

Tentative Rulings for June 30, 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).

09 CECG 01997 *JPMorgan Chase Bank, N.A., et al, v. Lindsay, et al.*
(Dept. 97B)

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

08CECG00694 *Drew Pfeiff, et al. v. ACT-Village at Fresno State, LLC, et al.* is continued to Tuesday, July 14, 2009 at 3:30 p.m. in Dept. 97D

08CECG00689 *American Casualty Company of Reading, PA v. National Union Fire Insurance Co. of Pittsburgh, PA, et al.* is continued to Thursday, July 2, 2009 at 3:30 p.m. in Dept. 97B

(Tentative Rulings begin at the next page)

(19)

Tentative Ruling

Family Tree Farms v. R. Redfeairn Drilling, Inc. et al.
07CECG04259

Hearing Date: June 30, 2009 (**Dept. 97A**)

Motions: Motion by Cross-Defendant Scott Belknap to Compel Responses to Special Interrogatories, Set No. One from R. Redfeairn Drilling, Inc.

Motion by Cross-Defendant Scott Belknap to Compel Responses to Special Interrogatories, Set No. One from Rick Redfeairn, Jr.

Motion by Cross-Defendant Scott Belknap to deem Requests for Admissions to Rick Redfeairn, Jr. admitted.

Motion by Cross-Defendant Scott Belknap to deem Requests for Admissions to R. Redfeairn Drilling admitted.

Tentative Ruling:

To grant an order of further responses to the special interrogatories, to be provided without objections in 15 days.

To deem the requests for admissions admitted.

To deny sanctions.

Explanation:

The requests for admission are directed towards specific allegations in the cross-complaint made by the responding parties, and about the related well and contract. The special interrogatories ask questions about certain allegations, and about the well. All are well within the zone of permissible discovery.

The points and authorities on the motions to deem admissions admitted reference Code of Civil Procedure section 2033.280, which is the statute that sets the conditions for deeming admissions admitted. See 2033.280(b). Cross-complainants' arguments on this point are not well taken.

The sanctions requests include time spent in meet and confer, which is not compensable. The requests also appear to be duplicative, with an identical amount sought for each of the four motions. None of the notices of motion contain notice of the request for sanctions and they are therefore denied pursuant to Code of Civil Procedure section 2023.040.

Tentative Ruling

Re: **Metropolitan National Bank v. Scripps GSB I LLC, et al**
Superior Court Case No. 08CECG01717

Hearing Date: June 30, 2009 (Dept. 97B)

Motion: By plaintiff for writ of possession & turnover order

Tentative Ruling:

To grant on conditions described below

Explanation:

The moving papers adequately establish plaintiff's right to possession of the property, and plaintiff also appears entitled to a waiver of the otherwise required undertaking, pursuant to CCP §515.010(b).

However the proof of service indicates service of the moving papers on only one of the addresses listed in the court's 2/19/09 order allowing defense counsel to withdraw. While it is defense counsel previously stated that Scripps Investment & Loans, Inc. has resigned as managing agent of the two defendant LLCs, it is still technically a defendant in this action, and even if it is dismissed, the 484 Prospect Street address in La Jolla is listed as the address for several of the LLC members as noted on the proof of service of the order allowing withdrawal.

In addition the moving papers don't state the *value* of the property that is the subject of this application, though that information is required by CCP §512.010(b)(3). While plaintiff will not be required to post an undertaking, item 5(d) on mandatory form CD-120 (the Order for Writ of Possession) requires the court to designate the amount of undertaking required from defendant in order to stay execution of the writ, and in order to do that the court needs to know the value of the property.

Finally, plaintiff has not submitted the required forms CD-120 and CD-130 (Order for Writ of Possession and Writ of Possession), for the court to sign.

The court will therefore grant the application, waive plaintiff's undertaking, and issue both a writ of possession and turnover order on the following conditions:

1. Plaintiff must serve both a copy of the orders and a copy of the application and related documents on both address listed on the February 19th order allowing withdrawal (i.e. both c/o Vatche Chorbajian at 655 N. Central Ave. in Glendale, and c/o Scripps

Tentative Ruling

Re: ***Cha v. Granville Homes, Inc.***
Case No. 09 CECG 00333

Hearing Date: June 30, 2009 (Dept. 97A)

Motion: Defendant's Motion to Dismiss Plaintiffs, and/or Enforce Settlement Agreements, and/or Order Substitution of Plaintiffs' Attorney

Tentative Ruling:

To deny the motion to dismiss, and/or enforce settlement agreements, and/or order substitution of plaintiffs' attorney as to plaintiffs Peter Cha, Calvin and Kristie Chen, Amparo Garcia, Santiago Garcia, Tom and Pamela Geimer, Fen Heng and Kim Lay, Olivia Matsumaya, and Vicky Phillips, as those plaintiffs have already filed substitutions of attorney and dismissals of their claims, and thus the motion is moot as to them.

Also, defendant has withdrawn its motion as to Aubrey Schaich, so that motion is no longer at issue.

However, the court intends to grant the motion to dismiss, enforce the settlement agreements, and order the substitution of plaintiffs' counsel with regard to the remaining settling plaintiffs, namely Manuel and Shirley Chatman, Arturo and Linda Garcia, Kerry Locke, Mary Lou Mendoza and Dora Leal, Betty Williamson, Van Len Xiong, and Margaret Ybarra.

Finally, the court intends to deny plaintiffs' request for a stay of the action, as well as plaintiffs' counsel's request for an order requiring Granville to pay his attorney's fees, and the request to retain jurisdiction over the issue of attorney's fees.

Explanation:

First of all, the motion to dismiss and/or enforce the settlement, and/or substitute out plaintiffs' counsel is moot as to several of the settling plaintiffs. Plaintiffs Peter Cha, Calvin and Kristie Chen, Amparo Garcia, Santiago Garcia, Tom and Pamela Geimer, Fen Heng and Kim Lay, Olivia Matsumaya, and Vicky Phillips have obtained the signature of their attorney consenting to the substitution, and have filed their substitutions and dismissals of their claims with the court. (See Exhibits to Balch decl. in reply to motion to dismiss.) Therefore, the motion is now moot as to those settling plaintiffs. Also, defendant has

withdrawn the motion as to Aubrey Schaich, so there is no need to rule on the motion as to him.

The only remaining plaintiffs still at issue are Manuel and Shirley Chatman, Arturo and Linda Garcia, Kerry Locke, Mary Lou Mendoza and Dora Leal, Betty Williamson, Van Len Xiong, and Margaret Ybarra. With regard to the remaining settling plaintiffs, the court intends to grant the motion to dismiss, as well as the motion to enforce the settlements and execute the substitutions of attorney with regard to the settling plaintiffs.

