associations, and one that so far as church government is concerned, owes no fealty or obligation to any higher authority. (*Id.* at p. 816.)

Defendants dispute that the Episcopal Church is a hierarchical church, but both the California Supreme Court in *In Re: Episcopal Church Cases* and the appellate court in *New v. Kroeger* found it to be so. (*In Re: Episcopal Church Cases*, *supra*, 45 Cal.4th at p. 494; *New v. Kroeger*, *supra*, 167 Cal.App.4th 816-817.) A review of the Constitution and Canons of the Church indicates that it is indeed hierarchical.

The Episcopal Church's Constitution provides for the establishment of a General Convention composed of two houses, the House of Bishops and the House of Deputies, each with the right to originate and propose legislation. (Mullin Decl. Exhibit 1, Constitution of Episcopal Church Article I, Sec. 1.) Among the duties of the General Convention is the enactment and amendment of the Canons. (See Mullin Decl. Exhibit 1, Canons of Episcopal Church Title 1, Canon 1, sec. (2(n)(3), Title V, Canon 1, Sec.1.) The General Convention approves and consents to the admission of new dioceses and the election of new bishops. (Mullin Decl. Exhibit 1, Constitution of Episcopal Church Article II, Sec. 2, Article V, Sec. 1.) New dioceses must express "unqualified accession to the Constitution and Canons" before they can be in union with the general convention and admitted to the Episcopal Church. (Mullin Decl. Exhibit 1, Constitution of Episcopal Church Article V, Sec. 1.)

Defendant's attempt to dispute the hierarchical nature of the Episcopal Church with the declaration of Rev. Wantland is unavailing. His declaration as to the nature of the Church is an inadmissible opinion on a legal conclusion. "[It] is thoroughly established that experts may not give opinions on matters which are essentially within the province of the court to decide." (*Carter v. City of Los Angeles* (1945) 67 Cal.App.2d 524, 528.)

*Lamb is the Incumbent of the Corporation Sole*

Corporations Code section 10002 provides: "A corporation sole may be formed under this part by the bishop, chief priest, presiding elder, or other presiding officer of any religious denomination, society, or church, for the purpose of administering and managing the affairs, property, and temporalities thereof." "Historically, a corporation sole consists of one person only and his successors, in some particular station, who are incorporated by law in order to give them legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have." (*Estate of Zabriskie* (1979) 96 Cal.App.3d 571, 576-577.) Religious corporations are merely "permitted as a convenience to assist in the conduct of the temporalities of the church. Notwithstanding incorporation the ecclesiastical body is still all-important. The corporation is a subordinate factor in the life and purposes of the church proper." (*Wheelock v. First Presb. Church* (1897) 119 Cal. 477, 483.)

"The Protestant Episcopal Bishop of San Joaquin, a Corporation Sole" was created to hold title to property belonging to the Missionary District and, later, Diocese of San Joaquin. (UMF Nos. 23, 28, 34.) The Corporations initial articles stated that it was formed because "the rules and regulations of the Protestant Church in the Missionary District of San Joaquin ... require that the bishop of said Missionary District shall become a corporation sole under the laws of the State of California by the title of The Protestant Episcopal Bishop of San Joaquin for the distraction of the temporalities thereof and the management of the state and property thereof." (UMF No. 23.) When the Missionary District became a Diocese, Cannon XVII (sections 411 and 412) continued to require

the Bishop to be a corporation sole “by the title of ‘The Protestant Episcopal Bishop of San Joaquin, a Corporation Sole’ ” and to hold title to “[t]rust funds and real estate acquired by gift or purchase for the use of the Diocese of San Joaquin, or for any unincorporated parish therein, or for the use of the Protestant Episcopal Church in any place within this Diocese where there is no organized congregation.” (UMF No. 34.)

