Tentative Rulings for May 12, 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).)

05 CECG 02778 ***Maldonado v. Atkins*** **(Dept. 97 B)**

08 CECG 03462 ***Stroup v. Carline*** **(Dept. 97C)**

08CECG04115 ***J & V Fresno, LLC v. Belinda Parmelee, et al.*** **(Dept. 97A)**

09CECG01274 ***City of Fresno v. Folgar, et al.*** **(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.

(Tentative Rulings begin at the next page)

03

Tentative Ruling

Re: *Lingenfelter v. County of Fresno*
Case No. 04 CE CG 03409

Hearing Date: May 12th, 2009 (Dept. 97D)

Motion: Plaintiff's Motion for Remand

Tentative Ruling:

The matter is off calendar, as plaintiff has not filed any moving papers.

Pursuant to CRC 3.1312 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 5-10-09.
(Judge's Initials) (Date)

(6)

Tentative Ruling

Re:	***Okoegwale v. Jack in the Box*** Superior Court Case No.: 08CECG02117
Hearing Date:	May 12, 2009 (**Dept. 97B**)
Motion:	By Defendant Jack in the Box, Inc., for terminating and monetary sanctions against Plaintiff Wendy Okoegwale

Tentative Ruling:

To grant the motion for terminating sanctions, with Defendant directed to submit to this court, within 7 days of service of the minute order, a judgment dismissing the action, and to grant monetary sanctions against Plaintiff in the amount of $350.00, payable to Defendant's attorney within 30 days after service of the order.

Explanation:

The discovery at issue was served on July 18, 2008. This court heard Defendant's motion to compel initial responses on October 28, 2008, and ordered that Plaintiff provide responses, without objection, within 10 days after service of the order.

When responses were not forthcoming, Defendant moved for terminating and monetary sanctions. Before the hearing, Plaintiff served unverified responses and on January 13, 2009, this court denied the motion for terminating sanctions, but ordered Plaintiff to provide a verification to the responses and to pay monetary sanctions.

When Plaintiff served additional, unverified responses, this court ordered on February 26, 2009, that Plaintiff provide "further" responses to certain form interrogatories, and to provide verifications within 10 days after service of the order.

No further responses or verifications were received. (Decl. of Raquel Pereyra, ¶10.)

On March 13, 2009, Defendant mailed a letter to Plaintiff reminding her of the court's orders and asking that verifications and further responses be served. No further responses or verifications have been served. (Decl. of Raquel Pereyra, ¶¶11-12.)

The unanswered discovery is basic discovery for this personal injury case. Although Plaintiff attempted early on to provide responses, the fact that they were unverified is tantamount to receiving no responses at all because they are unsworn. (*Appleton v. Superior Court* (1988) 206 Cal.App.3d 632, 636.) Plaintiff has been ordered more than once to make discovery and has offered no excuse for not complying with the court's prior orders. Although Plaintiff is representing herself in pro per, a plaintiff in pro per must follow the rules of civil procedure. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.) Plaintiff is required "to pursue the claim with alacrity and vigor." (*O'Dell v. Freightliner Corp.* (1992) 10 Cal.App.4th 645, 664.) Trial is set for August 17, 2009. It appears that the refusal to answer will prejudice Defendant's party's ability to prepare for trial. (*Morgan v. Ransom* (1979) 95 Cal.App.3d 664, 669.) It does not appear that a sanction short of dismissal would be appropriate to the dereliction. (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 796.)

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: **DSB** **on** **5-6-09**.
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***AD Cleaning, Inc. et al. v. PBC SolutionOne, Inc.***
Superior Court Case No. 08CECG02798
(consolidated with 08CECG03502)

Hearing Date: May 12, 2009 **(Dept. 97B)**

Motion: Plaintiffs' Motion for Summary Adjudication

Tentative Ruling:

To deny.

Explanation:

This case arises out of an Asset Purchase Agreement between PBC SolutionOne, Inc., on the one hand (buyer and defendant) and SolutionOne Cleaning Systems, Inc. (now AD Cleaning, Inc.), Equipment Leasing Specialties, Inc., SolutionOne Franchise Systems, Inc. (now AD Franchise, Inc.) and Todd Pigott (collectively referred to herein as Sellers). (UMF 1.) The sale was effective 11/16/06. (UMF 2.)

The Asset Purchase Agreement included a mutual indemnity clause requiring each party to indemnity the other for certain liabilities. Sellers agreed to indemnify PBC for actual or potential liability "prior to Closing", and PBC agreed to indemnify Sellers for the same liability "occurring ... after Closing." (UMF 4.)

To obtain indemnity, the party claiming indemnity must provide notice of the claim to the other party within 15 days of service of the suit. The indemnifying party then has 30 days to investigate. With respect to third party claims, sellers and purchasers agreed that if the tender of the defense and indemnity is accepted, the indemnifying party has the right to "assume control of the defense of such claim, and the Indemnified Party shall cooperate fully with the Indemnifying Party ..." (UMF 7.) Sellers contend, and PBC does not dispute as a general matter, that this assumption of the defense by the indemnifying party includes the right to appoint counsel. The indemnified party can "participate in the defense" of a third party claim "at its own expense." (*Id.*)

On 5/23/08, a class action lawsuit, *Ortega v. Pacific Building Care*, Case No. 08CECG03502, was filed against PBC for alleged unlawful employment practices, including failure to pay wages, provide meal periods or rest breaks, and failure to provide wages due and owing at termination of employment. The class period is defined as "the period of time (4) four years from the commencement of this action through the trial date in this matter." (UMF 11.)

Accordingly, the class period covers acts and omissions that occurred before and after the sale of the business.

PBC tendered the claim to Sellers on 6/25/08, demanding that Sellers assume PBC's defense of the *Ortega* action, as it had done with other actions. (UMF 21-23.) Sellers accepted the tender and elected to assume control of the defense by appointing counsel. Sellers' counsel informed PBC in a letter dated 7/23/08 that any defense "is limited to any pre-'Closing Date' liability for the allegations pled in the Action. To the extent there is no liability on behalf of the Sellers, you are on notice that the Sellers intend to seek full reimbursement of all costs from your clients as provided in the Asset Purchase Agreement." (See Tamman Dec. Exh. B.)

Due to this qualification and limitation, PBC contended that Sellers cannot exercise control of the defense unless and until they agreed that PBC is entitled to full indemnification, and that the disclaimer conflicted with Sellers' ability to provide an impartial defense. PBC interpreted the qualified assumption of defense as an election not to exercise the right to assume PBC's defense, and that PBC therefore has the right to select its own counsel. (See Tamman Dec. Exh. C.)

