

**Tentative Rulings for July 2, 2009**  
**Departments 97A, 97B, 97C & 97D**

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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).)

08CECG02902      *Ernest McKinney v. HomeQ Servicing* (Dept. 97B)

08CECG04412      *David Wood v. George Valverde* (Dept. 97B)

07CECG04281      *Ray Bergman v. Victor Pasnick* (Dept. 97C)

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

08 CECG 02554      *Martin v. Clovis Unified School District, et al.* is continued to July 16, 2009 at 3:30 P.M. in Dept. 97D.

04 CECG 01621      *Hillblom et al. v. Gray et al.* and related cross action is continued to July 23, 2009 at 3:30 p.m. in Dept. 97C.

06CECG01772      *Rudy Ruiz, as Guardian ad Litem for Andrea Ruiz v. George Brown, et al.*, is continued to July 16, 2009 at 3:30 p.m. in Dept. 97C

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(Tentative Rulings begin at the next page)

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**Tentative Ruling**

Re: **Valley Network Solutions, Inc. v. City of Coalinga**  
Superior Court Case No. 08CECG03309

Hearing Date: **July 2, 2009 (Dept. 97D)**

Motion: Demurrer to First Amended Complaint

**Tentative Ruling:**

To sustain the demurrer, with plaintiff granted 10 days' leave to file a second amended complaint. The time in which the complaint can be amended will run from service by the clerk of the minute order. All new allegations in the first amended complaint are to be set in boldface type. (CCP § 430.1(e).)

**Explanation:**

Plaintiff utilizes the Judicial Council form complaint for its First Amended Complaint ("FAC"), filed on 2/10/09. It is difficult to ascertain from the pleading the basis of plaintiff's claims. The FAC purports to assert causes of action for Breach of Contract and Common Counts (FAC ¶ 8), and prays for damages in the amount of \$27,165 (FAC ¶ 10).

As for the purported cause of action for breach of contract, no breach of contract cause of action is attached to the FAC. Use of the Judicial Council form complaint requires the use of attachments for alleging the causes of action. Paragraph 8 of the form pleading states, "[t]he following causes of action are attached and the statements above apply to each (*each complaint must have one or more causes of action attached*): ..." The plaintiff then checks the boxes indicating the causes of action being alleged, and adds to the form complaint attachments alleging the elements and facts pertinent to each cause of action. As argued by defendant, the cause of action for breach of contract fails to state facts sufficient to constitute a cause of action. (CCP § 430.10(e).) "A cause of action for breach of contract requires pleading of a contract, plaintiff's performance or excuse for failure to perform, defendant's breach and damage to plaintiff resulting therefrom. [Citation.]" (*McKell v. Washington Mutual* (2006) 142 Cal.App.4th 1457, 1489.) Having failed to include the breach of contract cause of action attachment, there are no allegations of formation of a contract, breach, nonperformance or damages. Nor is it clear whether the documents attached to the FAC are supposed to be the contract that was supposedly breached, or if so, which documents comprise the contract. Moreover, it is uncertain from the pleadings whether the contract is written or oral, or implied by conduct. (CCP § 430.10(g).)

The cause of action for common counts is also ambiguous. Plaintiff includes the common counts attachment, and checks boxes indicating that the claim is based on an open book account for money due, as well as for work, labor, services and materials rendered at the request of defendant and for which defendant promised to pay plaintiff. Plaintiff adds that the cause of action is based on defendant "drafting an imprecise and improper 'Request for Bid' that caused injury to Plaintiff due to these defects." (FAC CC-1(a) & (b).) Accordingly, it appears that plaintiff is alleging that it is owed money for material and services because defendant drafted an imprecise and improper Request for Bid. Attached to the FAC are various documents regarding the apparent installation of a surveillance and security system at the Claremont Custody Center in Coalinga. The referenced Request for Bid is not attached to the FAC. The cause of action is uncertain in that the relevant document is not attached, nor is there any allegation as to how the Request for Bid was improper or imprecise, or how such unspecified defects resulted in the creation of an open book account. Accordingly, the demurrer is sustained on grounds of uncertainty. (CCP § 430.10(f).)

The court will grant leave to amend one last time, on the presumption that once the factual basis for this action is properly articulated, there may be a valid cause of action. However, the court suggests (but does not require) abandoning use of the Judicial Council form complaint, and simply drafting a second amended complaint from scratch, setting forth the facts upon which this action is based. After the filing of two complaints, the essence of plaintiff's claims is still unclear.

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: DRF on 7-1-09.  
(Judge's initials) (Date)

**Tentative Ruling**

Re: ***Simonian v. Fulbright***  
Case No. 06 CE CG 04097

Hearing Date: July 2<sup>nd</sup>, 2009 (Dept. 97A)

Motion: Defendant Osborne's Motion to Strike/Tax Costs

**Tentative Ruling:**

To deny the defendant's motion to strike or tax costs, in its entirety. (CCP §§ 1033(a), 1033.5.)

This Judge discloses that, since the trial in this matter, I have seen Mr. and Mrs. Robert Osborne, Jr. at a gym in which I am a member. They apparently are also members. The court was not aware of this coincidence during the trial of this matter. Mr. Osborne volunteered, without prompting, that he knows one of my brothers and that Mrs. Osborne is somehow related to the husband of my niece, which niece is the daughter of the above referenced brother. The court also was not aware of this information during the trial of this matter. The court has not discussed, nor will it discuss, this case with anyone-including Mr. And Mrs. Osborne.

**Explanation:**

Defendant argues that the court has discretion to determine the amount of costs to award in cases where the plaintiff recovers only an amount that he could have recovered in a limited civil action (CCP § 1033(a)), and that plaintiff knew his damages were minimal so he should have filed the action in limited civil court from the outset. Therefore, defendant contends that the court should strike all of plaintiff's costs.

It is true that the court has discretion to limit recovery of costs where the plaintiff fails to recover more damages than he could have recovered in a limited civil action. (CCP § 1033(a).) However, the court is not *required* to reduce or eliminate plaintiff's costs. Instead, it has discretion to set the amount of costs. (*Ibid.*)

Here, it does not appear that plaintiff brought the action in bad faith or for improper purposes. There is no question that plaintiff prevailed on the intentional tort and punitive damage claims, and he was able to show that defendant assaulted and battered him. Also, plaintiff did dismiss several other defendants and causes of action, and he agreed to limit the extent of his remaining causes of action against Osborne. Therefore, it does not appear that



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**Tentative Ruling**

Re: **Sayavong et al. v. Thai Fusion Bar & Grill et al.**  
Superior Court Case No. 08CECG04213

Hearing Date: **July 2, 2009 (Dept. 97D)**

Motion: Demurrer to Second Amended Complaint

**Tentative Ruling:**

To overrule demurrers to the fifth, sixth and eighth causes of action. To sustain the demurrers to the ninth and tenth causes of action, with plaintiffs granted 10 days' to file an amended complaint to assert these causes of action against Thai Fusion only. The time in which the complaint can be amended will run from service by the clerk of the minute order. All new allegations in the second amended complaint are to be set in **boldface** type. If no amended complaint is filed, defendants shall file their answers within 30 days of service by the clerk of this order.

**Explanation:**

**Fifth and Sixth and Eighth Causes of Action**

Plaintiffs assert causes of action for assault, battery and intentional infliction of emotional distress against Michael Vasquez, the individual who allegedly committed the harassment, and the employer, Thai Fusion Bar & Grill. Vasquez is the only defendant alleged to have undertaken any acts of sexual harassment. (See SAC ¶¶ 10-12.)

Thai Fusion generally demurs to the intentional tort causes of action on the ground that the complaint does not show that Vasquez's conduct was committed within the scope of his employment duties. Thai Fusion argues that the complaint relies on the theory of respondeat superior for asserting these causes of action against Thai Fusion.

An employer can be held liable for assault and battery under respondeat superior. (**City of Los Angeles v. Superior Court** (1973) 33 Cal.App.3d 778, 782.) To recover under respondeat superior, plaintiffs bear the burden of proof to demonstrate that the employee's tortious act was committed within the scope of his employment. (*Id.*; **Ducey v. Argo Sales Co.** (1979) 25 Cal.3d 707, 721.) The incident giving rise to the injury must be an outgrowth of the employment, the risk of injury must be inherent in the workplace, or typical of or broadly incidental to the employer's enterprise. (**Lisa M. v. Henry Mayo Newhall Memorial Hospital** (1995) 12 Cal.4th 291, 298.)