The plaintiffs have the absolute right to dismiss their own claims by signing a request for dismissal form. (CCP § 581(b)(1).) Normally, the plaintiffs' attorney must also sign the form and consent to the dismissal. (CCP § 581(j).) However, the court has the power to enter a dismissal signed by the plaintiff even where the plaintiff's attorney refuses to consent as long as the court gives notice to the attorney. (CCP § 581(j).)

Here, all of the settling plaintiffs have executed dismissals, but plaintiffs' counsel has refused to sign the dismissal forms and consent to the dismissals. However, counsel does not have the right to prevent his clients from dismissing the action, since the cause of action belongs to the clients and not the attorney. (*Bowden v. Green* (1982) 128 Cal.App.3d 65, 73.) Therefore, the court should allow the settling plaintiffs to dismiss their claims.

The plaintiffs have also executed settlement agreements that appear to be valid and binding agreements, and thus are enforceable under CCP § 664.6. (See Exhibits attached to Brunn decl.) Under CCP § 664.6,

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.

Here, the parties executed written settlement agreements outside the presence of the court in which plaintiffs agreed to dismiss their claims in exchange for a waiver of Granville's right to recover attorney's fees and costs against them. (See Exhibit 1 to Brunn decl.) It does appear that there is sufficient consideration for the agreement due to the promise to waive attorney's fees and costs. Therefore, the court intends to enforce the agreements.

Finally, under CCP § 284, the client has the absolute right to discharge his or her attorney at any time, with or without cause. (*Fracasse v. Brent* (1972) 7 Cal.3d 784, 790.) Here, the plaintiffs have executed substitutions of attorney indicating that they want to discharge their attorney and represent themselves in

pro per. However, plaintiffs' counsel has refused to consent to some of the substitutions. If an attorney refuses to consent to the substitution, then the court has the power to order the attorney's substitution upon notice to the attorney. (CCP § 284(2).) Therefore, the court intends to order the substitution of the remaining settling plaintiffs' attorney.

Although plaintiffs have argued that the court should stay the action pending the outcome of the appeal of the court's denial of the TRO and preliminary injunction, the Court of Appeal has now issued its order denying plaintiffs' appeal without prejudice. (See order of Court of Appeal filed June 16th, 2009.) Plaintiffs have not refiled the appeal. Therefore, there is no longer any reason for the court to stay the action pending the outcome of the appeal, since there is none pending.

Plaintiffs also contend that the court should refuse to enforce the dismissals or any of the other settlement documents because the documents were generated by McCormick Barstow and therefore constitute illegal ex parte contacts with represented parties in violation of Rule of Professional Conduct 2-100. Plaintiffs point to the McCormick Barstow footer on one of the declarations, as well as certain distinctive typographical errors and other markers on the declarations. (See Exhibit 37 to Brunn decl.)

However, while plaintiffs claim that these documents are the "smoking gun" showing that defense counsel has been indirectly contacting plaintiffs, the evidence does not necessarily establish conclusively that defense counsel generated the documents in question, or that defense counsel has been using Granville's agents to indirectly contact plaintiffs. Defense counsel and Granville's employees have already denied that McCormick Barstow was involved in contacting the plaintiffs, and the evidence here merely shows that Granville was using a McCormick form when it contacted plaintiffs. Such circumstantial evidence is hardly the incontrovertible evidence that shows that McCormick has been contacting plaintiffs indirectly through Granville, and therefore the court declines to disregard the settlement documents and dismissals on this basis.

Furthermore, as pointed out in the defendant's reply brief, the California Bar has issued a formal opinion stating that it is not improper for a client to contact the opposing client without either counsel present, even where the opposing party is represented. (See California State Bar Formal Opinion No. 1993-131.)

"The parties have the right to communicate with each other without their counsel present. Information obtained by a client from an opposing party represented by counsel where there has been no prohibited direct or indirect communication under rule 2-100 may properly be communicated by the client to the attorney and used by the attorney as is otherwise appropriate." (*Id.* at p. 3.)

However, “When the content of the communication to be had with the opposing party originates with or is directed by the attorney, it is prohibited by rule 2-100. Thus, an attorney is prohibited from drafting documents, correspondence, or other written materials, to be delivered to an opposing party represented by counsel even if they are prepared at the request of the client, are conveyed by the client and appear to be from the client rather than the attorney...” (*Ibid.*)

On the other hand, “When the content of the communication to be had with the opposing party originates with and is directed by the client, it is permitted by rule 2-100. Thus, an attorney may confer with the client as to the strategy to be pursued in, the goals to be achieved by, and the general nature of the communication the client intends to initiate with the opposing party as long as the communication itself originates with and is directed by the client and not the attorney.” (*Ibid.*)

In the present case, Granville’s counsel does not deny that it drafted the settlement documents and other forms on behalf of its client. However, Granville and its attorneys both contend that the idea for contacting the plaintiffs originated with Granville’s principal, Dario Assemi, and that Granville’s attorneys were not involved in the discussions with plaintiffs. It is less clear whether Granville’s attorneys engaged in any discussions with their client or drafted any documents on behalf of Granville as part of the settlement process. According to the California Bar’s opinion cited above, drafting documents to be delivered to the opposing party by the client may cross the line into improper ex parte contacts. However, if Granville itself drafted the documents, then the contact was not improper.

On the other hand, the court notes that plaintiffs have not presented any evidence from the individual plaintiffs, with the sole exception of Aubrey Schaich and his wife, to show that the plaintiffs do not wish to enter into settlements with Granville or dismiss their claims. Nor have any of the individual plaintiffs, except for Aubrey Schaich, stated that they want plaintiffs’ counsel to remain as their attorney. Presumably, if the other plaintiffs did not want to settle and dismiss their claims, plaintiffs’ counsel would have provided declarations from them stating that the settlements were obtained through coercion, undue influence, fraud, or other questionable means. Therefore, it appears that the settling plaintiffs do in fact want to settle the case, and they also want to dismiss their claims and dismiss their attorney. If this is so, then plaintiffs’ counsel should not be able to prevent them from settling simply because he wants to maintain the action.

Still, regardless of whether there was improper contact between Granville’s attorneys and plaintiffs, it does not appear that the proper remedy would be to refuse to enforce the resulting settlements and dismissals. The remaining settling plaintiffs have not personally objected to the enforcement of the settlements or claimed that they do not want to substitute out their attorney

and dismiss their claims. Nor has there been any showing that it would be unjust or prejudicial to the plaintiffs to enforce the agreements. Again, the plaintiffs have the absolute right to fire their attorney and dismiss their claims if they wish to do so. Therefore, the court intends to grant the order enforcing the settlements, executing the substitutions and allowing plaintiffs to file their dismissals.

Also, the court intends to deny plaintiffs' counsel's request for an order requiring Granville to pay his attorney's fees. First, plaintiffs' counsel has not brought a separate noticed motion for attorney's fees as required under CCP § 1005. Simply requesting attorney's fees in an opposition is not sufficient to give notice of the request.