Sellers first attempted to appoint the law firm of Sutton Hatmaker to defend PBC in the Ortega action. (UMF 27.) PBC had no particular objection to Mr. Sutton, who had defended PBC in other actions relating to SolutionOne, other than the fact that he had been selected by Sellers. (UMF 28, 29, 31, 51.) Sellers then attempted to appoint the law firm Dowling, Aaron & Keeler to defend PBC (UMF 32 and 33), but that firm was rejected by PBC for the same reason (UMF 34, 37, 51). PBC then retained Nixon Peabody to defend the *Ortega* action, contending that Sellers must pay all of Nixon Peabody's fees and costs, and that Sellers are responsible for any indemnity or settlement paid in the *Ortega* action. (UMF 40 and 51.)

Based on these undisputed facts, in their motion for summary adjudication, Sellers seek alternative declarations that:

(1) Seller had the right to appoint counsel of its choice to defend PBC in the *Ortega* action when it elected to assume control of the defense;
(2) PBC has waived all rights of indemnity for the *Ortega* action for plaintiff;
(3) PBC does not have the right to independent counsel paid for by plaintiff.

Summary adjudication of these issues is appropriate pursuant to CCP § 437c(f)(1), which provides in relevant part that "A party may move for summary adjudication as to … one or more issues of duty, if that party contends that the

cause of action has no merit or that there is no affirmative defense thereto …" Under this prong, it is not necessary that the declaration concern an issue of duty owed *by the defendant*, PBC. Though it does not appear necessary (see *Linden Partners v. Wilshire Linden Assocs.* (1998) 62 Cal.App.4th 508, 522), granting the motion would completely dispose of the first cause of action of the Second Amended Complaint, which does not seek a declaration regarding PBC's withholding of payments due under Article 8.5 of the Promissory Note.

The primary and determinative issue is whether Sellers' reservation of rights to seek reimbursement of costs of defense related to un-covered claims created a conflict of interest that gave PBC the right to appoint its own counsel at Sellers' expense.

The starting point is interpretation of the Asset Purchase Agreement. "Indemnity agreements, like other contracts, must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (*Indenco, Inc. v. Evans* (1962) 201 Cal.App.2d 369, 374.) "An indemnity agreement is to be construed like any other contract with a view to determining the actual intention of the parties; no artificial rules apply." (*Fidelity & Deposit Co. v. Whitson* (1960) 187 Cal.App.2d 751, 756.)

PBC does not dispute Sellers' interpretation of the Asset Purchase Agreement – that the Asset Purchase Agreement gives Sellers the right to appoint counsel upon assuming control of the defense. Nor is it disputed that the Agreement does not explicitly give PBC the right to appoint independent counsel to represent it against a third-party claim. And Sellers do not dispute that the reservation of rights created a conflict of interest between Sellers (whose interest is to minimize covered claims) and PBC (whose interest is to maximize covered claims). The Asset Purchase Agreement does not address how the defense is to be handled in a situation like this where a conflict of interest arises.

In addressing this issue, the first question is whether insurance law cases addressing this issue are relevant here. Sellers are inconsistent on this issue. Sellers first argue that principles of insurance law apply and support Sellers' interpretation of the Asset Purchase Agreement (that Sellers' right to assume control of the defense gives it the right to appoint defense counsel). (See Sellers' Memo p. 13.) Sellers then argue that, when judged by the analogous standard of CC § 2860 [providing for independent counsel in the insurance context where there is a conflict of interest], PBC still does not have a right of independent counsel. (See Sellers' Memo pp. 16-19.) Sellers argue in their Reply brief, however, that the court should not apply insurance law principals in the instant dispute, and that there is no authority to support the application of CC § 2860 [which explicitly applies to "polic[ies] of insurance"] to an arm's length commercial transaction. (See Sellers' Reply p. 6.)

The court finds insurance law cases addressing conflicts of interest between insurers and insureds to provide a relevant and useful framework for addressing the issues in this case. As PBC correctly points out, the right to independent counsel is not based on insurance law, but on the ethical duty of an attorney to avoid representing conflicting interests. (See *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1394-95 ["the *Cumis* rule is not based on insurance law but on the ethical duty of an attorney to avoid representing conflicting interests"]; *Rockwell Internat. Corp. v. Superior Court* (1994) 26 Cal.App.4th 1255, 1264.)

Addressing the problem of an insurance defense attorney who is to provide a defense under a reservation of rights, the court in *San Diego Federal Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358 ("*Cumis*"), held that an insurance company must pay for independent counsel for its insured when there are divergent interests of the insured and insurer brought about by the insurer's reservation of rights to deny coverage under an insurance policy. "Although issues of coverage under the policy are not actually litigated in the third party suit, this does not detract from the force of these opposing interests as they operate on the attorney selected by the insurer, who has a dual agency status." (*Id.* at 364-65.) The *Cumis* holding, requiring independent counsel for the insured in such situations, was codified in CC § 2860 in 1987. (*Musser v. Provencher* (2002) 28 Cal.4th 274, 282-83.) Thus, while CC § 2860 specifically applies only in the context of insurance policies, it is merely a codification of broader principles relating to attorney conflicts of interest.

An indemnitee may have the right to independent counsel where there exists a conflict of interest exists. (See *Safeway Stores, Inc. v. Massachusetts Bonding & Ins. Co.* (1962) Cal.App.2d 99, 115-16; *Buchalter v. Levin* (1967) 252 Cal.App.2d 367.) Accordingly, the court will rely on insurance case law to provide the relevant framework on the issue of whether PBC had the right to independent counsel due to the existence of a conflict of interest.

"The potential for conflict requires a careful analysis of the parties' respective interests to determine whether they can be reconciled … or whether an actual conflict of interest precludes insurer-appointed defense counsel from presenting a quality defense for the insured." (*Dynamic Concepts, Inc. v. Truck Ins. Exchange* (1998) 61 Cal.App.4th 999, 1007-1008.)

A disqualifying conflict exists if "insurance counsel had … incentive to attach liability to [the insured]." (*Blanchard v. State Farm Fire & Casualty Co.* (1991) 2 Cal.App.4th 345, 350.) Here, it is not disputed that such a conflict of interests exists in this case, as the *Ortega* claims against PBC are covered only to the extent they occurred prior to the sale.

Independent counsel is allowed only where the interests of the two parties diverge and one party can shade liability to covered or uncovered claims.