The documents are clear. Only the “Bishop” of the Diocese of San Joaquin has the right to the incumbency of the corporation originally entitled “The Protestant Episcopal Bishop of San Joaquin, a Corporation Sole” and given the number C0066488 by the Secretary of State. Moreover, the Episcopal Church has spoken as to who holds the position of Bishop of the Diocese of San Joaquin – Reverend Lamb. Defendants challenge Lamb’s election as Bishop on procedural grounds such as notice and quorum, but this court has no power to rule on the validity of the Episcopal Church’s election of its Bishops.

Both the United States Supreme Court and California courts have held that in the case of hierarchical religious entities the civil courts must accept as binding and defer to decisions by religious tribunals with respect to religious doctrine, practice, faith, ecclesiastical rule, discipline, custom, law, membership, polity, clergy credentials and discipline, as well as religious entity governance and administration.. (*Jones v. Wolf* (1979) 443 U.S. 595, 602, 603-604; *Concord Christian Center v. Open Bible Standard Churches* (2005) 132 Cal.App.4th 1396, 1411; *Serbian Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696, 708–709, 713; *Presbyterian Church v. Hull Church* (1969) 393 U.S. 440, 449; *Rosicrucian Fellow. v. Rosicrucian Etc. Ch.* (1952) 39 Cal.2d 121, 131–132.)

Accordingly since the Episcopal Church has seen fit to recognize Lamb as the new Bishop of the Diocese of San Joaquin, we must do so as well. (See UMF No. 66 -- Undisputed that Lamb has been asked to consent to the ordination of new bishops, performed baptisms and confirmations, attended the 2008 meeting of the house of bishops as the Bishop of San Joaquin and attended the 2008 Lambeth Conference of Bishops as the Bishop of San Joaquin.) Moreover, the Episcopal Church has deposed Schofield as Bishop. (UMF No. 55.)

Defendants contend that there was no proper notice of the March 29, 2008 special convention at which Lamb was elected. It is true that there is no competent evidence that 30 days notice of the meeting was given. Hall’s declaration only establishes that he received the notice on March 2, 2008. (Decl. Hall ¶ 20; Exhibit 9.) He did not mail the notice. It is undated. Defendants also contend that the deposition of Schofield was contrary to Church policy, procedure and law. However, we may not look into the propriety of the election and deposition of church officers according to church regulations and rules. (*Serbian Orthodox, supra*, 426 U.S. at pp. 708-709; *Maxwell v. Brougner* (1950) 99

Cal.App.2d 824, 826; see *Vukovich v. Radulovich* (1991) 235 Cal.App.3d 281, 292–293]; *Higgins v. Maher* (1989) 210 Cal.App.3d 1168, 1173.)

*Lamb is the President of the Episcopal Foundation and Investment Trust*  
Diocesan Canon XXVII, section 28.02 states that the “Bishop of the Diocese shall serve as President and Chairman of the Board” of the Episcopal Foundation. (UMF No. 35.)

The Investment Trust’s articles of incorporation provide that the Bishop of the Diocese of San Joaquin “shall be ex officio president of the Board of Trustees.” (UMF No. 36.)

Therefore, Lamb holds both these offices.

*The Amendment of the Articles of Incorporation in 2006 and 2008 Are Void*

On March 21, 2006 Schofield filed amendments to the articles of incorporation that removed references that before a new bishop could be ordained, consent from the majority of Diocesan Bishops and Standing Committees of the Episcopal Church must be obtained and the bishop must be consecrated by three Episcopal bishops. (UMF No. 41.) This amendment was void because it violated the accession clause and was thus not in conformity with the “rules, regulations or laws” of the Episcopal Church. (See Corp. Code, § 10003.) Moreover, when amending the articles of incorporation of a corporation sole, the incumbent must “sign and verify a statement setting forth the provisions of the amendment and stating that it has been duly authorized by the religious organization governed by the corporation.” (Corp. Code, § 10010.) Because the amendment was in direct contravention of the Constitution and Canons of the Episcopal Church at the time it was made, the accession clause prevented the Diocese from “duly authorizing” it.