Furthermore, there is nothing in the parties' settlement agreements that would support plaintiffs' counsel's request for attorney's fees. Counsel relies on Paragraph 5 of the agreements, which provides that Granville will defend and indemnify plaintiffs from any claims for attorney's fees and costs brought by their attorney arising out of the settlement or dismissal of the plaintiff from the action. (See e.g. Exhibit 1 to Brunn decl.) Counsel claims that this provision means that he is a third party beneficiary to the agreement, and that Granville is acting as an insurer of plaintiffs, thus allowing him to seek attorney's fees directly from Granville.

However, it is apparent from the language of the agreement that the purpose of the provision was to protect plaintiffs from being liable for attorney's fees if they signed the settlement, not to benefit plaintiffs' counsel by guaranteeing him an attorney fee recovery. In fact, the agreement also provides that each side is to bear their own fees and costs. (Settlement Agreements, ¶ 3.) There is no indication that Granville or the settling plaintiffs ever intended Granville to be plaintiffs' insurer. Instead, Granville merely promised to defend and indemnify plaintiffs if they were sued by their former attorney for fees and costs arising out of the case. If every defense and indemnity clause in every agreement between private parties created an insurer/insured relationship, then most of the commercial contracts in the country would constitute insurance policies. Clearly, this is an inappropriate result and the court rejects plaintiffs' counsel's argument.

Even if plaintiffs' counsel were correct and Granville is an "insurer" of plaintiffs, then the correct remedy under Civil Code § 1559 would be for plaintiffs' counsel to file a separate lawsuit against Granville to recover his fees. (*Harper v. Wausau Ins. Co.* (1997) 56 Cal.App.4th 1079, 1086.) However, plaintiffs' counsel has not filed a separate action against Granville, and instead seeks an order for attorney's fees within the present action. Since the settlement agreement does not provide for such an award of fees, the court intends to deny the request.

Plaintiffs' counsel also claims that it would be unjust for the court to require him to file suit against his own clients in order to recover his fees, and therefore the court should order Granville to pay him directly. Again, however, there is no contractual or statutory provision requiring Granville to pay fees to plaintiffs' counsel, so there is no basis for the fee request. (CCP § 1021.) The court is not "forcing" plaintiffs' counsel to sue his own clients for fees. It is counsel's decision to make as to whether or not he should pursue an action for fees against his former clients.

Finally, plaintiffs' counsel asks that the court retain jurisdiction over the case until the attorney's fees issue is resolved. (CCP § 664.6.) Again, however, this request is based on the incorrect premise that the settlement agreement contains a provision giving plaintiffs' counsel the right to recover fees against Granville, which is clearly not the case. The settlement agreement provides that Granville will defend and indemnify plaintiffs against any claims for fees and costs by their former attorney, not that Granville must pay plaintiffs' attorney's fees at the conclusion of the present case. Therefore, the court declines the request to retain jurisdiction over the matter for the purpose of resolving plaintiffs' counsel's fee claim.

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: _____ **AMC** _____ on _____ **June 26, 2009** _____.
(Judge's Initials) (Date)

Tentative Ruling

Re: ***Pinnacle Real Estate LLC v. California Valley Real Estate Inc.***

Superior Court Case No. 08CECG04111

Hearing Date: June 30, 2009 (**Dept. 97C**)

Motion: By petitioner to confirm arbitration award

Tentative Ruling:

To grant petition to confirm but to require additional information before judgment is entered.

Explanation:

The current notice of hearing and a copy of the original petition appear to have been properly served on both respondent's counsel and the agent for the respondent. No objection having been filed, petitioner is entitled to an order confirming the arbitration award.

However along with the petition, notice of hearing and proposed order confirming the arbitration award, petitioner has submitted a proposed judgment that, while it asks the court to "fill in the blanks" concerning awardable post-award costs and attorney's fees, doesn't offer any evidence of what those fees and costs are.

The proposed judgment only refers to post-award interest at 10% from 10/29/08, so that can remain as is on the proposed judgment. But the court cannot award attorney's fees or costs without a declaration concerning the amount of post-award fees and costs actually incurred. And respondent must be given notice of the amount being requested so that he has an opportunity to challenge the amount requested.

The court will therefore grant the petition and sign the order confirming the arbitration award in the total amount of \$80,601.50. But it will direct moving counsel to serve defense counsel by fax with a declaration concerning the amount of post award fees and costs he is claiming no later than 5 p.m. on June 29, 2009.

Defense counsel is further directed to appear at the hearing with a new proposed judgment that includes the actual figures he is requesting as post-award attorney's fees and costs, as well as proof that the above-described declaration was faxed to defense counsel as directed. If defense counsel has any objection to the amount of fees and costs requested he must appear at the

hearing to explain the objection. If there is no appearance by defense counsel, the court will then issue the proposed judgment as requested.

Finally, the court notes that the envelopes provided with the proposed order and judgment only have \$.42 stamps when the current rate is \$.44, so if plaintiff's counsel wants the court to mail him a copy of the signed order and judgment, he is directed to bring additional postage.

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 A.M. Simpson 6-29-09
Issued By: _____ **on** _____
(Judge's initials) (Date)

(19)

Tentative Ruling

Hamilton v. Gilmore Wood, et al.
08CECG00803

Hearing Date: June 30, 2009 (**Dept. 97D**)

Motion: Defendants' Demurrer to Complaint

Tentative Ruling:

To overrule and require an answer in 10 days.

Explanation:

The filings submitted by moving party did not contain an actual demurrer. The Notice of Demurrer further failed to specify any ground permitted for a demurrer under Code of Civil Procedure section 430.30. Code of Civil Procedure section 430.60 states: "A demurrer shall distinctly specify the grounds upon which any of the objections to the complaint, cross-complaint, or answer are taken. Unless it does so, it may be disregarded." The Court declines to speculate which of the stated grounds is the one chosen by defendants.

The notice of demurrer states that defendants demur to claims in the complaint "to the extent that" they are asserted under an assignment. . "A demurrer does not lie to a portion of a cause of action." *Chazen v. Centennial Bank* (1998) 61 Cal. App. 4th 532, 542.

That has been true for a long, long time. "A general demurrer will not go to a part of a cause of action." *Campbell v. Genshlea* (1919) 180 Cal. 213, 217. " A demurrer cannot be interposed to a part of a cause of action or defense." *Reed v. Drais* (1885) 67 Cal. 491, 491-492. See also *Financial Corp. of America v. Wilburn* (1987) 189 Cal. App. 3d 764, 778 and *Grieves v. Superior Court* (1984) 157 Cal. App. 3d 159, 163.

The demurrer also rests on facts within the documents defendants present as materials they wish to have judicially noticed. None but Exhibit C to that request bears any filing stamp showing that the document is in fact part of a court record. The request for judicial notice is therefore denied as to all items but Exhibit C.