Defendants argue that the allegation of the SAC that Vasquez's conduct occurred "during the normal scope of the employment relationship" (SAC ¶ 30) is inconsistent with the prior allegation in FAC ¶ 43 that he acted "outside the normal scope" of his employment. Defendants argue that FAC ¶ 43 constitutes a judicial admission, and must be read into the current complaint, disregarding the SAC's sham allegations. (See **Castillo v. Barrera** (2007) 146 Cal.App.4th 1317, 1324; Weil & Brown, **Civ. Proc. Before Trial** (TRG 2008) § 7.48.) However, it appears that the FAC ¶ 45 allegation was an inadvertent mistake, given the inconsistency with FAC ¶ 5.

As plaintiffs point out, in seeking to hold Thai Fusion liable under the intentional tort causes of action, plaintiffs need not rely principally on the doctrine of respondeat superior. Rather, they rely on allegations of ratification by Thai Fusion. This issue was addressed in **Murillo v. Rite Stuff Foods** (1998) 65 Cal.App.4th 833. There, the court found that a plaintiff asserting intentional tort causes against an employer based on acts of sexual harassment in the workplace need not rely on the theory of respondeat superior. Ratification is an alternative viable theory:

[P]laintiff need not necessarily rely upon the doctrine of respondeat superior. A principal is liable when it ratifies an originally unauthorized tort. (*Shultz Steel Co. v. Hartford Accident & Indemnity Co.* (1986) 187 Cal.App.3d 513, 519, 523 [231 Cal.Rptr. 715].) The failure to discharge an agent or employee may be evidence of ratification. As noted in *McChristian v. Popkin* (1946) 75 Cal.App.2d 249 [171 P.2d 85], "If the employer, after knowledge of or opportunity to learn of the agent's misconduct, continues the wrongdoer in service, the employer may become an abettor and may make himself liable in punitive damages." (At p. 256; accord, *City of Los Angeles v. Superior Court* (1973) 33 Cal.App.3d 778, 782-783 [109 Cal.Rptr. 365]; *Coats v. Construction & Gen. Laborers Local No. 185* (1971) 15 Cal.App.3d 908, 914 [93 Cal.Rptr. 639]; *Seymour v. Summa Vista Cinema, Inc.* (9th Cir. 1987) 809 F.2d 1385, 1388.) (**Murillo**, 65 Cal.App.4th at 852.)

Here, plaintiffs allege that after being informed of Vasquez's harassing conduct, Duangboupha, owner of Thai Fusion, instead of taking some precautions to protect plaintiffs from Vasquez's conduct, constructively or actually fired plaintiffs. Duangboupha did not believe that Vasquez's conduct constituted sexual harassment. "Therefore, her actions were in fact a tacit ratification of Michael Vasquez's conduct." (SAC ¶ 12.)

The allegation that, having been informed of the conduct, Duangboupha took no action (including presumably failing to discharge Vasquez, is sufficient to base the intentional tort claims on the theory of ratification under **Murillo**.

Contending that the ratification allegations are insufficient, defendants rely on ***Rakestraw v. Rodriguez*** (1972) 8 Cal.3d 67, 73, which stated: “Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him. [Citations.]” Certainly, there are no such allegations in the SAC. And it is difficult to imagine a person committing sexual harassment *on behalf of* another. But ***Murillo***, involving workplace sexual harassment, is clearly more factually analogous to this action than ***Rakestraw***, which involved ratification of a fraudulent transaction. Accordingly, the court will follow ***Murillo*** and overrule the demurrer to these intentional tort causes of action.

#### Ninth and Tenth Causes of Action

In the ninth cause of action is for breach of contract plaintiffs allege that before beginning employment **at Thai Fusion**, they entered into an oral employment contract **with Duangboupha**. Plaintiffs allege that they were promised employment as long as their performance was satisfactory and would not be dismissed but for just cause. Plaintiffs allege the agreement was breached when Duangboupha actually and/or constructively fired them in retaliation. (SAC ¶¶ 44.)

In the 10<sup>th</sup> cause of action plaintiffs allege that Duangboupha breached the implied covenant of good faith and fair dealing in the contract, based on the facts alleged, as well as by failing to give them letters of recommendation.

As defendants point out, plaintiffs have alleged in the FAC and SAC that Thai Fusion was their actual employer (FAC ¶¶ 9, SAC ¶¶ 9), and that Duangboupha is the owner of Thai Fusion. Defendants request judicial notice of official records showing that Thai Fusion is a California corporation. The request is granted. Plaintiffs’ rationale for seeking to hold Duangboupha liable for breach of this contract is that that each defendant is the alter-ego of the other. SAC ¶¶ 6 alleges that “each Defendant was completely dominated and controlled by his co-Defendant and each was the alter-ego of the other.”

In ruling on the demurrer to the FAC, the court already found these allegations insufficient, and they remain unchanged in the SAC.

“A corporate identity may be disregarded-the 'corporate veil' pierced-where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation. [Citation.] Under the alter ego doctrine, then, when the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation's

acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners. [Citations.] The alter ego doctrine prevents individuals or other corporations from misusing the corporate laws by the device of a sham corporate entity formed for the purpose of committing fraud or other misdeeds. [Citation.]”

**(Sonora Diamond Corp. v. Superior Court** (2000) 83 Cal.App.4th 523, 538.)

Two general requirements must be met before the alter ego doctrine will be invoked: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and the shareholder do not in reality exist, and (2) the result will be inequitable if the acts are treated as those of the corporation alone. (*Id.* at 538.)

Plaintiffs allege domination and control of each defendant by the other, but not unity of interest and ownership. Nor do plaintiffs allege that any inequitable result if the acts of the corporation or individual are treated as its/hers alone. The court will not disregard the corporate entity unless it is necessary in order to prevent fraud or injustice. And “[m]ere ownership of all the stock and control and management of a corporation by one or two individuals is not of itself sufficient to cause the courts to disregard the corporate entity.” (**Norins Realty Co. v. Consolidated Abstract & Title Guaranty Co.** (1947) 80 Cal.App.2d 879, 883.) To the extent plaintiffs may rely on the alter-ego allegations of the complaint to hold each of the defendants liable for the torts of another, the alter-ego allegations are insufficient.

Accordingly, the demurrers to the ninth and tenth causes of action are sustained. For some reason plaintiffs asserted these contract claims against Duangboupha only, not the employer Thai Fusion. Leave to amend will be granted only to assert the causes of action against Thai Fusion if plaintiffs determine that the facts are sufficient to do so.

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: DRF on 7-1-09.  
(Judge’s initials) (Date)

(6)

**Tentative Ruling**

Re: ***JB Carter Enterprises, LLC v. United Security Bank***

Superior Court Case No.: 08CECG00707

Hearing Date: July 2, 2009 (**Dept. 97C**)

Motion: (1) Motion for summary adjudication by Plaintiff/Cross Defendant JB Carter Enterprises, LLC on the first amended cross complaint of United Security Bank and the first amended answer to the complaint;

(2) By Plaintiff/Cross Defendant JB Carter Enterprises, LLC for leave to amend complaint

**Tentative Ruling:**

To deny the motion for summary adjudication, except as to the twentieth separate defense of “unauthorized modification” which Defendant/Cross Complainant United Security Bank has agreed in its opposition has no merit, and to grant the motion to amend, with Plaintiff granted 10 days within which to file and serve the proposed first amended complaint. The time in which the complaint can be amended will run from service by the clerk of the minute order. All new allegations in the first amended complaint are to be set in **boldface** type. JB Carter Enterprises, LLC’s objections to United Security Bank’s evidence are overruled as irrelevant.

**Explanation:**

Motion for summary adjudication

The pleadings determine what issues are material in a summary judgment motion. Therefore, the moving party's evidence must be directed to the claims or defenses raised in the pleadings. The motion may not be granted or denied on issues not raised by the pleadings. (*Government Employees Insurance Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98.)

A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty. (Code Civ. Proc. §437c, subd. (f)(1).) A party moving for summary judgment or adjudication has the burden to show it is entitled to judgment concerning all theories of liability asserted. (*Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 717.)

Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to the terms included in the writing may not be contradicted by evidence of any previous agreement or of a contemporaneous oral agreement. (Code Civ. Proc. §1856, subd. (a).) The parties may explain or supplement the terms in such an agreement by evidence of consistent additional terms, unless the writing is intended as a complete and exclusive statement of the terms of the agreement. (Code Civ. Proc. § 1856, subd. (b).)