(Croskey, Heeseman & Popik, *Cal. Practice Guide: Insurance Litigation* (TRG 2008) § 7:785-785.5, citing *Dynamic Concepts, Inc.*, *supra*, 61 Cal.App.4th at 1006; *Blanchard*, *supra*, 2 Cal.App.4th 345.)

Not every reservation of rights results in a conflict requiring *Cumis* counsel. If the issue on which coverage turns is *independent* of the issues in the underlying case, such as mere interpretation of the contract or insurance policy, *Cumis* counsel is not required. (*Blanchard*, supra, 2 Cal.App.4th at 350; *Native Sun Investment Group v. Ticor Title Ins. Co.* (1987) 189 Cal.App.3d 1265, 1277.) An insurer's reservation of the right to seek reimbursement of defense costs allocable to non-covered claims, standing alone, does not constitute[] a 'coverage issue' within the meaning of CC § 2860 where it does not involve the possibility that policy coverage will be determined or affected by the facts as developed at trial. (*James 3 Corp. v. Truck Ins. Exch.* (2001) 91 Cal.App.4th 1093, 1109.)

Here, the issue of coverage is not independent of the underlying case. When the wage and hour or other violations occurred is directly determinative of whether Sellers' indemnification obligations. Though perhaps unlikely, due to the defense attorneys' ethical and professional duties that would be owed to PBC, Sellers could influence their ultimate liability by controlling the defense. This includes focusing their efforts on claims related to employees and subcontractors with whom only Sellers had worked and paying less attention to matters for which only PBC was potentially liable. By controlling the underlying defense, sellers could posture the case for settlement so as to minimize their exposure. Sellers could influence counsel to vigorously pursue facts and defenses related to pre-closing claims, conceding or paying less attention to matters related to post-closing claims, and/or posturing the case for settlement so as to minimize their exposure.

The court wishes to make clear that it has no reason to believe that either of the law firms that Sellers sought to appoint would conduct the litigation of the *Ortega* action in such a manner. But because (1) there is a clear and undisputed conflict of interest between Sellers and PBC, (2) issues determinative of the "coverage issue" (dates of violations) would necessarily be litigated in the underlying action, and (3) it is conceivable that Seller-appointed counsel could shade liability towards uncovered claims, the court cannot grant the declarations requested by Sellers.

PBC's procedurally improper sur-reply will not be considered.

Pursuant to CRC Rule 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 DSB 5-7-09
Issued By: ________________________ on ______________.
(Judge's initials) (Date)

(21)

Tentative Ruling

Re: ***Dhillon, et al. v. Fresno Herndon Development, LLC, et al.***
Superior Court Case No. 08 CECG 03987

Hearing Date: May 12, 2009 (**Dept. 97B**)

Motion: Defendant Urbahns' Demurrer to the First Amended Complaint

Tentative Ruling:

To OVERRULE demurrer to the second, third and sixth causes of action. (Code Civ. Proc. § 430.10, subd. (e).)

To OVERRULE demurrer to the first and sixth causes of action. (Code Civ. Proc. § 430.10, subd. (f).)

To SUSTAIN, with leave to amend, demurrer, to the fourth and sixth causes of action. (Code Civ. Proc. § 430.10, subd. (e).)

Plaintiff is granted 10 days' leave to file the Second Amended Complaint. The time in which the complaint may 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:

1. **First Cause of Action**

The pleadings are not uncertain. Plaintiffs assert the cause of action for breach of contract against Defendants Fresno Herndon Development, LLC and John, in both his individual and representative capacity. (First Am. Complaint, ¶ 4.)

2. **Second Cause of Action**

Plaintiffs have pleaded facts sufficient to constitute a cause of action for negligent misrepresentation. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184; *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 962. *See* First Am. Complaint, ¶¶ 13 – 15, 23, 25, 26.)

3. Third Cause of Action

Plaintiffs have pleaded facts sufficient to constitute a cause of action for intentional misrepresentation. (CACI no. 1900. *See* First Am. Complaint, ¶¶ 27 – 32.)

4. Fourth Cause of Action

To the extent Plaintiffs allege concealment, Plaintiffs have not pleaded facts sufficient to constitute a cause of action. Plaintiffs have not specifically alleged that as a property seller, Defendant had a duty to disclose. (*Brownlee v. Vang* (1965) 235 Cal.App.2d 465, 477.) Plaintiffs have not alleged that Defendant actively concealed or prevented Plaintiffs from discovering the important facts. (CACI no. 1901. *See also Mktg. W. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612-613.)

5. Fifth Cause of Action

Plaintiffs have not pleaded facts sufficient to constitute a cause of action for negligent interference with economic relations. Plaintiffs' relationship with a potential tenant is not an existing economic relationship with a third party. (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786.)

6. Sixth Cause of Action

Plaintiffs have pleaded facts sufficient to constitute a cause of action for breach of the implied covenant of good faith and fair dealing. (*Careau & Co. v. Security Pacific Business Credit, Inc*. (1990) 222 Cal.App.3d 1371, 1394-1395. *See* First Am. Complaint, ¶ 47.)

The pleadings are not uncertain.

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: **DSB** (Judge's initials) **on** **5-7-09** (Date).

Tentative Ruling

(5)

Re: ***Jesse Ortiz by and through his Guardian Ad Litem, Adriana Zuniga Ortiz v. Oren King et al.***
Superior Court Case No. 08 CECG 03532

Hearing Date: May 12, 2009 **(Dept. 97C)**

Motion: Demurrer and Motion to Strike by Defendants King

Tentative Ruling:

To sustain the special demurrer for uncertainty with leave to amend. To sustain the general demurrer to the second cause of action with leave to amend. To grant the motion to strike the claim for punitive damages with leave to amend. An amended complaint is to be filed within 10 days. The time in which the complaint can be amended will run from service by the clerk of the minute order. Only those allegations in the second amended complaint that are new or different from those in the first amended complaint are to be set in **boldface** type.

Explanation:

The minor Plaintiff was born on June 23, 1997. He and his mother were tenants at a house located at 2729 East Madison Avenue in Fresno during an unknown period of time. The house is owned by Defendants Oren and Doris King. It is alleged that the Plaintiff began to suffer underdevelopment of skills, anxiety and behavioral problems. At a time unknown, he was seen by a doctor, who ordered blood tests. The tests revealed high levels of lead in his system. His mother had the premises inspected by the City of Fresno and it determined that the entire house including the yard contains high levels of lead. Plaintiff alleges that on or about June 1, 1997, the Defendants painted the house and yard with paint that was contaminated with lead.