The 2008 amendment changing the name of the corporation to “The Anglican Bishop of San Joaquin” is likewise void. The Diocese of San Joaquin had not “duly authorized” the name change when it occurred. The only purported authorization came about after Schofield was deposed as a Bishop and the Anglican defendants were no longer recognized by the Episcopal Church as the Diocese of San Joaquin.

*The Diocese is Properly a Party Plaintiff*

Defendants contend that the Diocese of San Joaquin, by which they mean the Anglican Diocese of San Joaquin, has not been joined as a party and judgment may not be had unless it is joined because the declaratory relief action seeks to invalidate its acts.

There are two problems with this line of reasoning. First, it ignores the fact that the Episcopal Church has, rightly or wrongly, procedurally correctly or

not, recognized the organization headed by Lamb as the true and surviving Diocese of San Joaquin. (See UMF Nos. 55, 57-59, 66.) That Diocese is a party plaintiff.

Second, this is not a breach of contract action as defendants suggest in their memorandum of points and authorities. The Diocese is not being sued for breaching a contract with the Church. Although the rule regarding necessary parties is not relaxed in actions brought to obtain declaratory relief, the Diocese is not a necessary party. (See *Lloyd v. County of Los Angeles* (1940) 41 Cal.App.2d 808, 812.) No judgment or order against the Diocese directing them to pay or do anything is sought. Rather, Schofield is being sued for declaratory relief for his actions in amending the articles of incorporation of the corporation sole and in refusing to give up the incumbency of three corporations.

#### *The Corporation Sole is a Party Plaintiff*

Defendants claim that the corporation sole which is a party plaintiff is not the true corporation sole known as No. C0066488 which they claim to operate. Defendants are incorrect for the reasons expressed above. The Diocese of San Joaquin (plaintiffs) is not a new organization that “split off” from defendants’ older organization. It is the older organization from which defendants’ removed themselves.

#### *Plaintiffs Have Standing to Sue*

Defendants’ arguments that plaintiffs are not validly constituted as the Diocese and Bishop of the Diocese of San Joaquin, or indeed of any subpart of the Episcopal Church are poorly taken. The defendants have voted to leave an organization that held certain real property and no longer have any claim to it.

" 'Ultra vires' refers to an act which is beyond the powers conferred upon a corporation by its charter or by the laws of the state of incorporation . . . ." (*Marsili v. Pacific Gas & Elec. Co.* (1975) 51 Cal. App. 3d 313, 322.) Defendants argue that their right to amend their constitution and canons has always been unrestricted and unlimited. It is not. From the inception of the Diocese as a Missionary District, it acceded to the Constitution of the Protestant Episcopal Church in the United States of America and recognized the authority of the General Convention of the same. (Mullin Decl. Exhibit 7, Constitution of Missionary District of San Joaquin, Article II.) When the Missionary District Petitioned to become a Diocese in 1961, the petition clearly stated in conclusion, “As evidenced by the resolution of the Special Convocation above referred to, the Church in the Missionary District of San Joaquin has acceded to the Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America.” (Mullin Decl. Exhibit 9, Petition and Memorial of Missionary District of San Joaquin.) The Constitution of the new Diocese of San Joaquin likewise acceded to the Constitution of the Episcopal Church and recognized the authority of the General Convention. (Mullin Decl. Exhibit 11, Constitution of Diocese of San Joaquin, Article II.)