Extrinsic evidence is admissible to explain ambiguities or to give meaning and content to words used in the agreement, as long as that evidence does not vary or contradict the written terms of the agreement. (*Blackburn v. Charnley* (2004) 117 Cal. App. 4th 758, 766; see Code Civ. Proc. 1856, subd. (e).) Evidence admitted to explain an agreement may include evidence of a course of dealing, usage of trade, or course of performance. (Code Civ. Proc. 1856, subd. (c).)

The trial court determines whether the parties intended the writing to be a final expression of their agreement with respect to the terms included in it and whether the writing is intended also as a complete and exclusive statement of the terms of the agreement. (Code Civ. Proc. § 1856, subd. (d); see *Banco Do Brasil, S.A. v. Latian, Inc.* (1991) 234 Cal. App. 3d 973, 1001 [Whether rule applies to exclude evidence of any collateral oral agreements is question of law to be determined by court].) In *Banco Do Brasil, S.A.*, the parol evidence issue forbade introduction of a second oral agreement that contradicted the first agreement, not the definition of terms. "The Guaranty Agreement before us purports to set forth and describe the entire debt relationship between Banco and Latian. It refers to a total remaining unpaid obligation, specifies the security therefore and describes just how that debt will be repaid. It is inconceivable that an additional agreement to extend further credit would not be provided for therein." (*Banco Do Brasil v. Latian, supra*, 234 Cal. App. 3d 973, 1007.)

In determining whether the papers show that there is no triable issue of material fact, the court considers all the evidence set forth in the papers except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence. (Code Civ. Proc. §437c, subd. (c).)

Here, the May 2006 agreement, which pursuant to the integration clause appears to be the final and operative agreement that superseded the two previous agreements, does not define most of the terms contained within it, including the terms "surcharge fees," "interchange fees," "exchange fees," "network fees," "STAR fees," "Electronic Benefits Transfers," "rebate," "surchargeable cash transactions," "ATM fees," "all ATM fees," "Rebate," or "processing fees." The written agreement (a very poor copy of the second page of two pages is included as exhibit 7 to the moving papers), says that "1a.

Company [JB Carter Enterprises, LLC, dba ATMMS, "ATMMS"] shall receive all ATM fees, including, but not limited to, surcharge fees. b. Company [ATMMS] shall give Merchant a monthly rebate based on the number of surchargeable cash transactions at the ATM(s) during each calendar month (the "Rebate"). Such Rebate will be paid within 21 days after the first business day of the succeeding month. In the event that certain Electronic Benefits Transfers (EBT) or other transactions pay processing fees at a rate less than Cirrus or Plus rates as of the date and year first above written, the REBATE for these transactions will be paid minus said difference. Company [ATMMS] shall process transactions using, in its determination, the most appropriate method. In the event the current processing is no longer available, Company [ATMMS] will determine the best alternative and the rebate may change accordingly."

The term "Rebate" is purportedly an amount based on the "surchargeable cash transactions" at the ATMs during the calendar month, but the agreement then goes on, in the same paragraph to use the term "REBATE" in all capital letters rather than the purportedly defined term "Rebate" and which could be read to relate to Electronics Benefits Transfer (EBT) or other transactions which pay processing fees at a rate less the Cirrus or Plus rates. Further, within the same paragraph, the word "rebate" is used without any capitalization at all. Thus, it isn't clear whether the term "Rebate" [first letter capitalized] is supposed to mean the same thing as the term "REBATE" [all capitalized] and the word "rebate" [no letters capitalized] as used in the agreement. Certainly NONE of the other terms are defined in that portion of the agreement [page 2] which has been introduced into evidence.

Here, there really is no second agreement, only a disagreement about what the terms in the operative May 2006 agreement mean. As already mentioned, none of the terms, with the possible exception of the terms "Rebate," "REBATE," or "rebate" is defined in the agreement. United Security Bank's ("USB") interpretation of the terms "exchange fees" and "interchange fees" do not contradict any definition set forth in the agreement. (See *Hayter Trucking, Inc. v. Shell Western E&P, Inc.* (1993) 18 Cal.App.4th 1, 18.)

Here, while the agreement might have been integrated as to it being "an automated teller machine processing agreement" that bound both parties, and being the final, or operative agreement, it cannot said to have been integrated as to the meaning of terms that are not even defined in the agreement. Introduction of extrinsic evidence as to the meaning ascribed by USB to the undefined terms "interchange fee," and "exchange fee" as alleged in the cross complaint, and all the other terms also mentioned above, is thus not precluded by the parol evidence rule; in fact, it is necessary to ensure that the contract is interpreted, as much as possible, to give effect to the mutual intention of the parties as it existed at the time of contracting. (Civ. Code §1636 et seq.) It doesn't matter what the contract between USB and Table Mountain Casino said about "interchange fees," even if such evidence might be probative of the meaning of those terms at

trial. ATMMS has introduced no evidence as to what is meant by any of the defined terms by reference to the agreement itself, or course of dealing, or usage of trade, or course of performance, or even what its own construction is of the terms that are included in the agreement. Certainly the meaning of all these terms does not appear, on their face, to have a common-sense, ordinary, everyday meaning. ATMMS has not met its burden. (Code Civ. Proc. §437c, subd. (p)(2).)

Nor has ATMMS met its burden as to summary adjudication of any of USB's affirmative defenses, as discussed below. (Code Civ. Proc. §437c, subd. (p)(2).)

The motion as directed to the second affirmative defense of "no valid contract" fails. When the validity of the agreement is in dispute, the parol evidence rule does not preclude taking evidence relevant to that issue. (Code Civ. Proc. § 1856, subd. (f); *Lewis & Queen v. N.M. Ball Sons* (1957) 48 Cal. 2d 141, 148 [Parol rule does not preclude evidence that contract lawful on its face is in fact part of illegal transaction.]) Further, the second affirmative defense is also based on purportedly illusory nature of the agreement in that it permitted, by its terms, that ATMMS reserved to itself the unilateral right to terminate the contract if, at any time it determined that it was not profitable; that the contracts were induced by fraud; and that the May 2006 contract was necessary to serve Table Mountain Casino's need for multiple transaction capability ATMs. A party moving for summary judgment or summary adjudication has the burden to show it is entitled to judgment concerning all theories of liability, and a motion for summary adjudication can be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty. (*Lopez v. Superior Court, supra*, 45 Cal.App.4th 705, 717; Code Civ. Proc. §437c, subd. (f)(1).) ATMMS has introduced no facts or evidence on this portion of the second affirmative defense.

The motion is also denied as to the third affirmative defense of uncertainty. The agreement is not integrated as to the terms contained with the terms of the third affirmative defense, i.e., "pass through fees and expenses," "ATM fees," "Rebate," "all ATM fees," "surcharge fees," "surchargeable cash transactions," "certain Electronic Benefits Transfers," and "or other transactions." ATMMS has introduced no facts supported by evidence as to what it meant by any of the defined terms by reference to the agreement itself, or course of dealing, or usage of trade, or course of performance, or even what its own construction is of the terms that are included in the agreement. Further, the third affirmative defense alleges in essence the contract was illusory because it permitted ATMMS unilaterally to terminate the contract if ATMMS, in its discretion, determined the contract was not profitable for ATMMS. ATMMS has not introduced any evidence or facts on the purportedly illusory nature of the contract, and thus has not shown entitlement to judgment concerning all theories of liability.

The motion is also denied as to the sixth affirmative defense of estoppel. The agreement is not integrated as to the terms contained with it, and ATMMS has introduced no facts supported by evidence as to the terms contained within the sixth affirmative defense, i.e., that ATMMS had no intent to pay the undefined "exchange or interchange fees," or the other allegations within the sixth affirmative defense including the purportedly illusory nature of the contract, the set up of another agreement with Cash Systems, Inc., or on the representations Richard Ramirez allegedly made in 2 of the first amended answer and thus has not shown entitlement to judgment concerning all theories of liability. A motion for summary adjudication can be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.

The motion is also denied as to the eighth affirmative defense of unclean hands, purportedly based on the misrepresentations as alleged in 2 of the first amended answer, because no facts or evidence have been presented as to those allegations. A motion for summary adjudication can be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty. That ATMMS "substantially performed its obligations" is not part of the pleading of the eighth affirmative defense, and thus ATMMS cannot summarily adjudicate it on that basis. A motion for summary judgment cannot be granted on causes of action or affirmative defenses not pleaded. (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 382.)