Defendants' argument that they no longer represented plaintiffs as of the date defendants contend they filed a motion to withdraw in the underlying case fails because there is no document which can be judicially noticed showing any such motion was filed, and because the filing of a motion to withdraw does not end the representation. See Local Rules of the United States District Court for the Eastern District of California, Rule 83-182(d). Thus the demurrer fails procedurally as well as substantively.

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: DRF on 6-29-09.
(Judge's initials) (Date)

Tentative Ruling

Re: ***Cha v. Granville Homes, Inc.***
Case No. 09 CE CG 00333

Hearing Date: June 30th, 2009 (Dept. 97A)

Motion: Plaintiffs' Motion for Protective Order and Order Designating the Case as Complex

Tentative Ruling:

To continue the hearing on the motion for protective order and order designating the case as complex to July 28th, 2009 at 3:30 p.m. in Department 97A. The parties are ordered to meet and confer on the issue of whether the case should be subject to a case management order and whether a special master or referee should be appointed. Plaintiffs' counsel shall file a declaration with the court by July 21st, 2009 describing the results of the meet and confer process. The declaration shall also address whether the request for protective order is moot in light of the fact that the plaintiffs who were served with discovery have now been dismissed from the action.

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: _____**AMC**_____ on **June 26, 2009**_____.
(Judge's Initials) (Date)

Tentative Ruling

Re: ***In re Josephine Sandoval***
Case No. 09 CE CG 00619

Hearing Date: June 30th, 2009 (Dept. 97C)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To take the matter off calendar, as no moving papers have been filed. (Local Rule 2.8.4 A; petitions for minor's compromise must be filed at least 10 court days before the hearing date.)

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 A.M. Simpson **6-29-09**
Issued By: _____ **on** _____
(Judge's Initials) (Date)

(5)

Tentative Ruling

Re: ***Brian Lambrecht v. Walter Lambrecht et al. and Related Cross-Action***
Superior Court Case No. 05 CECG 000653

Hearing Date: June 30, 2009 (Dept. 97A)

Motion: Enter judgment pursuant to the confirmed Arbitration Award

Tentative Ruling:

To grant the motion pursuant to CCP § 1286. The proposed judgment will be signed.

Explanation:

On April 14, 2009 the Court signed the stipulation confirming the award of arbitrator, Retired Judge Howard R. Broadman. The order was filed the same day. On May 7, 2009 Defendants and Cross-Complainants filed a motion seeking the entry of judgment pursuant to the confirmed award. On June 17, 2009 Plaintiff and Cross-Defendant filed a statement of non-opposition.

Until an arbitration award is confirmed (or vacated), it has only the effect of a contract in writing between the parties. See CCP § 1287.6 and see *Jones v. Kvistad* (1971) 19 CA3d 836, 840. Accordingly, a petition to confirm the award is necessary. See CCP § 1286. Unless a petition to correct or vacate the award has been timely filed, the court **must** render a judgment confirming the arbitrator's award. See CCP § 1286—"The court shall confirm the award as made ..."; see also *Valsan Partners Limited Partnership v. Calcor Space Facility, Inc.* (1994) 25 CA4th 809, 818 and *Weinberg v. Safeco Ins. Co.* (2004) 114 CA4th 1075, 1083–1084. The Petition to confirm the award has already been granted. Therefore, the motion seeking entry of judgment must be granted.

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 June 26, 2009.
(Judge's initials) (Date)

Tentative Ruling

(17)

Re: ***People v. Singh et al.***
Superior Court Case No. 08 CECG 04384

Hearing Date: June 30, 2009 (Dept. 97D)

Motion: Motion for Order of Possession

Tentative Ruling:

To grant. Pursuant to Code of Civil Procedure section 1255.410, plaintiff is authorized and empowered to take possession of Parcel 84501, described in the complaint in this action, and to remove from Parcel 84501 any and all person, obstacles, structure and improvements of any kind situated on Parcel 84501 on July 30, 2009 or the 30th day following the service of this order whichever is later.

Explanation:

Code of Civil Procedure 1240.010 authorizes the State to take property for a "public use." Code of Civil Procedure sections 1240.040 and 1245.220 require that prior to exercising eminent domain power, the public entity must adopt a Resolution of Necessity, which must comply with section 1245.230. The State here has done so, and a copy of the Resolution is attached to the Amended Bretz Declaration.

Code of Civil Procedure section 1255.410 permits an eminent domain plaintiff, either at the time of filing the complaint or at any time thereafter, but prior to entry of judgment, to move for an order for possession of the property upon demonstrating that it is entitled to take the property by eminent domain and has made a deposit pursuant to Code of Civil Procedure section 1255.010 et seq. (Code Civ. Proc. § 1255.410, subd. (d).) The State has made this showing. Street and Highways Code section 102, subdivision (a) provides: "In the name of the people of the State of California, the department [of transportation] may acquire by eminent domain any property necessary for state highway purposes." The State has deposited the sum of \$1,200,000 into an interest bearing account with the Court.

Procedurally, "[t]he motion shall describe the property of which the plaintiff is seeking to take possession ... and shall state the date after which the plaintiff is seeking to take possession of the property." (*Ibid.*) The motion shall include a statement substantially in the following form: "You have the right to oppose this motion for an order of possession of your property. If you oppose this motion you must serve the plaintiff and file with the court a written opposition to the motion within 30 days from the date you were served with this motion." (*Ibid.*) The State has complied with this requirement. (See Notice of Motion page 2.)

The eminent domain plaintiff “shall serve a copy of the motion on the record owner of the property and on the occupants, if any. The plaintiff shall set the court hearing on the motion not less than 60 days after service of the notice of motion on the record owner of unoccupied property.” (Code Civ. Proc. § 1255.410, subd (b).) “If the property is lawfully occupied by a person dwelling thereon or by a farm or business operation, service of the notice of motion shall be made not less than 90 days prior to the hearing on the motion.” (*Ibid.*) This has been done.

The State is entitled to its order. Subdivision (d) of section 1255.410 provides:

(1) If the motion is not opposed within 30 days of service on each defendant and occupant of the property, the court shall make an order for possession of the property if the court finds each of the following:

(A) The plaintiff is entitled to take the property by eminent domain.

(B) The plaintiff has deposited pursuant to Article 1 (commencing with Section 1255.010) an amount that satisfies the requirements of that article.

(Code Civ. Proc. § 1255.410, subd. (d)(1).) The motion is unopposed.

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: DRF **on** 6-29-09
(Judge's initials) (Date)

Tentative Ruling

Re: ***Ashley Rebeles (minor) v. Safeco Insurance***
Superior Court Case No. **09CECG01123**

Hearing Date: June 30, 2009 (Dept. 97D)

Motion: Petition to Compromise a Minor's Personal Injury Claim

Tentative Ruling:

To grant. Orders signed. Hearing off calendar.