Although defendants make much over the fact that the Diocese acceded only to the Constitution, and not the Canons of the Episcopal Church, the court finds that the Diocese implicitly acceded to both by virtue of acceding to the Constitution. The function of the Constitution is to form a legislative body, the General Convention. The General Convention adopted and amends the Canons. Acceding to the Constitution that creates the legislative body, and recognizing the authority of the legislative body, while simultaneously denying accession to the product of the legislative body is nonsensical. By analogy, a state could accede to the Constitution of the United States and claim that it did not accede to the federal law or the decisions of the United States Supreme Court. Moreover, the Petition for the Erection of the Diocese of San Joaquin mentions accession to both the Constitution and Canons. This strongly implies that it was always the intention of the Diocese to accede to both documents. (See *In re Episcopal Church Cases*, *supra*, 45 Cal.4th at pp. 488.) Finally, the Constitution of the Episcopal Church in place in 1961 required accession to both the Constitution and Canons. (Mullin Decl. Exhibit 8, Constitution of Episcopal Church, Article VI.)

Accordingly, the 2008 amendments to the Diocese's Constitution purporting to strike the accession clause and insert new language relative to joining the Province of the Southern Cone were ultra vires and void.

The constitution of the Diocese has always permitted amendments. (AMF No. 69, Kamai Decl. Exhibits 4 and 7 Constitution of Diocese of San Joaquin, Article XIII.) Defendants contend that there was no legal impediment to their 2006 amendment qualifying the accession clause such that they acceded to the Episcopal Church's Constitution only to the extent that it was not inconsistent with the Constitution and Canons of the Diocese, as amended from time to time and further this 2006 amendment allowed for the 2008 amendment deleting the accession clause entirely and withdrawing from the Episcopal Church. Defendants are incorrect. The original accession clause itself prevents such amendment. If the Constitution of the Diocese incorporates and accedes to the Constitution and Canons of the Episcopal Church, which require accession, then the Constitution of the Diocese cannot be amended to remove such language.

Defendants also attack the special meeting at which Lamb was elected Bishop, claiming that the calling of the special meeting was not in accordance with the Constitutions and canons of either the Episcopal Church or the Diocese of San Joaquin. Again, the Episcopal Church having seen fit to recognize Lamb as the true Bishop of the Diocese of San Joaquin, this court is without the power to countermand that decision. Defendants cite *Singh v. Singh* (2004) 114 Cal.App.4th 1264, 1283 for the proposition that a court has jurisdiction to review whether a religious corporation adhered to its own internal rules and bylaws. *Singh* is distinguishable. In that case an orally elected board of directors sued for judicial determination of the validity of their election or to order a new election and determine the rights of the members to vote, pursuant to Corporations Code

section 9418, subdivision (c). The appellate court determined that the trial court, under neutral principles of law could validly interpret the bylaws of the corporation as it applied to the election of a board of directors and their term of office. It did not decide a matter of who was the ecclesiastical authority of the church.

#### *Trust Beneficiaries Need Not Be Named or Noticed*

Defendants claim that because this action is to remove Schofield from his position as incumbent of a corporation that holds property in trust for unincorporated missions and parishes, these beneficiaries are necessary parties and are required to be given notice of this action by virtue of Probate Code section 17203. Probate Code section 17203 applies only to proceedings under the probate code applicable to express trusts. The interest at stake here is incumbency in a corporation sole. The fact that the corporation sole holds property in trust does not mean that a petition for the removal of a trustee pursuant to Probate Code section 17200 has been filed.

#### *Procedural Issues*

Defendants claim that the motion must be denied because plaintiffs have failed to comply with Rule of Court 3.150 which requires that the specific cause of action must be stated specifically in the notice of motion and be repeated, verbatim in the separate statement of undisputed material facts. Specifically, plaintiff's notice of motion and separate statement seek summary adjudication on "Count I" not the "First Cause of Action." This distinction is immaterial. As Weil and Brown note, that although few lawyers and judges use the term "count," the term may be used interchangeably with the phrase "cause of action." (Weil & Brown, *Civil Procedure Before Trial* (The Rutter Group 2008) "Pleadings" § 6:105-6:106.)

Defendants also take issue with the separate statement's failure to place the supporting facts in the first column underneath the supported fact. (Rule of Court, Rule 3.1350, subdivision (d)) and failure to place all supporting evidence under one separate cover separately bound with a table of contents. (Rule of Court, Rule 3.1350, subdivision (g).) However, these minor technical violations did not impede the court's review of the motion and are not grounds to deny the motion.