On October 8, 2008 Plaintiff by and through his Guardian ad Litem filed a Complaint alleging a single cause of action for premises liability naming Oren and Doris King as Defendants as well as Fernanda and Sabas Martinez. On December 22, 2008 a First Amended Complaint was filed alleging three causes of action; to wit, general negligence, “intentional tort” and premises liability. On December 23, 2008 a dismissal was filed without prejudice as to Defendants Martinez. On April 14, 2009 Defendants King filed a special demurrer for uncertainty to the entire complaint and a general demurrer to the second cause of action. In addition, a motion to strike the claim for punitive damages was filed. Opposition was filed followed by a reply.

Demurrer

With regard to the special demurrer, the Defendants submit that they are uncertain as to the number of Plaintiffs. It is noted that demurrers on grounds of uncertainty are disfavored and will be sustained only where the complaint is so bad that the defendant cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him or her. See *Khoury v. Maly's of Calif., Inc.* (1993) 14 CA4th 612, 616. In addition, where the facts can be ascertained through discovery or where they are presumptively within the knowledge of the defendant, demurrers for uncertainty will almost certainly be overruled. Id. at 616. On the other hand, a demurrer for uncertainty *may* lie if the failure to label the parties and claims renders the complaint so confusing defendant *cannot tell what he or she is supposed to respond to*. See Williams *v. Beechnut Nutrition Corp.* (1986) 185 CA3d 135, 139, fn. 2. The First Amended Complaint is uncertain as to whether the Guardian Ad Litem is also a Plaintiff. See pages 4 and 4 at ¶¶ GN-1 and IT-1. Given the seriousness of the allegations, whether the Guardian Ad Litem is also a Plaintiff needs to be clarified. Therefore, the special demurrer will be sustained with leave to amend.

As for the general demurrer to the second cause of action alleging an intentional tort, the Court notes that the nature of the intentional tort is unclear. Is the Plaintiff alleging battery, assault, intentional infliction of emotional distress or some other type of intentional tort? See CCP § 425.10. As suggested in *Weil & Brown "Civil Procedure Before Trial" (The Rutter Group) "Pleadings"* ¶ *6:121.1*: "Use "CACI" (California Civil Jury Instructions) or "BAJI" (Book of Approved Jury Instructions) as a *checklist* of the substantive law in the civil actions covered thereby. These instructions indicate the elements that plaintiff must *prove* at trial to recover, and these are usually the same elements plaintiff must *plead* to state a cause of action." Although the First Amended Complaint is a Judicial Council form complaint, it is not immune from attack via demurrer. See *People ex rel. Department of Transp. v. Sup.Ct. (Verdeja)* (1992) 5 CA4th 1480, 1484. In particular, the form requires "a description of the reasons for liability". The description must support the form allegation: By the following acts or omissions to act, defendant **intentionally** caused the damage to plaintiff . . .." See page 5 ¶ IT-1. In the case at bench, the facts forming the gravamen of the second cause of action are identical to the cause of action for general negligence. In the opposition, Plaintiff argues that pleading in the alternative is acceptable. This is correct. But, "[a] complaint must allege the ultimate facts necessary to the statement of an actionable claim. It is both improper and insufficient for a plaintiff to simply **plead** the *evidence* by which he hopes to prove such ultimate facts." See *Careau & Co. v. Security Pac. Business Credit, Inc.* (1990) 222 CA3d 1371, 1390. At present, there are no facts pleaded supporting any type of intentional tort. Thus, the general demurrer will be sustained with leave to amend.

Motion to Strike

The motion to strike is addressed to the claim for punitive damages. In tort cases, a plaintiff may seek punitive damages for "oppression, fraud or malice" by the defendant. See Civil Code § 3294(a). The recovery depends on plaintiff's producing "clear and convincing" evidence showing that the defendant acted with "oppression, fraud or malice." It is noted that the First Amended Complaint did not attach the Judicial Council Form PLD-PI-001(6)—"Exemplary Damages Attachment". This omission renders the First Amended Complaint defective because facts supporting the claim for punitive damages must be pleaded. See *McDonell v. American Trust Co.* (1955) 130 CA2d 296, 300. The motion to strike will be granted with leave to amend.

Pursuant to California Rules of Court, rule 3.1312(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: **A.M. Simpson** **on** **5-11-09**.
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Capriola v. Lee***
Superior Court Case No.: 08CECG03192

Hearing Date: May 12, 2009 (**Dept. 97C**)

Motion: Demurrer to complaint by Defendants Donald Poladian and Poladian Chiropractic Corporation

Tentative Ruling:

To sustain, with Plaintiff granted 10 days' leave to amend. The time in which the complaint can be amended will run from service by the clerk of the minute order. All new allegations in the first amended complaint are to be set in **boldface** type.

Explanation:

The first and second causes of action do not state facts sufficient to constitute a cause of action. (Code Civ. Proc. §430.10, subd. (e).)

There are no charging allegations in the complaint directed at Donald Poladian or Poladian Chiropractic Corporation. A complaint is required to include a statement of the facts constituting the cause of action in ordinary and concise language. (Code Civ. Proc., §425.10, subd. (a)(1).)

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

Tentative Ruling Issued By: **A.M. Simpson** **on** **5-11-09**.
(Judge's initials) (Date)

(23)

Tentative Ruling

Re: ***Ewing Irrigation Products v. Elon Golf Construction, Inc., et al.***
Superior Court No. 06 CECG 01305

Triad/Holmes Associates v. Running Horse, LLC, et al.
Superior Court No. 07 CECG 00140

Hearing Date: Tuesday, May 12, 2009 (**Dept. 97D**)

Motion: Defendants La Jolla Loans, Inc.'s, Alan C. Jones', and Olga E. Jones' Joint Motion to Amend their Answers

Tentative Ruling:

To Grant Defendants' joint motion for leave to file amended answers. Amended Answers are to be filed with 10 days of service of this order.

Explanation:

Although the Court grants the Defendants' joint motion, the motion is technically deficient for three reasons. First, while the Defendants' motion included copies of the proposed amended pleadings, the proposed amended pleadings were not serially numbered to differentiate them from previous pleadings as required by California Rules of Court, rule 3.1324(a)(1). Second, the Defendants' motion fails to list the page and line numbers of the proposed additions to the answer in compliance with California Rules of Court, rule 3.1324(a)(3). Third, while the Defendants' motion includes the supporting declaration of Stephen Carroll, Carroll's declaration fails to satisfy any of the requirements of California Rules of Court, rule 3.1324(b)(1)-(4).