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** _____ **6-29-09** _____
(Judge's initials) (Date)

(18)

Tentative Ruling

Re: ***D.H. Williams Construction, Inc. v. Merced City School District, et al.***
Case No. 08CECG03033

Hearing Date: June 30, 2009 (Dept. 97D)

Motion: By defendant Bernard Bros, Inc. to compel responses to special interrogatories, and for monetary sanctions

Tentative Ruling:

To grant. Plaintiff is ordered to provide complete verified responses, without objection, to the special interrogatories (set one) within 20 days of service of this order. Sanctions in the amount of \$320.00 are awarded in favor of defendant Bernard Bros, Inc., and against plaintiff, and are to be paid within 30 days of this order.

Explanation:

California Code of Civil Procedure (CCP) section 2030.260(a) provides that the deadline for responding to interrogatories is 30 days after the service of such discovery. Under CCP section 2030.290(b), when a party has failed to submit a timely response to written interrogatories, the court may enter an order compelling such responses. The discovery at issue was propounded in March of this year and no responses have been provided as of the date of the declaration supporting the motion (May of this year). Therefore, the court grants the motion to compel responses to the interrogatories. As to sanctions involving the interrogatories, CCP section 2030.290(c) provides that the court shall order monetary sanctions against the losing party unless the party subject to the sanctions acted with substantial justification or other circumstances make the imposition of the sanction unjust. Contrary to plaintiff's arguments, plaintiff is the losing party, and plaintiff's failure to respond to the discovery at issue required the filing of this motion. As such, the court awards sanctions as stated above.

Pursuant to California Rules of Court, rule 3.1312, and CCP 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: _____ DRF _____ on 6-29-09 _____.
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Pacific Aviation Aircraft Management v. McDonald***
Superior Court Case No.: 08CECG00866

Hearing Date: June 30, 2009 (**Dept. 97B**)

Motion: By David McDonald, McDonald Aviation, LLC, and David L. McDonald Living Trust for order permitting discovery of financial information of Pacific Aviation Aircraft Management and Eugene Sullivan

Tentative Ruling:

To grant, permitting David McDonald, McDonald Aviation, LLC, and David L. McDonald Living Trust to conduct discovery concerning Pacific Aviation Aircraft Management's and Eugene Sullivan's financial condition and to grant a protective order limiting disclosure of the evidence obtained through such discovery solely to opposing counsel and solely for the purposes of the lawsuit.

Explanation:

In weighing the evidence submitted in favor of, and in opposition to, the motion, the court finds it is very likely David McDonald, McDonald Aviation, LLC, and David L. McDonald Living Trust ("McDonald") will prevail on their claim for punitive damages. (*Jabro v. Superior Court* (2002) 95 Cal. App. 4th 754, 758.)

Pacific Aviation Aircraft Management ("Pacific Aviation") and Eugene Sullivan ("Sullivan") are entitled to a protective order limiting disclosure of the evidence obtained solely to opposing counsel and solely for the purposes of the lawsuit. (*Richards v. Superior Court* (1978) 86 Cal.App.3d 265, 272.)

Although there was no signed agreement between Pacific Aviation and McDonald or between Sullivan and McDonald, there was an agency relationship. No particular formalities are required to create an agency relationship, however the parties must understand that one is to act primarily on behalf of the other and subject to the other's direction and control. Such understanding may be inferred from the acts of the parties. (*Cook v. Westersund* (1981) 127 Cal.App.3d 192.) An agency relationship not only imposes upon the agent the duty of acting in the highest good faith towards his principal, but precludes the agent from obtaining any advantage over the principal in any transaction had by virtue of his agency. "Such an agent is charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision." [Internal

citations omitted.] (*Batson v. Strehlow* (1968) 68 Cal. 2d 662, 674-675.) Sullivan was Pacific Aviation's principal, and clearly acting as the principal on Pacific Aviation's behalf in dealing with McDonald in the acquisition of the airplane, including determining a fair price. McDonald's testimony at deposition, when he was asked questions concerning agency, does not refute this relationship as he was being asked for a legal conclusion as to the term "agent." (*Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255, 1259; decl. of David Doyle, exhibit A, depos. of David McDonald, p. 68.)

In cases where there is a fiduciary relationship, one party has the right to rely on representations made to him by the other party without the duty of further inquiry. (*Davis v. Kahn* (1970) 7 Cal.App.3d 868, 878.) Thus, although the written offer from Black Diamond to McDonald \$55.9 million for the sale of the airplane didn't provide for any payment of a commission or finder's fee to Pacific Aviation, Sullivan and Pacific Aviation were duty-bound to disclose the fact that they were receiving a \$900,000 commission from Black Diamond on top of the \$55 million that James Hagerty of AvPro, Black Diamond's agent in the transaction, testified at deposition was "from the very beginning" always "the net purchase price" contemplated by the seller. (Decl. of Donald Fischbach, exhibit, deposition of James Hagerty, p. 50:18-22.) [The court notes that the written offer is not attached to the declaration of Gene Sullivan, but assumes the written offer is the same as the written offer attached to the declaration of David McDonald as exhibit E.] Nor did McDonald have a duty to check the escrow instructions.

Further, there is evidence that Sullivan and Pacific Aviation represented to Black Diamond, the seller of the airplane, that the \$900,000 commission was the only commission Pacific Aviation would receive in the sale of the aircraft to McDonald. (Decl. of David McDonald, exhibit H.)

Although there are some conflict in McDonald's testimony including, for example, an inconsistency as to why he did not sign the written agreement, which may be a jury question, the inconsistency does not go to the crux of the question here, i.e., whether there was or was not an agreement that Sullivan's and Pacific Aviation's commission on the transaction was limited to \$250,000 and whether the lowest price which Black Diamond would take for the airplane was \$55 million, or \$55.9 million. Civil Code section 3295 is a discovery statute, and does not deal with the traditional factfinding process in anyway. (*Jabro v. Superior Court* (2002) 95 Cal.App.4th 754, 759.) A conflict does not defeat the motion because the court is required to weigh the evidence. (*Id.* at p. 759.)

Nor does it matter whether Sullivan or not Sullivan was expressing an "opinion" about how much the seller would accept, because Sullivan was McDonald's agent assisting McDonald in negotiating fair terms and a fair price for the airplane and McDonald therefore had the right to rely on what Sullivan said and here, did not say. An agent is a fiduciary with respect to matters within the scope of the agency. (*Alvarez v. Felker Mfg. Co.* (1964) 230 Cal.App.2d 987.)

(5)

Tentative Ruling

Re: ***Ketchens v. Thaxter, D.D.S.***
Superior Court Case No. 06 CECG 04322

Hearing Date: June 30, 2009 (**Dept. 97C**)

Motions: By Defendant to compel the deposition attendance of the Plaintiff

Tentative Ruling:

To grant the motion to compel the deposition attendance of the Plaintiff pursuant to CCP § 2025.450. The Plaintiff's deposition will be set for a date and time mutually agreeable to the parties provided that the deposition is taken is no later than **Wednesday, July 15, 2009**. The moving party will submit an order to the Court no later than **July 2, 2009** that includes the date, time and place to which the parties have agreed for the deposition. All service must be via fax or hand delivery.