Defendants contend that because the first cause of action is broken into subparts seeking declaratory relief on several issues, each issue had to be separately identified in the separate statement of facts in support of summary judgment and the separate statement organized so that it could be determined which fact related to each issue. Code of Civil Procedure section 437c, subdivision (f)(1), provides: "A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages [as specified in Section 3294 of the Civil Code], or one or more issues of duty . . . . A motion for summary adjudication shall be

granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." As such the cause of action for declaratory relief stands or fails as a whole and the plaintiffs were not required to break the separate statement into sub "issues" for adjudication, as this would have been improper.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 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:** AMC **on** May 4, 2009 .  
(Judge's initials) (Date)

(6)

**Tentative Ruling**

Re: ***Diocese of San Joaquin v. Schofield***  
Superior Court Case No.: 08CECG01425

Hearing Date: May 5, 2009 (**Dept. 97A**)

Motion: By Plaintiffs The Episcopal Church, The Diocese of San Joaquin, The Rt. Rev. Jerry Lamb, and the Protestant Episcopal Bishop of San Joaquin, to compel Defendant David Schofield to produce documents in compliance with requests for production of documents (set one); to compel Defendant The Diocesan Investment Trust of San Joaquin to produce documents in compliance with requests for production of documents (set one); to compel Defendant The Anglican Diocese Holding Corporation to produce documents in compliance with requests for production of documents (set one); and to compel response to special interrogatories (set one) on all Defendants other than Merrill Lynch

**Tentative Ruling:**

To grant, with Defendant David Mercer Schofield to produce documents responsive to document requests #1-18 and 20-27, Defendant The Diocesan Investment Trust of San Joaquin to produce documents responsive to document requests #1-14, Defendant The Anglican Diocese Holding Corporation to produce documents responsive to document requests #1-14, and all Defendants other than Merrill Lynch to provide a verified written response to special interrogatory #5, without objection, with all documents to be produced and the verified written response within 10 days after service of the order.

**Explanation:**

Defendants have not complied with their statement of compliance concerning the document requests. (Code Civ. Proc. §2031.320, subd. (a).)

Defendants have not produced the documents they said they would produce in their written responses to special interrogatories (sets one), special interrogatory #5. (Code Civ. Proc. §2030.230.) Their failure to produce writings as promised is tantamount to having served no response at all, and Plaintiffs have moved to compel a written response. (Code Civ. Proc. §2030.290, subd. (b).)



**Tentative Ruling**

Re: ***Pinnacle Real Estate LLC v. California Valley Real Estate Inc.***  
Superior Court Case No. 08CECG04111

Hearing Date: May 5, 2009 (**Dept. 97C**)

Motion: Petition to confirm arbitration award

**Tentative Ruling:**

To deny without prejudice based on procedural defects in amended notice of hearing.

**Explanation:**

This is petitioner's second attempt to obtain court confirmation of the arbitration award. The first petition, originally calendared for 3/11/09, was first served with a notice of hearing that erroneously listed the hearing date as 3/3/09. The first amended notice of hearing properly listed the 3/11/09 hearing date, but it was served by mail on respondent's attorney even though that attorney was not "of record" in this judicial action.

Petitioner attempted to correct that defect by serving a second amended notice with a continued hearing date and that notice was personally served on the attorney, but not on the petitioner. Thus the court denied the petition on 3/25/09 based on the procedural defects described above.

Petitioner has now filed a new notice of hearing along with a *new petition* that doesn't identify itself as a "first amended petition." It's not clear why that was done as petitioner could have served the original petition with a new "notice of hearing." But as noted in the Frazee objection to this new petition, the notice of hearing served personally on respondent on 4/8/09 refers to the original filing date but only the 2<sup>nd</sup> filed petition, signed on 4/7/09, was actually served.