The motion is also denied as to the sixteenth affirmative defense of impossibility, which alleged that because Table Mountain Casino terminated its agreement with USB and the agreement between ATMMS and USB was entirely premised upon an ongoing ATM arrangement with the casino, because the motion does not in any way address those allegations. ATMMS has not introduced facts supported by evidence to show that this defense has no merit. Why does USB contend that it was unable to renew its contract with Table Mountain Casino? It's not alleged in the affirmative defense except generally and it's not in the facts and evidence said to support adjudication of USB's sixteenth affirmative defense of impossibility.

The motion is also denied as to the seventeenth affirmative defense of misrepresentation and the eighteenth affirmative defense of mistake, for the same reasons as it is denied for the second, third, sixth, and eighth affirmative defenses because no evidence is presented as to the disputed terms already mentioned and the allegations of misrepresentation in ¶2 of the first amended answer. Additionally, ATMMS's own facts and evidence show that there is a triable issue as to these defenses because the evidence shows USB had previously received the undefined, so-called "Star Fees" from previous ATM transactions and one of USB's representatives had been "assured by Richard Ramirez that we would continue to receive these fees . . ." but had not been paid

interchange fees in the monthly rebate for the period ending March 30, 2006. (Facts #73-74.) In determining whether the papers show that there is no triable issue of material fact, the court considers all the evidence set forth in the papers except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence. (Code Civ. Proc. §437c, subd. (c).)

The motion is granted as to the twentieth affirmative defense of unauthorized modification because USB says it no longer intends to rely on it and agrees it may be stricken from the answer.

The motion is denied as to the twenty-first affirmative defense of impossible conditions, and the twenty-second affirmative defense of frustration of purpose, for the same reason as it is denied for the sixteenth affirmative defense of impossibility, above.

#### Motion to amend

Here, the proposed cause of action for breach of the covenant of good faith and fair dealing adds allegations that USB unfairly interfered with ATMMS's right to receive the benefits of the three agreements by, among other things, unfairly terminating the May 2006 written agreement on November 28, 2006, breaching its July 2001 agreement with Table Mountain Casino by failing to provide service and maintenance for the ATMs located at the casino, disclosing confidential financial information to the casino related to the terms of the three agreements, and failing to participate in good faith negotiations with the casino to reach an agreement whereby USB would continue to provide ATM services to the casino. (Proposed first amended complaint, 57.)

California law recognizes an implied covenant of good faith and fair dealing in every contract. However, breach of the covenant does not necessarily give rise to a cause of action. (*Quigley v. Pet, Inc.* (1984) 162 Cal. App. 3d 877, 889-890.) The covenant is to the effect that neither party to the contract will do anything deliberately to deprive the other of the benefits of the agreement. (*Pasadena Live, LLC v. City of Pasadena* (2004) 114 Cal. App. 4th 1089, 1092-1094.)

A breach of the implied covenant of good faith and fair dealing involves something more than a breach of a contractual duty itself. It involves unfair dealing in the form of a conscious and deliberate act that unfairly frustrates the agreed common purpose of the contract and disappoints the reasonable expectations of the other party to the contract. (*Careau & Co. v. Security Pac. Bus. Credit, Inc.* (1990) 222 Cal. App. 3d 1371, 1394.) If a claim for breach of the implied covenant of good faith and fair dealing does not go beyond the statement of a breach of the express contractual terms and seeks the same relief sought in a breach of contract claim, it is simply superfluous to the contract claim. A claim

for breach of the implied covenant is separate and distinct from a contract claim in three situations: (1) if no contract claim is alleged; (2) if the plaintiff is seeking recovery in tort; and (3) if the plaintiff alleges that the defendant acted in bad faith to frustrate the benefits plaintiff was to receive under the contract. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal. 4th 317, 353, fn.18.)

Judicial policy favors resolution of all disputed matters between the parties in the same lawsuit. (*Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939.) If the delay in seeking the amendment has not misled or prejudiced the other side, the liberal policy of allowing amendments prevails. Indeed, it is an abuse of discretion to deny leave in such a case . . . even if sought as late as the time of trial. (*Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564-565.)

If the plaintiff is the party seeking leave to amend, knowing that trial will be delayed, proximity to the trial date is not ground for denial. As long as no prejudice to the defendant is shown, the liberal policy regarding amendment prevails, and it is an abuse of discretion to refuse the amendment. (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 297 [No surprise to defendant because the parties had conducted discovery on the issues sought to be raised by the amendment.]

Here, the cause of action is superfluous as to the allegations that USB terminated its agreement with ATMMS on November 28, 2006, because that allegation is the essence of ATMMS's breach of contract claim, as is the allegation that USB failed to service and maintain the ATMs because the contract itself required USB to keep the ATM equipment "in working order." (Contract, ¶3b.). The remainder of the allegations of the claim do not appear to have required any additional discovery because they relate to USB's two impossibility defenses that USB would have already had to conduct discovery on because whatever defenses and objections are raised by the defendant in the answer are deemed controverted by the plaintiff without the plaintiff having to file another pleading. (Code Civ. Proc. §431.20(b); *Martin v. Sugarman* (1933) 218 Cal. 17, 19 [In suit for personal injuries, plaintiff could introduce evidence at trial to attack defendant's affirmative defense of release contained in defendant's answer.]

### **Evidentiary objections**

Because a party opposing party a motion for summary adjudication has no obligation unless and until the moving party has by declaration stated facts establishing every element necessary to sustain a judgment in his or her favor (*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468), JB Carter Enterprises, LLC's objections to United Security Bank's opposing evidence are overruled as irrelevant.

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**

**6-30-09**

**Issued By:** \_\_\_\_\_ **on** \_\_\_\_\_.

(Judge's initials)

(Date)

(19)

**Tentative Ruling**

***Gill v. Singh et al.***

08CECG02665

Hearing Date: July 2, 2009 (Dept. 97A)

Motion: Motion by defendant Singh for Judgment on the Pleadings

**Tentative Ruling:**

To deny.

**Explanation:**

The complaint alleges that defendants Singh and Prime Star Logistics, Inc. ("Prime Star") were both employers of plaintiff, that each employed plaintiff as a truck driver, that each failed to procure workers compensation insurance. It also alleges that the true business form of Prime Star is unknown.

Defendant Singh argues that Prime Star must be found to be a corporation and because a corporation is alleged to be an employer of plaintiff, Singh cannot be his employer as well. However, there is no allegation that Prime Star is a corporation and such contention is not supported by any request for judicial notice. Further, while there may be circumstances where an individual and a corporation could not act as a joint employer, there also might be circumstances where they might, such as an employee leasing agreement. The alleged pleading inconsistency asserted as the basis for this motion does not appear from the pleading itself.

Further, case law notes that "The plaintiff remains free to allege any and all 'inconsistent counts' that a reasonable attorney would find legally tenable on the basis of the facts known to the plaintiff at the time." *Crowley v. Katleman* (1994) 8 Cal. 4th 666, 691. The ability to plead inconsistent facts also extends to a defendant: "[I]t is well settled in California that a defendant may plead as many inconsistent defenses in an answer as she may desire and that such defenses may not be considered as admissions against interest in the action in which the answer was filed." *Park City Services, Inc. v. Ford Motor Co., Inc.* (2006) 144 Cal. App. 4th 295, 309.

There being no identifiable inconsistency in the pleading, and inconsistency not furnishing a basis for a judgment on the pleadings, the motion is denied.

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 June 30, 2009.**

(Judge's initials)

(Date)





(23)

**Tentative Ruling**

Re: ***Yesenia Ayala v. Matthew Allen Gomes, et al.***  
Superior Court Case No. 09 CECG 01577

Hearing Date: Thursday, July 2, 2009 (**Dept. 97B**)

Motion: Petition to Compromise a Minor's Claim

**Tentative Ruling:**

To DENY WITHOUT PREJUDICE. Counsel must cure the defects noted below and obtain a new hearing date. Counsel must file a First Amended Petition, Order Approving Compromise, and Order to Deposit Money. Counsel may also file declarations and supporting documents as needed. Hearing off calendar. No appearances necessary.

**Explanation:**

The Petition fails to comply with CRC 7.950(4). There are no photocopies of all doctors' reports containing a diagnosis of and prognosis for the injury and there is no recent medical report of the claimant's present condition.

The Petition fails to comply with CRC 7.950(5). The Petition does not provide the names of the hospitals, doctors, and other medical providers that furnished medical care, the amounts of the charges for the care (whether paid or owing), the amounts paid (whether covered by insurance or not), the amounts of any negotiated reductions of the charges, and the net amount owed to each medical provider.