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 5-10-09 .
(Judge's initials) (Date)

(18)

<u>Tentative Ruling</u>

Re: ***Medical Staffing Network, Inc. v. Sierra Kings District Hospital***
Case No. 08CECG02164

Hearing Date: May 12, 2009 (Dept. 97D)

Motion: By defendant to strike the fraud cause of action and claim for punitive damages

Tentative Ruling:

To grant the motion to strike with leave to amend. The court grants plaintiff 30 days leave to amend. The court grants plaintiffs 15 days leave to amend. Boldface type must highlight any new text in the second amended complaint (SAC), and strikethrough font must indicate any text deleted from the first amended complaint (FAC).

Explanation:

As a threshold issue, the parties dispute denial of entry of default in this matter. In this case the FAC was filed on March 5, 2009, and no responsive pleading was filed by April 6, 2009. On April 13, 2009 defendant filed the motion to strike presently before the court. Plaintiff filed with the court an application for entry of default against defendant on April 24, 2009. The court clerk did not enter default due to the filing of the pending motion to strike. Defendant contends entry of default was improperly denied. The court finds that it was not. Where plaintiff has not yet applied for entry of default, plaintiff, in effect, has allowed the defendant further time to plead. (*Fiorentino v. City of Fresno* (2007) 150 Cal.App.4th 596, 605.)

A pleading or motion filed after expiration of the time to respond is subject to a motion to strike, which is within the court's discretion, and if such a motion to strike were granted, default then could be entered. (*Buck v. Morrossis* (1952) 114 Cal.App.2d 461, 464-465.) In the opposition papers plaintiff contends that the court should strike defendant's motion to strike. But plaintiff has not actually filed a motion to strike defendant's motion to strike, which is the proper practice under *Buck*. (*Ibid.*) Therefore, the court declines to strike defendant's motion to strike, and assesses the merits below.

Government Code section 810 *et seq.* governs liability of public entities and public employees. Government Code section 818.8 provides that a public

entity is not liable for an injury caused by misrepresentation of an employee of the public entity, whether or not such misrepresentation is negligent or intentional. However, Government Code section 822.2 provides an exception from general immunity for misrepresentations for actual fraud, corruption, or malice. Immunity under Government Code section 822.2 for misrepresentation is not absolute: it applies only when the misrepresentation involves interference with financial or commercial interests. (*Kern v. Sparks* (2007) 149 Cal.App.4th 11, 20.) Government Code section 820(a) provides that a public employee may be liable to the same extent as a private person. Also, while Government Code section 818 may preclude an award of punitive damages against a public entity, it is not a bar to a public employee's liability for punitive damages. (*Runyon v. Superior Court* (1986) 187 Cal.App.3d 878.)

"'When the plaintiff alleges an intentional wrong, a prayer for exemplary damage may be supported by pleading that the wrong was committed willfully or with a design to injure." (*Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1041.) California Civil Code (Civil Code) section 3294(a) provides that punitive damages may be recovered when "defendant has been guilty of oppression, fraud, or malice." Civil Code section 3294(c)(3) defines fraud as intentional misrepresentation, deceit, or concealment of a material fact known to the defendant that is made with the intent of depriving a person of property or legal rights, or otherwise causing injury. In deciding the merits of a motion to strike, the court considers the plaintiff's allegations in context and presumes them to be true. (*Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.) A motion to strike pursuant to CCP section 436 is the proper mechanism to remove plaintiff's exemplary damages claim. (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 164.)

However, the requirement of pleading fraud with particularity necessitates pleading facts that "show how, when, where, to whom, and by what means the representations were tendered." (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184, citing *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) Although an exception to immunity may apply, plaintiff has failed to plead facts sufficient to demonstrate malice, oppression or fraud with the requisite specificity. Therefore, the court grants defendant's motion to strike, and permits plaintiff leave to amend.

Pursuant to California Rules of Court, rule 3.1312, and CCP 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
Issued By: ______DRF______________________ on __5-10-09__________.
(Judge's initials) (Date)

(20)

Tentative Ruling

Re:	***AD Cleaning, Inc. et al. v. PBC SolutionOne, Inc.*** Superior Court Case No. 08CECG02798 (consolidated with 08CECG03502)
Hearing Date:	**May 12, 2009 (Dept. 97B)**
Motion:	Motion for Terminating Sanctions

Tentative Ruling:

To deny terminating sanctions without prejudice, but to order plaintiff Todd Pigott to refrain from attempting to influence any witness to provide favorable testimony. To deny plaintiffs' request for attorneys' fees. To deny the request to take oral testimony at the hearing. To deny the request for a continuance of the hearing.

Explanation:

Defendants request terminating sanctions against plaintiffs based on evidence that plaintiff Todd Pigott has been attempting to influence percipient witnesses, possibly through bribes.

Plaintiffs have asserted a number of evidentiary objections. Objections 1, 2, 3, 5, 6, 7 and 8 (as originally numbered) are overruled. Objection 4 is sustained on the ground that Mr. Colon's letter is hearsay. The statement against interest exception (Evid. Code § 1230) does not apply because defendants have not shown that Mr. Colon is unavailable as a witness under Evid. Code § 240(a), or that Colon's statements were clearly against his interest. Objection 9 is sustained as to "I reported the meeting to PBC" on hearsay grounds.

A trial court has the inherent power to dismiss a case when a plaintiff's misconduct is deliberate and egregious and makes any sanction other than dismissal inadequate to ensure a fair trial. (*Stephen Slesigner, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 740.) Dismissal is a drastic remedy to be employed only in the rarest of circumstances. (*Id.* at 764.)

Though the evidence presented is troubling, it is also ambiguous in many respects, and it is not apparent that a fair trial cannot be had. With respect to Mr. Castro, the court is provided with no context in which to evaluate Mr. Pigott's offer to discuss a potential recovery against PBC. Nor does Mr. Castro appear to

have been negatively influenced by an improper offer. With respect to Mr. Colon, it is not clear from the letter that the "very high offer" to "be on their side" came from Mr. Pigott, as opposed to the plaintiffs in the *Ortega* class action. And while Mr. Pigott has offered no explanation for his apparently improper offers to Mr. Cruz of a "severance" if he spoke out against and left PBC, and to set him up with a janitorial business in exchange for help, clearly Mr. Cruz was not influenced in any manner contrary to defendants' interests.

Accordingly, defendants have not met their burden of establishing that any remedy short of dismissal is inadequate to preserve the fairness of trial, particularly since evidence of Mr. Pigott's conduct and statements may very well be admitted at trial to impeach his credibility and perhaps the credibility of certain third party witnesses.

The court thus finds terminating sanctions are not warranted at this point. However, the court does believe that an order precluding Mr. Pigott from attempting to influence any prospective witness in the case is justified under the circumstances.