More importantly, the new "notice of hearing" served on 4/8/09 lists a hearing date of 5/25/09 when the actual date calendared is 5/5/09. The 5/25/09 date was listed on the "objection" when it was filed, so it's not clear that respondent is even aware of the actual hearing date.

And while the actual hearing date *is* correctly listed on petitioner's "reply," that reply was not served within 10 days of the actual hearing date as required by CCP §1290.2.



## Tentative Ruling

(RA#24)

Re: **Randy Scott Garringer v. Clovis Unified School District**  
Court Case No. 09CECG00129

Hearing Date: **May 5, 2009 (Dept. 97B)**

**Motion:** Defendant Clovis Unified School District's Demurrer to Plaintiff's First Amended Complaint for Damages

### **Tentative Ruling:**

To Sustain the demurrer as to the First and Second Causes of Action, with leave to amend.

To Overrule the demurrer as to the Third and Fourth Causes of Action. Plaintiff is granted 10 days' leave to file the second amended complaint. The time in which the complaint can be amended will run from service by the clerk of the minute order. All new allegations in the second amended complaint are to be set in boldface type.

### **Explanation:**

#### First Cause of Action:

A claim under Labor Code §1102.5 must be grounded on the violation of a state or federal law or regulation, and not merely improper conduct [*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1384–1385] The complaint clearly refers to Title I, and also alleges that the missing equipment was purchased with federal grant money under Title I. In *Patten v. Grant Joint Union High School Dist.*, *supra* at 1386, the court stated that “disclosing the allegedly unauthorized use of public assets” was “a whistleblowing archetype.” [see also *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1308 and 1312--the whistleblowing state employee “was simply doing her job when she uncovered the unauthorized use of state assets.”] While plaintiff could no doubt amend his complaint to insert the specific statutes *under Title I* that prohibit the misuse of grant funds, his reference to Title I should suffice to put defendant on notice of what law was suspected to have been violated.

Plaintiff has clearly stated his belief that “the federally funded equipment had been misappropriated by CUSD and used improperly in violation of the funding grant and in violation of state and federal laws and regulations.” That act, if true, would certainly be in violation of the law governing CUSD's funding grants

under Title I. What is not clearly stated are facts which gave rise to plaintiff's allegedly *reasonable belief* that the equipment had been misappropriated.

Further, plaintiff completely fails to allege that he *reported the suspected violation* to CUSD. Plaintiff has pleaded that 1) the equipment was missing; 2) he told his supervisor that it was missing; 3) he also mentioned the missing equipment at a meeting; and then 4) that he believed this missing equipment had been misappropriated. He fails to allege a connection between his belief that he communicated to his supervisor his belief that the equipment had been misappropriated. If he did not communicate his suspicions about the misappropriation, then he did not "blow the whistle."

As to adverse employment consequences, plaintiff pleads that 1) he was assigned "lesser" job duties (with no detail about whether this means he was actually demoted, or paid less than he had been previously); 2) his supervisor suggested he consider resigning (with no further contextual information that might flesh out the retaliatory nature of this comment); 3) his supervisor was reassigned to plaintiff's work area and worked next to him, as a pretext to listen in on his telephone conversations; 4) he received "unwarranted and unjust" disciplinary write-ups (with no indication of how . Defendant argues that this is insufficiently pleaded under existing case law.

Courts look at the specifics of each case to determine whether, based on objective evidence, the employment action is adverse. [*Thomas v. Department of Corrections* (2000), *supra* at 510-511] Therefore, even though this case is at the pleading stage, plaintiff must supply more factual detail, if he chooses to amend his complaint, since in an action against a public entity, particularity in pleading is required in order to withstand demurrer. [*Lopez v. S. Cal. Rapid Transit Dist.* (1985) 40 Cal. 3d 780 785; see also *Susman v. City of Los Angeles* (1969) 269 Cal.App.2d 803, 809—every fact essential to the existence of statutory liability against a public entity must be pleaded.”]