Rather, the only numbers that the Petition presents at Petition ¶ 10 are the amounts charged to and paid by Medi-Cal. However, Counsel has improperly listed the amount of the Medi-Cal reimbursement lien at Petition ¶ 10 because Medi-Cal is not a medical provider. Rather, the amount of Medi-Cal's lien (here, \$1,034.20) should be listed (along with any other outstanding medical liens) in Petition ¶ 10(a)(5) and Petition ¶ 10(a)(6). Then, since there should be a difference between the total net amount owed to individual medical providers (Petition ¶ 10(a)(4)), the total amount of medical liens (Petition ¶ 10(a)(5)) and the total amount of medical expenses to be paid from the proceeds of judgment (Petition ¶ 10(a)(6)), Counsel must explain the difference between Petition ¶ 10(a)(4)-(6) by describing the Medi-Cal lien (Medi-Cal's address, the amount of the lien, and why the court should authorize payment of the lien from the settlement proceeds) in Attachment ¶ 10.



(23)

**Tentative Ruling**

Re: ***Chohan Express v. Diesel Specialties, et al.***  
Superior Court No. 08 CECG 01530

Hearing Date: Thursday, July 2, 2009 (**Dept. 97D**)

Motion: Defendant Diesel Specialties' Motion for Terminating Sanctions, and Defendant's Request for Monetary Sanctions

**Tentative Ruling:**

To DENY Defendant's Motion for Terminating Sanctions.

To GRANT Defendant's Request for Monetary Sanctions in the amount of \$250, against Plaintiff's attorney, to be paid within 20 days of this ruling.

**Explanation:**

Code of Civil Procedure § 2023.030(c)(3) provides that the Court can impose a terminating sanction against any party engaging in conduct that is a misuse of the discovery process by issuing an order dismissing the action, or any part of the action. Sanctions should not constitute a "windfall" to the requesting party; *i.e.* the choice of sanctions should not give that party more than would have been obtained had the discovery been answered. (*Weil & Brown, supra*, at ¶ 8:1213.) The imposition of terminating sanctions is a drastic consequence, one that should not lightly be imposed, or requested. (*Ruvalcaba v. Government Employees Ins. Co.* (1990) 222 Cal.App.3d 1579, 1581.)

Here, terminating sanctions are not appropriate. First, the Defendant has failed to present evidence that there is a history of abuse or misuse of the discovery process in this case. This is not a situation where the Defendants have brought multiple discovery motions and the Plaintiff has violated all of the various Court orders. Rather, the Defendant has only provided evidence that that the Plaintiff has violated one Court order. On March 24, 2009, the Court issued an order granting the Defendant's motion to compel verified initial responses to Form Interrogatories, Set One, Special Interrogatories, Set One, and Request for Production of Documents, Set One, and told the Plaintiff to serve initial responses, without objections, within 10 days after service of the order. Further, the Court granted the Defendant's motion for deemed admissions. Finally, the Court ordered the Plaintiff to pay the Defendant \$265.00 in sanctions within 30 days. (White Decl., Exhibit 1.) The Defendant has provided evidence that the Plaintiff has failed to provide the outstanding discovery responses and failed to pay the monetary sanctions within the provided time limits. (White Decl. ¶ 7.) However, the fact remains that the Plaintiff has

only violated a single court order regarding discovery, and that there is no history of abuse of the discovery process in this case.

Second, it is not clear that the Plaintiff would refuse to comply with the Court's March 24, 2009 order if given more time or a lesser sanction imposed. There is no evidence that the Plaintiff has abandoned this lawsuit or is refusing to provide any discovery responses regardless of the sanction imposed.

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** 7-1-09 .  
(Judge's initials) (Date)

## Tentative Ruling

(17)

Re: ***Houngvienkhan v. Dynasty Bar***  
Superior Court Case No. 08 CECG 00745

Hearing Date: July 2, 2009 (Dept. 97A)

Motion: Motion for Summary Judgment

### **Tentative Ruling:**

To deny.

### **Explanation:**

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

The court's sole function on a motion for summary judgment is issue-finding, not issue-determination. The court must determine from the evidence submitted whether there is a 'triable issue as to any material fact.' (Code Civ. Proc. § 437c(c); *Zavala v. Arce* (1997) 58 Cal.App.4th 915, 926.) The moving party bears the burden of showing the court that the plaintiff 'has not established, and cannot reasonably expect to establish, a prima facie case ... .' [Citation.]" (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.)

A defendant who seeks a summary judgment must define all of the theories of liability alleged in the complaint and challenge each factually. (*Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 714.)

### ***Premises Liability & Negligence***

It is well established that California law requires an owner or occupier of land to exercise ordinary care in the management of his property and the breach of such duty constitutes actionable negligence. (Civ. Code, § 1714; *Rowland v. Christian* (1968) 69 Cal.2d 108; *Davert v. Larson* (1985) 163 Cal.App.3d 407, 410.) Thus, the elements of a cause of action for premises liability are the same as those for negligence: duty, breach, causation, and damages. (*Ortega v. Kmart*

*Corp.* (2001) 26 Cal.4th 1200, 1205.) Defendants claim plaintiff can establish neither duty nor causation.

### *Duty*

The complaint alleges that the defendants failed to provide adequate security, "responsible persons" and lighting.

The California Supreme Court has had occasion to consider the scope of a landowner's duty to protect persons against the criminal acts of third parties. (See, e.g., *Castaneda v. Olsner* (2007) 41 Cal.4th 1205, 1210-1211; *Morris v. De La Torre* (2005) 36 Cal.4th 260, 264; *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 229; *Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1141-1142; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1185, disapproved on other grounds in *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 853, fn. 19; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670.) In deciding whether to impose a duty to protect against third party crime, the Court generally has focused its analysis on balancing the foreseeability of the criminal act against the burden of the duty to be imposed. ""[I]n cases where the burden of preventing future harm is great, a high degree of foreseeability may be required." [Citation.]"" (*Ann M. v. Pacific Plaza Shopping Center*, *supra*, at p. 678.)

For instance, heightened foreseeability is required to find that the scope of a landowner's duty of care includes the hiring of security guards. (*Sharon P. v. Arman, Ltd.*, *supra*, at pp. 1190-1191; *Ann M. v. Pacific Plaza Shopping Center*, *supra*, at pp. 678-679.) Such a high degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises or at substantially similar establishments in the immediate proximity. (*Ibid.*) ""On the other hand, in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required." [Citation.]"" (*Ann M. v. Pacific Plaza Shopping Center*, *supra*, at pp. 678-679.) In such cases, a landowner may have no obligation to provide security guards or undertake other burdensome measures, but may still owe a duty of care to invitees to take simple, minimally burdensome steps to protect against crime that is reasonably, rather than highly, foreseeable. (*Morris v. De La Torre*, *supra*, at pp. 270-271; *Delgado v. Trax Bar & Grill*, *supra*, at pp. 242-243.)

One of the undisputed facts is that there were no incidences of assault or violence at the Dynasty Restaurant prior to this incident. (UMF No. 9.) However, there are no facts indicating whether there were any similar incidences of assault or violence at any substantially similar establishments in the immediate proximity. Defendants have not met their burden of establishing that the attack on plaintiff was not foreseeable and that they had no duty to provide security.

The controlling case in this instance is *Delgado v. Trax Bar & Grill, supra*, 36 Cal.4th 224. In that case the Supreme Court reversed the Fifth District holding that even when proprietors have no duty under *Ann M. and Sharon P., supra*, to provide a security guard or undertake other similarly burdensome preventative measures, the proprietor is not necessarily insulated from liability under the special relationship doctrine. (*Delgado v. Trax Bar & Grill, supra*, 36 Cal.4th at p. 240.) A proprietor that has no duty under *Ann M. and Sharon P.* to hire a security guard still owes a duty of due care to a patron or invitee by virtue of the special relationship, and there are circumstances (apart from the failure to provide a security guard) that may give rise to liability based upon the proprietor's special relationship. (*Id.* at pp. 240-241.) For example, there is a duty to warn patrons of known dangers, including other intoxicated guests. (See *Taylor v. Centennial Bowl, Inc.* (1966) 65 Cal.2d 114.)