Plaintiffs request $9,000 in sanctions pursuant to CCP § 128.5 on the ground that the motion for terminating sanctions is frivolous. The court can order a party to pay attorneys' fees incurred as a result of tactics that are frivolous or solely intended to cause unnecessary delay. "Frivolous" means "(A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party." (CCP § 128.5(b)(2).)

While terminating sanctions are denied, the court does not find that the motion is frivolous or "totally and completely without merit". The evidence presented is not without ambiguity, but presents a picture of Mr. Pigott that is quite troubling.

Pursuant to CRC Rule 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: DSB **on** 5-8-09.
(Judge's initials) (Date)

<u>Tentative Ruling</u>

(RA#24)

Re: ***Maribel Alonso, et al. v. Sergio Alonso Basulto***
Court Case No. 08CECG01886

Hearing Date: (May 12, 2009) **(Dept. 97A)**

Motion: Petition to Approve Compromise of Disputed Claim of Minor

Tentative Ruling:

To grant. Order signed. Hearing off calendar.

Pursuant to California Rules of Court, Rule 3.1312 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 8, 2009 .
(Judge's initials) (Date)

<u>Tentative Ruling</u>

(17)

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

Hearing Date: May 12, 2009 (Dept. 97A)

Motion: Demurrer to Third Amended Complaint

Tentative Ruling:

To sustain the demurrer to the second and fourth causes of action with leave to amend and to overrule the demurrer to the sixth cause of action. A Fourth Amended Complaint shall be filed and served within 10 days of the 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 2008) "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. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

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.)

Second Cause of Action – Declaratory Relief

Wild Carter contends that the "agent's immunity rule precludes liability on this cause of action. The rule is that "duly acting agents and employees cannot be held liable for conspiring with their own principals … ." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd*. (1994) 7 Cal.4th 503, 512.)

Wild Carter contends that the declaratory relief cause of action is premised on the implied agreement of Wild Carter and other defendants to wrongfully withhold the retainer amount that allegedly belongs to plaintiffs. In the cause of action for declaratory relief the payment of the retainer fee occurred with the knowledge and participation of Wild Carter and the payment was an effort to deplete the accounts belonging to plaintiff (Complaint ¶ 110.) The complaint never uses the word "conspiracy." In order to maintain an action for conspiracy, a plaintiff must allege that the defendant had knowledge of and agreed to both the objective and the course of action that resulted in the injury, that there was a

wrongful act committed pursuant to that agreement, and that there was resulting damage. (*Quelimane Co. v. Stewart Title Guaranty Co*. (1998) 19 Cal.4th 26, 47.) However, the plaintiff does not have to allege specific facts to plead the existence of a conspiracy. Ultimate facts regarding the elements of the conspiracy are sufficient. (*Greenwood v. Moradian* (1955) 137 Cal.App.2d 532, 537-538.) The pleading is sufficient to allege a conspiracy.

Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc. (2005) 131 Cal.App.4th 802, 834 recognized, "[c]ases have interpreted the 'financial advantage' exception to the agent's immunity rule to mean a personal advantage or gain that is over and above ordinary professional fees earned as compensation for performance of the agency." *Berg & Berg* involved a statutory provision (Civil Code section 1714.10) with exceptions that allowed a conspiracy claim against an attorney; the exceptions mirrored those carved out from the agent's immunity rule. The court held the term "'in furtherance of the attorney's financial gain'" meant that "through the conspiracy, the attorney derived economic advantage over and above monetary compensation received in exchange for professional services actually rendered on behalf of a client." (*Id*. at pp. 824, 836.) Even allegations of excessive billing for the services rendered by the attorney did not satisfy the financial gain requirement of the statute's exception. (*Id*. at pp. 835–836.)

The "agent's immunity rule" does not apply when the agents are acting "as individuals for their individual advantage." (See *Applied Equipment*, *supra*, 7 Cal.4th at p. 512, fn. 4; *Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 47 [the rule "does not preclude the subjection of agents to conspiracy liability for conduct which the agents carry out 'as individuals for their individual advantage' and not solely on behalf of the principal"]; *1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 592 ["[a]n exception to the agent's immunity, for conduct undertaken for personal advantage, is consistent with the immunity rule, because pursuit of a personal interest renders the actor more than merely the agent of another"].)

Here, all that is pled is that Wild Carter knowingly participated in the transfer of funds from its client to its trust account as a retainer. This only implicates activity taken on behalf of the client and, as set forth above receipt of monetary compensation is not enough "personal advantage" sufficient to vitiate the agent's immunity rule. However, it is conceivable that plaintiff's could plead that Wild Carter was acting in furtherance of its own individual advantage in accepting the retainer.

Third Cause of Action – Conversion

Conversion is generally described as the wrongful exercise of dominion over the personal property of another. (*Gruber v. Pacific States Sav. & Loan Co*. (1939) 13 Cal.2d 144, 148.) The basic elements of the tort are (1) the plaintiff's ownership or right to possession of personal property; (2) the defendant's

disposition of the property in a manner that is inconsistent with the plaintiff's property rights; and (3) resulting damages. (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066.)

Again, the tort committed is merely the acceptance of the retainer. (Complaint ¶ 124 [incorporating earlier allegations].) The agent's immunity rule would apply unless plaintiffs can plead Wild Carter was acting in furtherance of its individual advantage in committing the tort.

Sixth Cause of Action -- Fraudulent Conveyance

The cause of action based on the Uniform Fraudulent Transfer Act (Civ. Code § 3439, et seq., UFTA or Act) is different. Sections 3439.04 and 3439.05 of the Act set forth the situations in which a transfer may be deemed fraudulent. For example, a transfer made with the actual intent to hinder, delay, or defraud creditors is fraudulent. (Civ. Code § 3439.04, subd. (a)(1).) Under section 3439.04, subdivisions (a)(1) and (a)(2), it does not matter whether the creditor's claim arose before or after the transfer was made.

A creditor's remedies may include the voiding of a fraudulent transfer or an attachment against the asset. (Civ. Code § 3439.07.) "[A] fraudulent conveyance claim requesting relief pursuant to Civil Code section 3439.07, subdivision (a)(1), if successful, may result in the voiding of a transfer of title of specific real property. By definition, the voiding of a transfer of real property will affect title to or possession of real property." (Kirkeby v. Superior Court (2004) 33 Cal.4th 642, 649.) The transferee must be a party to the fraudulent conveyance action. (See Heffernan v. Bennett & Armour (1952) 110 Cal.App.2d 564, 586; see also Liuzza v. Bell (1940) 40 Cal.App.2d 417, 424.)