Explanation:

Plaintiff was employed by the Defendant as a dental assistant from May 17, 2005. Shortly after she began her employment, the Plaintiff became pregnant. Plaintiff alleges that thereafter she was subjected to discrimination and harassment due to her pregnancy and her race. She was terminated on or about October of 2005. On December 29, **2006** Plaintiff filed a complaint alleging five causes of action: (1) violation of Gov. Code § 12945 et seq.; (2) tortious termination in violation of public policy; (3) intentional infliction of emotional distress; (4) negligence and (5) negligent infliction of emotional distress. The Defendant filed an Answer on August 12, **2008**.

Defendant asserts that on November 24, 2008, a notice of deposition was served on the Plaintiff's attorney setting the date of December 15, 2008 for Plaintiff's deposition. See Exhibit A attached to the Declaration of Ramazzini. This date was not convenient for Plaintiff and the deposition was re-set for January 13, 2009 upon mutual agreement. See Exhibit B. The deposition did not go forward at this time because the Plaintiff's attorney could not locate his client. The deposition was re-set for March 25, 2009 but was cancelled again for the same reason. See Exhibits C and D. On May 14, 2009 Defendant again notified Plaintiff's attorney that Plaintiff's deposition would be taken on May 29, 2009 and would not be re-set. See Exhibit E. Plaintiff did not appear and a record of the non-appearance was made. See Exhibit F. On June 15, 2009 the Court granted the Defendant's ex parte application seeking an order shortening

time to file and serve a motion to compel the deposition attendance of the Plaintiff.

Opposition to the motion was filed on June 24, 2009. In it, Plaintiff's attorney indicates that he has lost contact with the Plaintiff. However, this is not a ground for denial of a motion to compel. Defendant has met the requirements of CCP § 2025.450 and the motion will be granted. No sanctions were requested.

Pursuant to California Rules of Court, rule 391, 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 A.M. Simpson 6-29-09
Issued By: _____ **on** _____
(Judge's initials) (Date)

(6)

Tentative Ruling

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

Hearing Date: June 30, 2009 (**Dept. 97C**)

Motion: By Plaintiff for leave to file second amended complaint

Tentative Ruling:

To deny, without prejudice.

Explanation:

Plaintiff's motion does not fully comply with California Rules of Court, rule 3.1324.

No prejudice is shown. (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 486-488; *Hirsa v. Superior Court* (1981) 118 Cal.App.3d 486, 490.)

Although it appears that Plaintiff might be able to state a valid cause of action upon amendment (see Civ. Code, §§1708.5, 51.9, *Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 375), consideration of the of the validity of a proposed amendment is premature. If and when leave to amend is granted, the opposing party will have the opportunity to attack the validity of the amended pleading. (*Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048.)

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** **6-29-09**
Issued By: _____ **on** _____
(Judge's initials) (Date)

Tentative Ruling

Re: **JCM Farming Sales Inc. v. Visalia Produce, et al.**
Superior Court Case No: 09 CECG 01078 AMS

Hearing Date: Tues., June 30, 2009 (**Dept. 97 C**)

Motion: Defendants' Demurrer to the Original Complaint.

Tentative Ruling:

To OVERRULE in part and SUSTAIN in part WITH LEAVE TO AMEND as set forth below. Plaintiff shall have 10 calendar days' leave within which to file a First Amended Complaint. All new language therein shall be set forth in **boldface** type. Time shall run from the clerk's service of the minute order.

Explanation:

The court SUSTAINS the demurrer WITH LEAVE TO AMEND as to the second cause of action for interference with prospective economic advantage.

Defendants appear to argue correctly that as a general rule, a party to a contract can be charged with breaching it, but cannot be charged with interfering with its own prospective economic advantage arising therefrom. (**Kruse v. Bank of America** (1988) 202 Cal.App.3d 38, 65-66.)

Defendants argue that Plaintiff must allege wrongful interference by an "act independent from the interference itself", citing **Della Penna v. Toyota Motor Sales USA Inc.** (1995) 11 Cal.4th 376. (Defendants' Memo in Support at p. 3, lines 26-28.) But **Della Penna** requires no showing of an act INDEPENDENT of the breach. Rather, Della Penna requires a showing of an act that is "wrongful by some legal measure other than the fact of interference itself." In other words, the act that constitutes the breach must be independently wrongful aside from the fact that it constitutes a tortious breach of contract. Although "wrongful" has not been specifically defined by the California Supreme Court, the court of appeal in **Arntz** observed that the rule in Oregon is that the conduct "must violate some statute or other regulation or a recognized rule of common law or an established standard of a trade or profession." **Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.** (196) 47 Cal.App.4th 464, 477.) Here, the act of not replanting the vines and trees would constitute a breach of the contract, but does not appear to be independently wrongful or illegal.

If the only harm of the breach was to reduce the market value or resale value of the property, then it appears the relevant cause of action is for breach of contract. Plaintiff does not appear to have alleged any interference with some

prospective business relationship between it and a third party. An existing business relationship with a third party must be alleged. (See first element of tort set forth in **Arntz** at p. 475; **Westside Center Associates v. Safeway Stores** (1996) 42 Cal.App.4th 507, 523.) Plaintiff has merely alluded to a current decline in the market value of the property, due to the failure to replant. But at least one court has expressly ruled that the interference with the market theory (of all possible but as yet unidentified buyers) will not support a cause of action for interference with prospective economic advantage. (**Westside Center** at p. 527.)

Defendants also demur to the third cause of action for fraud (promise without intent to perform) on three grounds. The demurrer is **OVERRULED** on the first two grounds, but **SUSTAINED WITH LEAVE TO AMEND** on the third ground of lack of specificity in pleading.

Defendants argue that JCM failed to allege that any promises were made in **BAD FAITH**, without intent to perform. (Defendants' Memo in Support at p. 4, line 20.) Plaintiff argues correctly that no specific allegation of bad faith appears to be required. (**Bondi v. Jewels by Edwar Ltd.** (1986) 267 Cal.App.2d 672, 677.)

Defendants argue that Plaintiff must allege more than a mere failure to perform in order to state a false promise claim. (**Tenzer v. Superscope Inc.** (1985) 39 Cal.3d 18, 30.) But Plaintiff notes correctly that **Tenzer** involved a summary judgment motion and that the court of appeal in **Tenzer** stated that Plaintiff needed to **PROVE** more than a mere failure to perform. The court did not state that at the pleading stage Plaintiff needed to **ALLEGE** more than a mere failure to perform.

Defendants argue correctly that the claim is uncertain because it lacks the level of specificity required when pleading fraud. "The requirement of **specificity** in a fraud action against a corporation requires the plaintiff to allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (**Tarmann v. State Farm Mutual Auto. Ins. Co.** (1991) 2 Cal.App. 4th 153, 157.)