The Supreme Court recognized that under the special relationship doctrine:

... a proprietor who serves intoxicating drinks to customers for consumption on the premises must “exercis[e] reasonable care to protect his patrons from injury at the hands of fellow guests” (*Saatzer v. Smith* (1981) 122 Cal.App.3d 512, 518 [176 Cal.Rptr. 68] (*Saatzer*)), and that such a duty “ ‘arises ... when one or more of the following circumstances exists: (1) A tavern keeper allowed a person on the premises who has a known propensity for fighting; (2) the tavern keeper allowed a person to remain on the premises whose conduct had become obstreperous and aggressive to such a degree the tavern keeper knew or ought to have known he endangered others; (3) the tavern keeper had been warned of danger from an obstreperous patron and failed to take suitable measures for the protection of others; (4) the tavern keeper failed to stop a fight as soon as possible after it started; (5) the tavern keeper failed to provide a staff adequate to police the premises; and (6) the tavern keeper tolerated disorderly conditions [citations].’ ” (*Saatzer, supra*, 122 Cal.App.3d at p. 518; see also *Slawinski v. Mocettini* (1963) 217 Cal.App.2d 192, 196 [31 Cal.Rptr. 613], and authorities cited.)

(*Delgado v. Trax Bar & Grill, supra*, 36 Cal.4th at p. 241.)

Defendants provide no facts from which it can be inferred that no such duty arose. There is no information as to whether Soundara had a reputation for fighting, no information as to whether Soundara was allowed to remain on the premises after becoming obstreperous and/or aggressive, no information that defendants had been warned of Soundara, no information as to whether defendants stopped the fight as soon as reasonably practicable, and no information as to whether defendants tolerated disorderly conditions.



## Tentative Ruling

(5)

Re: ***Peterson v. International Juice Concentrates, Inc.***  
**and related Cross Actions**  
Superior Court Case No. 08 CECG 04237

Hearing Date: July 2, 2009 (Dept. 97 C )

Motion: By Cross-Defendants Fruit Patch Inc. and Fruit  
Patch Sales, LLC to compel arbitration

### **Tentative Ruling:**

To deny the application pursuant to CCP § 1281.2.

### **Explanation:**

On February 20, 2007 Plaintiffs and Defendant International Juice Concentrates, Inc. entered into an agreement for the purchase of pomegranates. The Defendant agreed to purchase the 2007 crop for \$127,500 plus cultural costs through April 30, 2007 and additional cultural costs upon receipt of invoice or proof of payment by the Seller. The Defendant agreed to purchase the 2008 crop for \$127,500 due and payable on January 1, 2008. The agreement included the following provision:

If payment for the 2008 crops is not paid on or before January 30, 2008, the payment will be considered late, and the Sellers shall have the right to cancel the Agreement for the 2008 crops if the Buyer does not make payment to the Sellers within 30 days written notice from the Sellers to the Buyers of the Sellers' intent to cancel the Agreement for 2008.

The agreement further provided that the Buyer would pay for cultivation costs within 10 days of receipt of invoices and/or proof of payment by the Sellers of cultural costs. Buyer agreed to pay Mr. Peterson the sum of \$2,000 per month for supervision of the farming of the 2008 crops.

The 2007 crop was harvested and the Defendant paid the sum promised. However, on January 1, 2008 the Defendant did not have the funds to pay for the 2008 crop. The Plaintiffs elected not to cancel the agreement. Instead, Defendant asserts that they agreed to a postponement of payment until the Defendant sold the crop. The Defendant sold the crop to Cross-Defendants Fruit Patch and Oro Loma. However, in the interim, the Plaintiffs had filed a UCC indicating that they had a security interest in the crop. According to the

Defendant, this “false and unlawful” filing caused a “cloud of title” to the crop and resulted in the sale of the crop at a loss.

On December 5, 2008 the Plaintiffs filed a complaint for breach of contract seeking \$159,843 based upon the Defendant’s failure to pay for the 2008 crop plus sums due for farming supervision and cultural costs. On December 10, 2008 they filed an application seeking a right to attach order and a writ of attachment. The Defendant filed opposition on February 24, 2009 along with an Answer and a Cross-Complaint against the Petersons, Fruit Patch Inc. and Fruit Patch Sales, LLC and Oro Loma Ranch. Plaintiffs filed a reply. A hearing was held on that date and the Court took the matter under advisement. On March 19<sup>th</sup>, the Court denied the application on the grounds that the filing of the UCC statement appeared to be wrongful and on the grounds that the Plaintiffs had not met their burden of proof pursuant to CCP § 483.010 in that amount to be secured must be a “fixed or readily ascertainable amount not less than \$500”.

On May 5, 2009 Fruit Patch filed a motion seeking to compel arbitration. No opposition has been filed. Oro Loma filed a Cross-Complaint in interpleader on June 5, 2009 and deposited \$54,855.07 with the Court.

CCP § 1281.2 states in relevant part:

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

**(a)** The right to compel arbitration has been waived by the petitioner; or

**(b)** Grounds exist for the revocation of the agreement.

**(c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact.** For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. This subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295.



(19)

**Tentative Ruling**

***Maduena v. Mejia***

08 CECG 01979

Hearing Date: July 2, 2009 (Dept. 97B)

Motion: Motion for Approval of Minor's Compromise

**Tentative Ruling:**

To deny without prejudice to filing of an amended petition which corrects the deficiencies discussed below.

**Explanation:**

The petition is presented with no tabs on the voluminous exhibits thereto, in violation of California Rules of Court, Rule 3.1110(f). Any amended petition need include such tabbing.

California Rules of Court, Rule 7.950(3) requires "A description of the nature and extent of the injury giving rise to the claim, with sufficient particularity to inform the court whether the injury is permanent or temporary." The current petition has no medical report dated later than July of 2008, when the minor was still receiving treatment. A report by a physician as to her current state of recovery is required.

The petition lacks evidence as to insurance limits for the persons paying the settlement, rendering it impossible for the Court to ascertain if the settlement is reasonable under the circumstances. There is no evidence of any underinsured coverage available through the driver or owner of the vehicle in which the minor was driving, which is necessary for the same reason. An amended petition need contain a declaration from counsel discussing discovery on these issues and the result. Paragraph 21 of the petition, representing that a thorough investigation was done, has not been checked.

The medical bills information show that no amount was lowered by negotiation of counsel. There also is no showing of any negotiation with Blue Shield about any contractual right it may have to recover its payments from the proceeds of the settlement. An amended petition need contain a declaration from counsel as to efforts made to lower the amount of the bills, efforts to discover and negotiate any right of Blue Shield to recovery, and any impact such rights have on the payment of the settlement proceeds. See *Parnell v. Adventists Health System* (2005) 35 Cal. 4<sup>th</sup> 595 and Civil Code section 3040.



## Tentative Ruling

(17)

Re: ***In Re: Ethan C. Tugas***  
Superior Court Case No. 09 CECG 001716

Hearing Date: July 2, 2009 (Dept. 97A)

Motion: Petition for Minors' Compromise

### **Tentative Ruling:**

To deny without prejudice unless counsel can appear and address the deficiency in the petition. The minor is excused from appearing.

### **Explanation:**

The attorneys seek a fee of 25% minus the costs, i.e., \$100,000 - \$891.19 = \$99,108.81 x .25 = \$24,777.20. California Rule of Court 7.955 provides: "In all cases under Code of Civil Procedure section 372 or Probate Code sections 3600-3601, the court must use a reasonable fee standard when approving and allowing the amount of attorney's fees payable from money or property paid or to be paid for the benefit of a minor or a person with a disability. The court may approve and allow attorney fees under a contingency fee agreement made in accordance with law, provided that the amount of fees is reasonable under all the facts and circumstances."

There has been no showing that the requested \$24,777.20 is reasonable under the facts and circumstances of this case. Contingency fee contracts are not evidence of reasonable fees by themselves. "A contingent fee contract, since it involves a gamble on the result, may properly provide for a larger compensation than would otherwise be reasonable." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132.) However, the remedy in such cases is use a fee enhancement, or so-called multiplier, for the contingent risk to bring the financial incentives for attorneys enforcing important constitutional rights. (*Ibid.*) In *Ketchum*, the California Supreme Court stated: "[T]he lodestar is the basic fee for comparable legal services in the community; it may be adjusted by the court based on factors including, as relevant herein, (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys. (4) the contingent nature of the fee award. [Citation.] The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services." (*Ketchum v. Moses, supra*, 24 Cal.4th at p. 1132.)



(21)

**Tentative Ruling**

Re: ***American Casualty Company of Reading, PA v. National Union Fire Insurance Co. of Pittsburgh, PA, et al.***  
Superior Court Case No. 08 CECG 00689

Hearing Date: Tuesday, July 2, 2009 (**Dept. 97B**)

Motion: Defendant's Motion for Summary Judgment  
Plaintiff's Motion for Summary Judgment, or in the alternative, Summary Adjudication

**Tentative Ruling:**

To grant defendant's Request for Judicial Notice nos. 1 – 4 and plaintiff's Request for Judicial Notice nos. 1 – 3.