Every person has a duty not to knowingly participate in a fraudulent transfer, including the transferee. A transferee who takes property "in good faith and for reasonably equivalent value" has met that duty, and, therefore, may prevent the voiding of the transfer. Plaintiffs have alleged that Wild Carter knowingly participated in the fraudulent transfer and that Wild Carter did not provide reasonably equivalent value in exchange for the $500,000. (Complaint ¶¶ 143-144.) Plaintiffs have pled that the transfer was intended to harm the interests of the plaintiffs. (Complaint ¶ 143.) This adequately invokes that Wild Carter was acting in its own motivation to harm the plaintiffs in accepting the money. The retainer was not equivalent to the value owed, it was intended to harm the plaintiffs by hiding assets, and Wild Carter knowingly participated in this scheme. The complaint need not plead Wild Carter's motivation in its individual advantage, merely that it had one, causing harm to plaintiffs.

Plaintiffs maintain that the court's ruling on the motion for leave to amend is dispositive on the issue as to whether the Third Amended Complaint states a case. It is not. All the motion for leave to amend decided was whether plaintiff needed to comply with Civil Code section 1714.10, the gate keeping statute on

actions against attorneys and their clients for conspiracy. The court determined that the complaint was good against a 1714.10 challenge on the motion to amend. It did not consider the agent's immunity rule in making this determination.

Thus, plaintiffs' argument that the complaint adequately pleads the various causes of action is without moment as the agent's immunity rule is a complete defense to even a properly pleaded cause of action. Moreover, plaintiffs' analysis of section 1714.10 is misplaced, the agent's immunity rule and section 1714.10, which similar in some respects, are not equivalent.

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 11, 2009** **.**
(Judge's initials) (Date)

(23)

Tentative Ruling

Re: ***J & V Fresno, LLC v. Enodem, LLC, et al.***
Superior Court Case No. 08 CECG 01990

Hearing Date: Tuesday, May 12, 2009 (**Dept. 97C**)

Motion: Plaintiff's Default Prove-Up

Tentative Ruling:

To DENY without prejudice.

Explanation:

The Court denies the Plaintiff's request for a default judgment without prejudice for the following reasons:

- The Plaintiff has failed to file a request for court judgment on mandatory Judicial Council form CIV-100.
- A request for dismissal of all of the Doe defendants on mandatory Judicial Council form 982(a)(5) must be filed before any request for court judgment can be granted.
- The Plaintiff has failed to present any declarations or documentary evidence to prove up its claim for breach of contract.

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

Tentative Ruling
Issued By: **A.M. Simpson** on **05/08/09**.
(Judge's initials) (Date)

<u>**Tentative Ruling**</u>

(RA#24)

Re: **Leon Y. George, et al. v. James C. Melton, et al.**
Court Case No. 06CECG03599

Hearing Date: **May 12, 2009(Dept. 97D)**

Motion: 1) Cross-Defendant The Goodyear Tire and Rubber Company's Demurrer to Complaint
2) Cross-Defendant The Goodyear Tire and Rubber Company's Motion to Strike

Tentative Ruling:

1) Demurrer: To overrule in part and to sustain in part. It is overruled as to the demurrer to the prayer for punitive damages and granted as to the injunctive relief requested. It is sustained as to the first and second causes of action, as to plaintiffs' designation of the party plaintiff as the "Estate of Raffi L. George." However, leave to amend is granted to correct the identification of the decedent's interest as party plaintiff. Said correction must be done in ***one of two ways*:**

- If administrators of the Estate of Raffi L. George have already been appointed by a court of competent jurisdiction, then plaintiffs may file an amendment to the complaint (and <u>not</u> a fully amended complaint) in order to amend the caption of the case and correct the name of this plaintiff from "Estate of Raffi L. George" to "[Name(s)], as Administrator (or Co-Administrators) of the Estate of Raffi L. George" (<u>*and note*</u>: if there are <u>co</u>-administrators, then <u>both</u> must be named as party plaintiffs); <u>**OR**</u>
- If an estate has <u>not</u> been opened, and does not need to be opened, then plaintiffs must file the required Statement/Affidavit pursuant to CCP §377.32, in addition to filing an amendment to the complaint correcting the names of the parties plaintiff to indicate that they bring this case in their individual capacities <u>and</u> *as "successors in interest* of *Raffi L. George."*

2) Motion to Strike: To deny in part and grant in part: 1) the request to strike the "Estate of Raffi L. George" as a party is denied; 2) the request to strike the prayer for punitive damages is denied; 3) the request to strike the prayer for injunctive relief is granted.

Plaintiff has 20 days within which to file the amendment. The time in which plaintiff may file the amendment will run from service by the clerk of the minute order.

Explanation:

In personal injury actions where the injured person dies from the injuries, there are basically two types of actions that can be brought—a wrongful death claim, and a "survival" action. There are several important distinctions between the two types of actions, as follows:

1) **Wrongful death claim:** this can be brought by various statutorily-specified persons, who have an independent cause of action for the loss *they have sustained* by reason of the death. [CCP § 377.60; See *Corder v. Corder* (2007) 41 Cal.4th 644, 651; *Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 819; *Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 105]

- Thus, damages recoverable in a wrongful death action belong to the parties-plaintiff *personally*—wrongful death damages are not part of the victim's estate and do not descend through the estate. [CCP § 377.60; *Reyna v. City & County of San Francisco* (1977) 69 Cal.App.3d 876, 880] With this type of action:
- The wrongful death claimants (parents here) are entitled to bring the wrongful death actions in their own names, as plaintiffs here have done. Further, they have pleaded their standing to bring this action at ¶12b, where they state that they are parents of the decedent, who died with no wife or children. Note: parents only have the standing conferred by statute to bring this action if they are his intestate heirs [CCP §377.60(a)], or they were dependent on decedent [CCP §377.60(b)].
- As a general rule, the wrongful death claimant is entitled to damages for all detriment he or she personally suffered and is likely to suffer in the future because of decedent's death. The measure of damages is not limited to out-of-pocket losses; rather, it covers the total value of the benefits the heirs could reasonably expect to receive had decedent lived. [*Corder v. Corder* (2007) 41 Cal.4th 644, 663; *Allen v. Toledo* (1980) 109 Cal.App.3d 415, 423; *Yates v. Pollock* (1987) 194 Cal.App.3d 195, 200–201; *Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 520]
- But, the wrongful death claimant **cannot** recover damages personal to the victim, and thus cannot be awarded as damages:
    - Decedent's pain and suffering (and this is likewise limited even in a "survival" action) [See *Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 819; *Corder v. Corder* (2007) 41 Cal.4th 644, 661; *DeMeo v. St. Francis Hosp.* (1974) 39 Cal.App.3d 174, 176–177]
    - Claimant's own pain and suffering as a result of decedent's death [*Corder v. Corder*, *supra* at 661] (but compensatory

damages for loss of love, companionship, comfort, affection, etc., are available [*Id.*]