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 A.M. Simpson 6-29-09
Issued By: _____ **on** _____
(Judge's initials) (Date)

Tentative Ruling

(RA#24)

Re: ***Paramjot Kaur v. Rite Aid Corporation, et al.***
Court Case No. 08CECG03379

Hearing Date: June 30, 2009 (Dept. 97B)

Motion: Defendant Thrifty Payless, Inc. dba Rite Aid's Motion for
Leave to File Cross-Complaint

Tentative Ruling:

To grant with defendant granted 10 days' leave to file the cross-complaint. The time in which the cross-complaint can be filed will run from service by the clerk of the minute order.

Explanation:

Plaintiff has filed no opposition to this request, and since proposed cross-defendant Pharmacy Professionals, Inc. ("PPI") is no longer a party to this action, it has no standing to object to the motion. Moreover, defendant's claims against PPI arise from the "same transaction, occurrence, or series of transactions or occurrences as the cause brought against [it]." [CCP §428.10(b)]

There are some public policy limitations allowing permissive cross-complaint to be filed, including "where under the particular facts alleged, the cross-complaint would operate inequitably." [See *Platt v. Coldwell Banker Residential Real Estate Services* (1990) 217 Cal.App.3d 1439, 1450] Such unfairness may exist where 1) defendant can obtain the same relief by affirmative defense to the complaint; and 2) the cross-complaint would "jeopardize or entangle a special relationship which strong policies dictate be preserved." [*Jaffe v. Huxley Architecture* (1988) 200 Cal.App.3d 1188, 1193] Here, however, neither of those factors is implicated. Generally, the mere fact a cross-complaint seeks to apportion liability in the underlying action does not by itself make it "unfair" or "inequitable." [*Platt v. Coldwell Banker Residential Real Estate Services*, supra, 217 CA3d at 1450]

Therefore, it is in the interests of justice to allow the filing of the proposed cross-complaint.

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

(RA#24)

Re: ***Richard H. Castaneda v. Henry Castaneda***
Court Case No. 08CECG04214

Hearing Date: June 30, 2009 (Dept. 97D)

Motion: 1) Henry Castaneda's Motion for Preferential Trial
Setting
2) Richard Castaneda's Demurrer to Cross-Complaint

Tentative Ruling:

The court declines to rule on the demurrer, because the arbitrator alone has jurisdiction to determine whether the claims made in the cross-complaint are barred by *res judicata*.

To deny without prejudice the Motion for Preferential Trial Setting.

To stay the action pending further petitions/motion to confirm or vacate the arbitrator's award. The parties are also given leave, during the period of the stay, to file petition(s) to compel arbitration as to the cross-complaint.

Explanation:

Demurrer:

Each party in this action has demurred to the other party's pleading.¹ Each has argued that the issues and claims raised by the other party are *either* subject to the parties' earlier mediation agreement (and thus the claims are barred on the grounds of *res judicata*) *or* that the claims require interpretation and/or enforcement of the agreement (and thus, per the terms of the agreement, are subject to the jurisdiction of the mediator at binding arbitration). Likewise, each has opposed the demurrer to his own pleading by arguing that the claims and issues raised were not dealt with by the mediation agreement (and thus no bar exists).

The court cannot determine issues of *res judicata* when the parties have agreed that the mediator shall resolve all issues "over the interpretation, enforcement, application or performance" of the agreement, through binding arbitration. Indeed, the mediator/arbitrator (and not this court) is in the best position to determine whether *res judicata* applies to bar claims raised in the current pleadings [i.e., whether the claims either 1) were dealt with substantively

¹ While only one demurrer is considered today, the ruling on the earlier demurrer (which overruled the Henry Castaneda's demurrer to the complaint) is consistent with this ruling on Richard Castaneda's demurrer to the cross-complaint, since in the earlier ruling the court declined to decide the issues of *res judicata* on which that demurrer was grounded.

in the earlier mediation, **or 2**) are subject to the parties' agreement to prepare "a form Request for **Dismissal with Prejudice.**"]

Neither party has filed a petition to compel arbitration regarding the claims raised by the other's pleading. And the court cannot order the parties to arbitration by way of a ruling on a demurrer. However, the court has already made an order to arbitration, as to the complaint. That order is still in effect. In his petition to compel arbitration, Richard Castaneda did not ask that only *part* of the case (i.e., only certain issues or claims) be sent to arbitration. Further, in making its order to arbitration on December 9, 2009, the court found that all issues and claims raised by the complaint were subject to the parties' agreement to arbitrate, and thus subject to the jurisdiction of the arbitrator. The court's order dated December 9, 2008, reserved jurisdiction only to hear the Order to Show Cause re. Preliminary Injunction (which the parties later stipulated to drop from calendar). And, of course, the court continues to have jurisdiction to confirm, correct or vacate any award made by the arbitrator, pursuant to CCP §1285, et seq.²

As to the cross-complaint (as to which an order to arbitration has not yet been made), the issues and claims raised by that pleading are the same as those raised in Henry Castaneda's earlier complaint. His "primary rights" argument in the opposition to the demurrer is not applicable, since that would only apply if the claim on these "primary rights" [which he cites as being "(1) the right to be free from personal injury; (2) the right of possession of property; and (3) the right to performance of a contractual obligation"] were not raised in the earlier action. In all the cases cited in the opposition, the plaintiff had not raised the same claims/causes of action in the earlier action, but raised new claims (i.e., an action regarding *different* primary rights), even if based on the same facts. Here, however, Henry Castaneda's earlier action claimed, based on the same facts, the invasion of the *exact same primary rights* (i.e., causes of action for intentional infliction of emotional distress, conversion, and intentional interference with economic relationship). On that there can be no question. Thus, these claims are simply either barred by res judicata or not. The pertinent question is whether these claims were the subject of the mediation, or have been waived or barred by the **agreement to dismiss with prejudice** that was made in the Settlement Agreement. Again, this is something that must be decided by binding arbitration, pursuant to the Settlement Agreement.

Motion for Preferential Trial Setting

A ruling on this motion would be premature at this juncture, given that the issues raised in the complaint are to be dealt with at arbitration, and it appears

² It should be noted that the court cannot confirm the "Arbitration Order" (filed herein on May 15, 2009) absent a petition brought pursuant to CCP §1285, et seq. The court has taken judicial notice of that document, but the mere *filing* of that document does not "confirm, correct, or vacate" the award.

that this will also be the case with the cross-complaint.

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** 6-29-09 .
(Judge's initials) (Date)

Tentative Ruling

(17)

Re: ***Jones v. Employment Development Department et al.***
Superior Court Case No. 08 CECG 04338

Hearing Date: June 25, 2009 (Dept. 97B)

Motion: Demurrer to First Amended Petition/Complaint

Tentative Ruling:

To sustain without leave to amend. Respondents/Defendants shall submit, within 5 days of service of this order a judgment of dismissal in conformance with this order.