#### Second and Third Causes Of Action:

Defendant has combined the issues related the second and third cause of action, apparently since they both deal with the disability discrimination claim. A *prima facie* case for disability discrimination and failure to accommodate a physical and/or mental disability under FEHA requires plaintiff to plead: 1) he suffers from a protected disability; 2) he is otherwise qualified to do his job; 3) he was subject to an adverse employment action *because of* his protected disability. [*Jenkins v. County of Riverside* (2006) 138 Cal.App.4th 593, 603]

Defendant argues that plaintiff does not state a cause of action for disability discrimination because he does not have a "protected disability." Defendant cites to many federal cases that support its proposition that plaintiff is not disabled, since one of the accommodations he requested was to be

transferred away from his current supervisor (i.e., this raises issues of “selective disability,” and whether this is a viable claim). However, Plaintiff has pleaded a *pre-existing* disability with depression disorder and panic disorder. That is the disability he pleads at the first prong of his disability causes of action. In 2008, he went out on a Worker’s Comp disability leave with these issues (workplace stress). The request to be transferred to a different supervisor was an accommodation plaintiff requested upon returning to work. Thus, it appears that he adequately pleads the first prong of this cause of action.

As for defendant’s argument that plaintiff’s requests for accommodation were *per se* unreasonable, courts have declined to hold that an accommodation of “switching supervisors” is not *per se* unreasonable. [See, e.g., *Kennedy v. Dresser Rand Co.* (1999) 193 F.3d 120, 122.] *Kennedy* is instructive about the burden of *proof* at summary judgment and trial, but says nothing regarding a plaintiff’s duty at the pleading stage. Plaintiff has alleged that he was disabled and defendant knew it, that defendant could have made reasonable accommodations for plaintiff’s disabilities without undue hardship, but it failed to do so, and thereby plaintiff was harmed. This is sufficient.

Where the disability claim is lacking is as to pleading *facts* showing that plaintiff’s employment was terminated because of his disability [*Jenkins v. County of Riverside* (2006) 138 Cal.App.4th 593, 603] To prevail under the disparate treatment theory, an employee must show that the employer harbored a discriminatory intent.” [*Mixon v. Fair Employment & Housing Comm’n* (1987) 192 Cal.App.3d 1306, 1316] As was stated above, plaintiff’s has an affirmative duty to plead with particularity this claim of statutory liability against a government entity. [see, e.g., *Lopez v. S. Cal. Rapid Transit Dist.*, *supra*; *Susman v. City of Los Angeles*, *supra*] Therefore, more detail than merely plaintiff’s conclusory statement at ¶19 must be alleged (“Plaintiff’s disabilities . . . were a motivating reason for Defendant CUSD’s decision to terminate Plaintiff’s employment effective October 2, 2008”).

Since the allegation related to motivation for termination is part of the Second Cause of Action, and more facts are needed to sufficiently plead this element, the demurrer to the Second cause of action is sustained, with leave to amend, but only as to this issue. The demurrer to the Third cause of action is overruled.

#### Fourth Cause of Action

Plaintiff has stated a cause of action here. The employer’s duty to participate in the interactive process does not cease just because it entered that process at previous times with the same employee, about the same condition. The operative time here is the time at which the process broke down, that being when plaintiff’s second leave of absence expired. At that point in time, plaintiff alleges, he wanted to discuss alternatives with defendant, and defendant refused



**Tentative Ruling**

Re: ***Sorensen v. International Jet Engine Supply Inc.***  
Superior Court Case No. 598111-3

Hearing Date: May 5, 2009 (Dept. 97C)

Motion: By defendant Morro for attorney's fees

**Tentative Ruling:**

To grant motion and to award fees of \$210,485.