- **Punitive damages, no matter how reprehensible defendant's conduct was.** [CCP §§ 377.34, 377.61; *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 Cal.3d 425, 450] The constitutionality of this exclusion has been upheld, despite what plaintiffs have argued in this motion. [*Ford Motor Co. v. Super. Ct.* (1981) 120 Cal.App.3d 748; *Georgie Boy Mfg., Inc. v. Super. Ct.* (1981) 115 Cal.App.3d 217]

2) **"Survival" action:** By contrast, a "survival" action is one in which the *decedent's* own claims against the tortfeasors are pursued, with the *caveat* that certain damages claims do not survive: e.g., pain, suffering and disfigurement. [CCP § 377.34] This type of action can only be brought by either the decedent's court-appointed personal representative (i.e., appointed in a separate probate action), or by the decedent's "successor[s] in interest" (for estates where there are otherwise no assets to be probated). [CCP §377.30] However, a person seeking to commence such an action as the decedent's "successor in interest" must execute and file an affidavit or declaration pursuant to CCP §377.32, which gives the pertinent information about the decedent and his estate (or lack thereof), and further states that the declarant/affiant has a superior right to commence the "survival" action. Damages compensable in a "survival" action are set forth in CCP § 377.34, and specifically **include** punitive damages and **exclude** pain and suffering damages.

Demurrer:

Having clarified this, we look at the complaint in considering the demurrer. It is evident that plaintiffs joined all claims within this action, i.e., their individual claims for wrongful death, and decedent's "survival" action. Under California's permissive joinder rules, this is allowable: Anyone may join as co-plaintiff or be sued as defendant if they claim an interest "in the property or controversy which is the subject of the action." [CCP §§ 378(a)(2), 379(a)(2)]

That they joined these claims is clear from the face of the complaint. Both the caption and the body of the complaint indicate that they intended to bring a survival action. At ¶3 they state that the plaintiff designated as "The Estate of Raffi L. George" is "the successor to the claims held by Raffi L. George during his lifetime." This adequately put defendants on notice that this action is, in part, a "survival" action. They clearly erred in *properly designating* that plaintiff (despite plaintiffs' counsel's steadfast refusal to acknowledge this). However, it would certainly be an unjust result if this error was addressed by ruling, as Goodyear urges, that this causes plaintiffs to be entirely cut off from bringing the survival action at all (as would be the effect if the demurrer were sustained without leave to amend, or the motion to strike the "estate" as a plaintiff were summarily granted, without opportunity to correct the error). Instead, this error is easily

corrected, and the method of correction depends on whether or not a probate estate has already been opened:

- Plaintiffs state in their opposition that Leon George is "the co-administrator of the Estate." [Opposition, page 2, lines 14-15] If indeed co-administrators have been *appointed by the probate court* to this role, then plaintiffs may file a simple amendment to the complaint (rather than having to file a fully amended complaint) in order to amend the caption of the case and correct the name of the pertinent party plaintiff.
- If an estate has not been opened, and does not need to be opened, then plaintiffs can file an amendment to the complaint correcting the names of the parties plaintiff (that they bring this action as individuals and as successors in interest to the decedent). Also, in that event, they would be required to file the Statement pursuant to CCP §377.32.

Either way, there is absolutely no indication that one of those corrections is not feasible, and either method gives effect to the intentions of the plaintiffs when they filed their case. Further, either option does not unfairly surprise the defendants, and can be done with the minimum of time and expense to the parties.

As to the demurrer to the prayer for punitive damages and injunctive relief, these are not properly addressed by way of demurrer, since a demurrer challenges only the sufficiency of a *cause of action* pleaded. A demand for improper relief does not vitiate an otherwise valid cause of action. [*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 cal.App.4th 1547, 1561-1562] However, an improper damage claim *is* properly addressed by a motion to strike, which defendant has done here, and thus both of these issues will be considered below.

Motion to Strike:

The ruling on the demurrer sufficiently deals with defendant's request that the "estate" plaintiff be stricken from the complaint. This request must be denied. Further, with the correction/amendment allowed by the ruling on the demurrer, the prayer for punitive damages is entirely appropriate, since such damages are allowed in a survival action, per CCP § 377.34. The request to strike the punitive damage claim must also be denied.

As for the issue of the plaintiffs' prayer for injunctive relief, this appears to be well beyond the jurisdiction of the court to order. First, generally, injunctive relief is not granted where monetary damages are adequate to compensate. [*Thayer Plymouth Center, Inc. v. Chrysler Motors* (1967) 255 Cal.App.2d 300, 307] Even though plaintiffs have undeniably suffered a horrible loss, the injunctive relief requested would certainly not be necessary to make them whole. Obviously, it is true that nothing can ever make plaintiffs "whole," but monetary

damages have long been considered adequate compensation as tort damages for loss of life and limb. Thus, the injunctive relief, aimed at correcting the instrumentality that led to their loss, cannot possibly be said to be designed to make *plaintiffs* whole. Rather, it is clear that as far as that the injunctive remedy requested, this is designed to inure to the benefit of *the public.* In other words, this is a remedy suitable in a class action lawsuit, which it not what this case is.

Further, the burden would be on plaintiff to show that there is even authority for this court having the jurisdiction to make such a wide-sweeping recall. The National Highway Traffic Safety Administration (NHTSA) is the Federal Agency tasked with the mission to improve safety on our Nation's highways. The Office of Defects Investigation (ODI) is an office within the NHTSA that is authorized to order manufacturers to recall and repair vehicles or items of motor vehicle equipment when ODI investigations indicate that they contain serious safety defects in their design, construction, or performance. ODI also monitors the adequacy of manufacturers' recall campaigns. Before initiating an investigation, ODI carefully reviews the body of consumer complaints and other available data to determine whether a defect trend may exist. NHTSA has a legislative mandate existing under Title 49 of the United States Code, Chapter 301, Motor Vehicle Safety, to issue federal motor vehicle safety standards. Given that this federal agency occupies this field, plaintiffs have not provided evidence that preemption does not apply. Therefore, the motion to strike the prayer for injunctive relief must be granted.

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: DRF **on** 5-11-09 .
(Judge's initials) (Date)