To deny defendant's motion for summary judgment and plaintiff's motion for summary judgment.

To grant plaintiff's motion for summary adjudication as to its third cause of action for equitable contribution and as to the first and second causes of action of defendant's cross-complaint.

**Explanation:**

**Defendant's Motion for Summary Judgment:**

Defendant moves for summary judgment on the basis that as a matter of law plaintiff is not entitled to subrogation, contribution or indemnity for any one or more of five reasons. The court rejects these claims and denies the motion as follows:

*The parties did not insure the same risk.* Both policies insured the same insured against the same risk. Both policies provided concurrent overlapping coverage for professional liability. (*Maryland Casualty Company v. Nationwide Mutual Insurance Company* (2000) 81 Cal. App. 4<sup>th</sup> 1082, 1089.)

*Plaintiff did not obtain defendant's prior consent to settle the underlying claim.* The "no voluntary payments" provision is not a defense to a claim for equitable contribution. (*Edmondson Property Management v. Kwock* (2007) 156 Cal. App. 4<sup>th</sup> 197, 203.)

*The underlying claim was excluded pursuant to the prior acts exclusion in defendant's policy of insurance. Exclusion (o) operates as an "other insurance" provision, which is disregarded in an action for equitable subrogation. (Edmondson Property Management v. Kwock, supra, 156 Cal. App. 4<sup>th</sup> at 203-204.)*

*Plaintiff's conduct and representations to the court in the underlying case establish that equity is in favor of defendant. Any statements attributed to Ms. Marcotte's counsel in the underlying malpractice action are not a judicial admission by plaintiff here. (See MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co. (2005) 36 Cal. 4<sup>th</sup> 412, 422.)*

*Labor Code § 2865 requires the risk for Ms. Marcotte's conduct should be equitably and solely borne by plaintiff. Defendant may not seek indemnity pursuant to Labor Code section 2865. In the underlying action, no judgment was entered against defendant's insured, Access Nurses, Inc. (Davidson v. Welch (1969) 270 Cal.App.2d 220, 226. See also County of San Diego v. Sanfax Corp. (1977) 19 Cal.3d 862, 881 fn. 10.) Since Access Nurses, Inc. may not seek indemnity pursuant to Labor Code section 2865, defendant has no right of subrogation. (St. Paul Fire & Marine Ins. Co. v. Murray Plumbing & Heating Corp. (1976) 65 Cal.App.3d 66, 76.)*

To the extent Defendant raises other issues, defendant moves for summary judgment only. (*Maryland Casualty Co. v. Reeder* (1990) 221 Cal.App.3d 961, 974, fn. 4.) Summary adjudication may not be granted when not requested in the notice of motion. (*Homestead Sav. v. Sup.Ct.* (1986) 179 Cal.App.3d 494, 498.)

Plaintiff's Motion for Summary Judgment/Summary Adjudication:

Plaintiff moves for summary adjudication of its third cause of action for equitable contribution. It also moves for summary judgment as the defendant's cross-complaint or, in the alternative, summary adjudication of defendant's first cause of action for declaratory relief and the second cause of action for subrogation. Plaintiff does not move for summary adjudication of one or more issues of duty. (Code Civ. Proc. § 437c, subd. (d).)

In its claim for equitable contribution, plaintiff claims it is entitled to contribution of at least one-half of its \$1 million settlement payment because it paid in excess of its proportionate share of the obligation since the parties herein are co-obligors for primary layer professional liability through the issuance of the respective policies. Defendant argues plaintiff is not entitled to equitable contribution because the parties do not share the same level of liability on the same risk as to the same insured. The court has determined above that the parties did insure the same insured against the same risk. Both parties' policies



**Tentative Ruling**

Re: ***Vue v. B-K Lighting, Inc., et al***  
Superior Court Case No. 09CECG00855

Hearing Date: July 2, 2009 (**Dept. 97A**)

Motion: Demurrer by De la Torre to 1<sup>st</sup> and 2<sup>nd</sup> causes of action; Motion by defendants to strike references in ¶¶21 and 22 to the CUIAB, the local police and “other agents and employees of B-K Lighting”

**Tentative Ruling:**

To sustain De La Torre’s demurrer to the first two causes of action without leave to amend; to strike the reference to the local police without leave to amend; to grant the motion to strike the reference in ¶21 to the CUIAB and the reference in ¶22 to “other agents and employees of B-K Lighting” with leave to amend as indicated below

**Explanation:**

Plaintiff does not oppose the demurrer and concedes that he can’t state a cause of action against De La Torre for either harassment or retaliation. The court will therefore sustain De La Torre’s demurrer to those two claims without leave to amend.

As for the motion to strike, plaintiff also appears to concede that a cause of action for defamation cannot be premised on statements made to the CUIAB since such statements would be absolutely privileged.

However while plaintiff argues that the reference to the CUIAB was intended not to claim that statements made there were defamatory but to demonstrate that the same statements made elsewhere were malicious, that is not at all clear from the pleading.

While plaintiff argues in the opposition that malice can be inferred from the fact that defendants made the same allegations at the CUIAB hearing and yet the videotape offered in support of the claim of theft was found by the ALJ not to establish that a theft had occurred, those facts are not included in the pleading.

And even if they were, the fact that the ALJ found against defendants’ claim of theft doesn’t necessarily show or even suggest that defendants had no reasonable basis for believing a theft had occurred and that plaintiff committed it. The mere fact that the same theft allegation was made in that forum cannot, in and of itself, support the inference of malice.

The court will therefore grant the motion to strike the reference to the CUIAB with leave to amend only if plaintiff can truthfully allege that something occurred at that hearing other than the ALJ disbelieving the proffered evidence of theft. Otherwise both CC §47(b) and CC §48 make the reference to the fact that the theft allegation was made at the CUIAB hearing legally irrelevant.

As for the reference to the statements made to the police, none of the authorities cited by plaintiff in the opposition support the claim that CC §47(b) only applies to statements made to law enforcement to report a crime.

Here, even assuming the pleading included all of the facts alleged in the opposition, defendants initiated contact with the police for the purpose of getting them to investigate plaintiff's well being, and in that context it appears to have been necessary for them to explain why they believed plaintiff was despondent. The court will therefore grant the motion to strike the reference in ¶22 to statements made to the police, and since plaintiff hasn't identified any additional facts which would make such statement actionable, leave to amend will be denied.

However in relation to whether malice has been alleged sufficiently to plead around the qualified privilege available under CC §47(c) in relation to other B-K Lighting employees, while plaintiff has alleged that the publications were made with "hatred, ill will and an intent to injury plaintiff in order to justify the illegal and discriminatory termination of plaintiff" (¶27) and that "each of these publications...was made with knowledge that no investigation supported the unsubstantiated and obviously false statements," plaintiff at the same time alleges that the publications were made "negligently" which is inconsistent with the claim that they were made "intentionally" and with actual knowledge of their falsity.

The court will therefore strike the reference to statements made to "other agents and employees of defendant B-K Lighting" with leave for plaintiff to amend to clarify whether he is claiming the statements were made negligently or with malice, and to provide additional specific facts to support the conclusory allegation of malice.

While plaintiff does allege in ¶27 that the theft allegation was made to justify the illegal and discriminatory termination, and in ¶28 that the statements were made with knowledge that no investigation supported the "unsubstantiated and obviously false statements," plaintiff hasn't identified who made the statements and how that person would know that there was no investigation or that the statements were not true.





## Tentative Ruling

(RA#24)

Re: **Scott Fimbres, et al. v. Wathen-Castanos, Inc., et al.**  
Court Case No. 08CECG03656

Hearing Date: **July 2, 2009 (Dept. 97A)**

**Motion:** **1) Plaintiffs' Motion (1) to Appoint Special Master and (2) Adopt Case Management Order**  
**2) Plaintiffs' Motion for Protective Order**

### **Tentative Ruling:**

To deny the Motion for Appointment of Special Master and for Adoption of a Case Management Order.

To deny the Motion for Protective Order. However, the court exercises its discretion to fashion the following relief:

1) With regard to plaintiffs' responses to the Document request No. 17 for "loan application documents," to allow a limited protective order: Plaintiffs may redact all confidential and/or privileged financial information from said documents before producing them to defendants.

2) The time to respond to all written discovery propounded on plaintiff should be extended. Plaintiffs should be given 45 days from notice of the order to serve the responses and provide the documents demanded.