**Explanation:**

The issues to be decided in this motion are whether, as a non-signatory to the contract, Morro is entitled to any fees; if so, whether he is entitled to fees for work performed in relation to the non-contract claims (either before or after the contract claim was voluntarily dismissed); whether fees are available in this case under 15 USC §77k(e) in addition to under CC §1717; and whether both the rate billed and the number of hours spent are "reasonable."

On the first issue, it's relatively clear from the authorities cited in 7 Witkin ***California Procedure*** (5<sup>th</sup> Ed.) "Judgment" at §206 that since Mr. Morro was alleged to be the alter ego of the company and was charged with breach of contract on that basis, it was plaintiff that made it necessary for Morro to defend both the contract claim and the related securities claims (even though he later admitted Morro played no direct role in the solicitation). Had plaintiff prevailed on those claims, Morro would have been liable for fees, and thus the court finds that he can recover fees despite not being a signatory to the contract.

As for whether he should be barred from claiming any fees for defending the other causes of action after the breach of contract action was dismissed, there are two aspects to the question. To the extent plaintiff is relying on CC §1717(b)(2), the authorities cited in 7 Witkin, ***California Procedure, supra***, "Judgment" §201 appears to answer that question affirmatively.

And to the extent he is claiming that after the contract cause of action was dismissed there was no longer any authority for recovery of fees, 15 USC §77k appears to be such authority, and was used as such in the opinion in ***Amtower v. Photon Dynamics, Inc.*** (2008) 158 Cal.App.4th 1582, 1606 to affirm the court's exercise of discretion to award the fees.

Here, the opinion of the referee makes it relatively clear that he found plaintiff to have affirmatively misrepresented facts in order to obtain the initial default judgment, and that he had no factual basis for claiming that Morro

misrepresented anything or that he was misled into signing the contract. Judge Broadman found him to be an experienced investor who was well aware of the circumstances of the company when he decided to sign the contract, and thus his attempts to pin his losses on Morro do appear to have been sufficiently “without merit” to warrant recovery of fees in order to make Morro whole.

As for the rate billed, while the reply argues that defendant shouldn't be bound by the prevailing rate in Fresno when plaintiff chose to sue officers who resided elsewhere, the company and the underlying activities all apparently occurred here, and no showing has been made that defendant couldn't have retained competent counsel in Fresno. In this case there hasn't even been a showing that plaintiff resides in Newport Beach where his attorney is based.

This is in contrast to the circumstances in *Horsford v. Board of Trustees of CSUF* (2005) 132 Cal.App.4<sup>th</sup> 359, and similar cases where there was an affirmative showing by a prevailing plaintiff that it was necessary to obtain out-of-town counsel.

Under these circumstances the court will adopt Mr. Dapelo's alternative proposal of awarding any authorized hours at the \$275/hour rate.

As for the number of hours expended, while normally detailed billing records and an attorney's declaration that the work performed was necessary are prima facie evidence of the reasonableness of the claims, here no detailed records have been provided. And any waiver by the plaintiff of an objection to the sufficiency of the evidence doesn't bind this court.

It appears in this case that at least the 2nd motion to vacate default was made necessary solely due to Mr. Dapelo's negligence. Since Mr. Dapelo doesn't detail how much time was spent on each motion, the court will divide the 143.1 hours claimed generally for “setting aside default” and only award 72 hours.

Similarly, in relation to the summary judgment motion, it appears that at least some of the time spent was not reasonably necessary in that a procedurally defective motion had to be denied except as to the part conceded by the plaintiff. Of the 306 hours claimed under “law and motion research,” the court will reduce the allowable number of hours by 100.

So of the 909.9 hours spent in total prior to the filing of this motion, the court will deduct 71.1 for the unnecessary set aside motion and 100 hours for the defective portions of the summary judgment motion, leaving 738.8. Adding 18.6 for these moving papers and 8 for the reply and hearing, that comes to 765.4 hours, at \$275/hour, or a total fee award of \$210,485.