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. 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.)

Writ of Mandate

Unemployment Insurance Code section 410 provides, in relevant part: "...the right of the director, or of any other party except as provided by Sections 1241, 1243, and 5313, to seek judicial review from an appeals board decision shall be exercised not later than six months after the date of the decision of the appeals board or the date on which the decision is designated as a precedent decision, whichever is later." Here, petitioner pleads that the Board's decision was issued January 26, 2006. (Petitioner ¶ 11.) The instant writ petition/complaint was filed December 15, 2008.

Because the instant petition/complaint shows on its face that it is barred by the applicable statute of limitations, petitioner "must plead facts which show an excuse, tolling, or some other basis for avoiding the statutory bar." (*Ponderosa Homes, Inc. v. City of San Ramon* (1994) 23 Cal.App.4th 1761, 1768.)

Plaintiff asserts that her "correspondence" by writing, telephone and in person meetings with the EDD and various governmental agencies and officials tolled the statute of limitations is without merit. Writing letters, making telephone calls, and having meeting are not recognized forms of tolling the statute of limitations.

“The ‘equitable tolling’ doctrine evolved in the 1970’s to toll statutes of limitations when defendants would not be prejudiced and plaintiffs, who had several legal remedies, pursued one such remedy reasonably and in good faith.” (*Downs v. Department of Water & Power* (1997) 58 Cal.App.4th 1093, 1100 (Downs).) Three factors determine whether the statute of limitations is equitably tolled in a particular case: (1) timely notice to defendants in filing the first claim; (2) lack of prejudice to defendants in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct by plaintiffs in filing the second claim.” (*Downs, supra*, 58 Cal.App.4th at p. 1100; *Tarkington v. California Unemployment Ins. Appeals Bd.* (2009) 172 Cal.App.4th 1494, 1503.)

The problem is that letter writing, phone calling and visiting are not “pursuing a legal remedy.” These are non-legal remedies. Were these options available to extend the statutes of limitations, the statutes of limitations would effectively cease to exist at the option of the plaintiff.

Nor is an equitable estoppel present. In order to assert equitable estoppel, the following four elements must be present: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct be acted on, or must so act that the party asserting estoppel had a right to believe it was so intended; (3) the party asserting estoppel must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. (*Kleinecke v. Montecito Water Dist.* (1983) 147 Cal. App. 3d 240, 245–246.) “The doctrine of equitable estoppel is based on the theory that a party who by his declarations or conduct misleads another to his prejudice should be estopped from obtaining the benefits of his misconduct... . Under appropriate circumstances equitable estoppel will preclude a defendant from pleading the bar of the statute of limitations where the plaintiff was induced to refrain from bringing a timely action by the fraud, misrepresentation or deceptions of defendant.” (*Kleinecke, supra*, at p. 245, citations omitted.)

“To establish estoppel as an element of a suit the elements of estoppel must be especially pleaded in the complaint with sufficient accuracy to disclose facts relied upon. [Citation.]” (*Chalmers v. County of Los Angeles* (1985) 175 Cal. App. 3d 461, 467.) Whether equitable estoppel applies is normally a question of fact. (*Bertorelli v. City of Tulare* (1986) 180 Cal. App. 3d 432, 440.) However, where the complaint pleads undisputed facts establishing that equitable estoppel does not apply, the issue may be resolved on demurrer. (*Cal. Cigarette Concessions v. City of L. A.* (1960) 53 Cal.2d 865, 868.)

Here, not only does the petition not plead any fraud or misrepresentation as to the statute of limitations or conduct which prevented or deterred petitioner from filing her writ. One of the letters in Exhibit J is a letter from EDD dated June 16, 2006 indicating that petitioner’s only recourse is to file a petition for writ of mandate in the superior Court. This was over a month before the six-month

Tentative Ruling

(17)

Re: **Central Valley Community Bank v. Jesse Ituarte, Inc. et al.**
Superior Court Case No. 08 CECG 03090

Hearing Date: June 30, 2009 (Dept. 97D)

Motion: Motion for Summary Judgment/Adjudication

Tentative Ruling:

To deny without prejudice.

Explanation:

The corporate defendant is in default. The only defendant as against whom summary judgment is sought is the individual defendant, who has filed for bankruptcy protection.

The filing of a bankruptcy action "operates as a stay, applicable to all entities, of -- [P] (1) the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the [bankruptcy action], or to recover a claim against the debtor that arose before the commencement of the [bankruptcy action]" (11 U.S.C. § 362(a)(1).) The statute contains 18 specific exemptions from the automatic stay, none of which is applicable here. (11 U.S.C. § 362(b).) Actions taken in violation of the automatic stay are void. (See *Grant v. Clampitt* (1997) 56 Cal.App.4th 586, 590.)

Because the granting of a summary judgment motion would result in a judgment against the debtor/defendant, it would constitute a continuation of the action against the debtor and is prohibited. The motion is denied without prejudice.

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: DRF on 6-29-09
(Judge's initials) (Date)

Tentative Ruling

Re: ***Hoskins v. Settlemyer***
Superior Court Case No. 08CECG01413

Hearing Date: June 30, 2009 (**Dept. 97D**) (continued from June 16th
at plaintiff's request)

Motion: By defendant to enforce settlement by dismissing
action with prejudice

Tentative Ruling:

To require both sides to appear at the hearing to testify to their understanding about the relationship between the one page agreement to settle this action and the agreements attached as exhibit B to the moving papers.

Explanation:

Though neither side mentions CCP §664.6, it appears that defendant is essentially asking the court to enforce the settlement agreement by dismissing this action as plaintiff agreed to do in the one page writing she signed on 1/23/09.

And while neither party expressly claims that the terms of that agreement were related to and interdependent on the terms of the marital settlement agreement, both sides appear to presume that they are, since defendant has attached a copy of that second agreement, and plaintiff claims that the court should deny this motion in part because defendant hasn't complied with all of the terms of the divorce settlement.

Here, there is a signed writing that includes the language required by Evid. Code §1123 to make a mediated settlement agreement enforceable, however the one page agreement concerning this action doesn't clearly "stand alone" from the agreement reached the same day in the dissolution action, in that in exchange for dismissal, the only thing defendant agrees to do is abide by any existing restraining orders and release plaintiff from any as yet unasserted claims he may have against her.

The court will therefore take testimony from both parties concerning the degree to which they understood the agreement to dismiss this action to be dependent on performance of the agreements included in the dissolution settlement (i.e. timely payment of spousal support for an additional 13 months, and payment of the \$12,000 "equalization" payment). The court will also hear any other relevant testimony concerning why the agreement to dismiss this action should or should not be enforced.

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: DRF on 6-15-09.
(Judge's initials) (Date)