The court refrains from awarding sanctions against plaintiffs' attorney.

### **Explanation:**

#### **Motion for Appointment of Special Master and for Adoption of Case Management Order**

Where a discovery matter is complex, the court has authority to appoint a referee to hear and determine the dispute with or without the parties' consent. But specific requirements must be met before the court may order a reference.

If the parties do not consent to appointment of a referee, a referee may be appointed on motion of any party or on court's own motion where necessary "to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon." [CCP § 639(a)(5)]

Appointment of a discovery referee is authorized, however, only where “**necessary**” to hear and determine such motions or disputes. [CCP § 639(a)(5)]

At this juncture, the appointment of a special master appears to be premature because it is likely that other parties (10 to 30 subcontractors) will be named in this case. Both sides appear to acknowledge that adding subcontractors is inevitable. However, the court does not know who those parties are, and how many there will be. There is not even an estimate given as to when these parties will be brought in. When all the subcontractors are added, it is entirely possible that a special master will be warranted.

However, as earlier stated, making that order now would be premature. Once all parties are joined, each of those parties should have the right to make their own nomination, and object to (or disqualify) the other parties’ nominee(s). The mere fact that the court could order (as provided in the proposed Case Management order, ¶1.3) that new parties will be given an opportunity to voice their objections or disqualifications via an ex parte application does not make that the *preferred, much less time and cost efficient* way to do it, especially when the number of parties to be named is so large. It makes far more sense to wait, especially since there are no factors otherwise compelling the immediate referral to a special master.

Second, even if there were no new parties contemplated and added, the facts here do not justify appointment of a special master. While the discovery propounded by defendants is certainly voluminous (it could hardly help but be, since there are 34 plaintiffs), it does not appear to be oppressive or harassing. Undertaking review of this motion for protective order alone is indication enough that at this point, there is simply no “exceptional circumstance” that warrants appointing a special master for discovery purposes. Simply put, it is not much different from a similar discovery motion in a non-complex case. As noted in *Taggares v. Superior Court* (1998) 62 Cal.App.4th 94, 105, the “exceptional circumstances” envisioned by CRC 3.920(c) is where the majority of factors favoring reference are present, those factors being 1) multiple issues are involved; 2) there are multiple motions to be heard simultaneously; 3) the present motion is only one in a continuum of many; and 4) the number of documents to be reviewed make the inquiry inordinately time-consuming. There are multiple issues implicated by the discovery sought (which is true in many cases), but there are not multiple motions, and the review of the documents is no more time-consuming than it would be in considering a discovery dispute in a case not designated as complex. There are many plaintiffs from whom discovery is sought in this case, but the court can consider the discovery involved in the instant motion for protective order by looking at only one set of documents (since at this point identical documents have been propounded on each plaintiff). In short, the discovery issues at present are not so complicated as to require a referee.

And third, plaintiffs have not adequately addressed defendants' argument that the request for appointment of a *settlement conference* referee is tantamount to forcing defendants to mediate this case (and pay for it). In plaintiffs' Reply brief they assert that the court is authorized to make a referral for settlement conferences, and to require the parties to pay for it. However, that does not address defendants' argument. The number of conferences set in the Case Management Order ("CMO") is exceptional, and the additional powers conferred on the referee with regard to those mandatory settlement conferences [as noted in the proposed CMO, ¶4.2(b)] clearly take it outside the scope of a judicially supervised settlement conference. Just because ¶4.2(b) ends with the sentence stating that "[t]he Special Master is not conducting mediation" does not make it so.

There may come a time when a referee for either discovery or settlement conferences (or both) will make sense in this case. But that time is not now. For that reason alone, the proposed CMO is also not appropriate. In addition, the stay of discovery and the limitations on the number of defendants' special interrogatories are unwarranted. Overall, such a wide-ranging CMO is best considered with the input of all the parties who will be a part of this case

### **Motion for Protective order**

Defendants have propounded written discovery on each of the 34 homeowner-plaintiffs, including Request for Production of Documents (38 categories of documents), Requests for Admissions (19 requests), Special Interrogatories (26 interrogatories) and Form Interrogatories (57 interrogatories). Plaintiffs feel that this is an undue burden on them, and that these discovery requests are "harassing, given the nature and subject matter of this construction defect lawsuit."

Additionally, defendants have served a notice of inspection of the real property for each of the 21 homes involved in the litigation, with inspections to take place from July 28, 2009 through July 30, 2009, and from August 4, 2009, through August 6, 2009, at the rate of approximately 4 homes per day. Plaintiffs contend that these inspections should be deferred until the subcontractors are brought into the case, so that all parties can inspect the homes without plaintiffs having to go through the process on multiple occasions.

Plaintiffs argue that they should not be required to answer any of the written discovery propounded. This applies to the Special Interrogatories ("SI"), the Form Interrogatories ("FI"), the Document Demands ("DD") and the Request for Admissions ("RFA"). They contend that they should only be required to answer the **10 (TEN)** special interrogatories listed in the proposed CMO, and produce the document required by the CMO. They are willing to answer these interrogatories, and produce these documents, within 45 days. It is their position

that “the discovery afforded under the CMO will provide Defendants with sufficient evidence with which to defend themselves.”

As to plaintiffs’ contention that the discovery propounded is overly burdensome and harassing, it should be noted that the fact that plaintiffs chose to band together and file one action (rather than 37 separate actions) does not change the discovery rules as to the amount of discovery defendants can propound. Nor does the fact that two plaintiffs are married and live in the same house mean that only one set of interrogatories can be propounded on this “set of two” plaintiffs. There is no law to that effect, and in fact it is routine practice to propound identical discovery on related parties, even if the answers will be virtually identical.

With those points in mind, “burdensome” must be defined in the context of the case. Thus, the more pertinent way to look at it is whether or not the propounded discovery would be “burdensome” to each single plaintiff. Then, the impact of the number of plaintiffs is fairly dealt with by allowing sufficient (i.e., extended) time to respond (not by disallowing the discovery, as plaintiffs propose). On a “per plaintiff” basis, the discovery propounded is reasonable in amount, pertinent to the subject matter of the case, and reasonably calculated to lead to admissible evidence.

Plaintiffs are required to respond to all discovery propounded. To the extent that any of the interrogatories and inspection demands can be read to be asking for privileged information, plaintiffs may assert the appropriate privilege but still must answer the questions as they pertain to the knowledge of the responding party. Even if information will be addressed by their experts, plaintiffs still have an obligation to provide what information and documents they now have. They can give responses qualified with the fact that discovery is ongoing, and clarify that a response does not include any information from their experts, as the time for expert witness discovery has not come yet. But they must respond fully and completely, “after making a reasonable and good faith effort to obtain the information by inquiry to other persons or organizations.” [See *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 406]

As to the form interrogatories, they must all be answered, even those which appear to be only remotely pertinent (such as the questions as to personal injury). Given that plaintiffs have alleged breach of the warranties of fitness, and that some defects (such as mold) can cause physical difficulties, it is information that may lead to admissible evidence, and the questions are limited in scope to be in connection with the “incident” (i.e., the defects of the homes).

However, it seems appropriate to allow plaintiffs to redact the confidential financial information from the loan documents to be produced.

As to the inspection demand, plaintiffs' contention that it would be optimal to have the inspections done once (i.e., by all defendants, both current and prospective) instead of twice (once now, and again when the subcontractors are brought in), is understandable. Realistically, though, since there are going to be so many people involved, and so many homes, it might be difficult to coordinate only one inspection per home even if all subcontractors were currently in the case. On balance, the need to name the subcontractors in this lawsuit as soon as possible, in order to move this case forward, outweighs the concern over not inconveniencing the homeowners with multiple inspections. Therefore, the inspection demand should be complied with, and the inspection of the subject real properties must be allowed.

As for the request for sanctions, given that this is a complex case, and that the appointment of a special master *may* be necessary at some juncture, there is at least a colorable argument that plaintiffs acted in good faith in bringing the motion for appointment of special master and for adoption of case management order. Plaintiffs' counsel has argued that the proposed CMO was drafted along the lines of others that he has used in other complex construction defect cases. Taken at face value, this provides some evidence that he reasonably believed he stood a viable chance to have his motion regarding the special master and CMO granted, which would in turn provide the "substantial justification" for making the motion for protective order

Further, as plaintiffs have pointed out, they have not "refused to comply" with the discovery propounded, since the time for them to respond had not yet passed at the time of this motion.

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

**Tentative Ruling**

Issued By:                     AMC                     on July 1, 2009

(Judge's initials)

(Date)