

Tentative Rulings for July 18, 2013
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

10CECG02001 *Bussiere v. CDCR – PVSP Medical* (Dept. 403)

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

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

(6)

Tentative Ruling

Re: ***Ireland v. City of Coalinga***
Superior Court Case No.: 12CECG00171

Hearing Date: July 18, 2013 (**Dept. 403**)

Motion: By Defendant City of Coalinga for summary judgment

Tentative Ruling:

To deny. Because Defendant did not meet its burden, its evidentiary objections to Plaintiff's evidence are overruled as irrelevant to the determination of the motion.

Explanation:

Exhaustion Of Administrative Remedies

Plaintiff Deborah Ireland ("Plaintiff") was not required to exhaust her administrative remedy by bringing a claim with the California Labor Commissioner.

Campbell v. Regents of the University of California (2005) 35 Cal.4th 311, is reconcilable with *Lloyd v. County of Los Angeles* (2009) 172 Cal.App.4th 320, when it is understood that *Campbell* was a narrow holding that applied long-established exhaustion requirements of the internal administrative procedures of the Regents of the University of California to an employee of the university.

In *Campbell*, the court addressed the unique exhaustion requirements of the University of California. "The Regents may create a policy for handling whistleblower claims under their power to organize and govern the University. *Such a policy is treated as a statute in order to determine whether the exhaustion doctrine applies.*" [Italics added.] (*Campbell v. Regents of the University of California, supra*, 35 Cal.4th 311, 321.)

Plaintiff is more like the county employee in *Lloyd v. County of Los Angeles, supra*, 172 Cal.App.4th 320, 331-332, than a University of California employee. Therefore, under the permissive language of Labor Code section 98.7, proceeding through the Labor Code administrative procedure was simply an additional remedy which she could have chosen to pursue but did not.

Whistleblower Elements

As relevant here, the elements of a Labor Code section 1102.5, subdivision (b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, non-retaliatory explanation for its

acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation. (Judicial Council of Cal. Civ. Jury Instns. (Dec. 2012) CACI No. 2730.)

To establish the first element, the plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two. (*Patten v. Grant Joint Union High School District* (2005) 134 Cal.App.4th 1378, 1387.)

The employee must demonstrate by a preponderance of evidence that a protected activity was a contributing factor in the adverse action against the employee. The employer may then attempt to prove by clear and convincing evidence that the action would have been taken anyway for legitimate, independent reasons even if the employee had not engaged in the protected activities. (Lab. Code, § 1102.6.)

1. Plaintiff Engaged In Protected Activity By Reporting The Possible Crimes To Her Employer, A Governmental Entity

An employee's report of illegal activity can constitute protected conduct under Labor Code section 1102.5, subdivision (b), even if she was "simply doing her job" in making the report. (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 469; *Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236, 238-239; Lab. Code, §1102.5, subd. (e).)

Therefore, Plaintiff's conduct is protected.

2. Plaintiff "Disclosed" Information That Was Hidden And Not Known: That She Reasonably Believed A Crime Had Been Committed

Here, Plaintiff e-mailed Chief Minor on February 22, 2011, around 10:47 p.m., regarding what Animal Control Officer Mike McLeod told her about being "bugged" by Officer Earl O'Neal about getting the dogs Plaintiff's daughter had surrendered, and that Officers O'Neal and Young had taken the dogs and shot them. Mr. McLeod said that officer O'Neal also said "something about feeding [the dogs] bologna on hooks, blowing them up and shooting them." After working at the State Hospital on February 22, 2011, around 5:45 p.m., Plaintiff stopped to discuss what she had heard from Mr. McLeod with a friend. During that conversation, it occurred to Plaintiff that "this action, if true, [was] a felony and had to be reported." (Facts #5-9, Plaintiff's depositions, pp. 53:8-55:19, 62:21-65:10, 65:15-25, 53:18-55:19, 62:21-65:10, 130:3-133.17, 134:20-135:12, 51:11-25.)

3. The Proximity In Time Between Plaintiff's Protected Activity And Her Termination Shows A Causal Link Between The Two

The undisputed facts show that Plaintiff e-mailed Chief Minor on February 22, 2011, and that she was terminated on May 17, 2011, raising at least an inference of a causal link between the two. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 614-615.)

Tentative Ruling

(2)

Re: **Lee v. Tijero, Jr.**
13CECG01131

Hearing Date: July 18, 2013 **(Dept. 403)**

Motion: Petition to Approve Minor's Compromise

Tentative Ruling:

Having failed to file a petition to approve the compromise the hearing is off calendar. Petitioner must obtain a new hearing date for consideration of any future petition filed. Petitioner must comply with Super. Ct. Fresno County, Local Rules, rule 2.8.4.

Explanation:

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: _____ **KCK** _____ **on** _____ **7/17/2013** _____.
(Judge's initials) (Date)

Tentative Ruling

(2)

Re: **Lee v. Tijero, Jr**
13CECG001130

Hearing Date: July 18, 2013 **(Dept. 403)**

Motion: Petition to Approve Minor's Compromise

Tentative Ruling:

To deny without prejudice. Petitioner may file a verified amended petition that cures the defects listed below. Petitioner must obtain a new hearing date for the amended petition. (The Superior Court of Fresno County, Local Rules, rule 2.8.4.)

Explanation:

1) Attorney Fees/Assets:

Attorney declaration is not included. No proof of additional asset search provided.

2) Medical Expenses:

The medical expenses listed in Items 13, 17 and the attached settlement breakdown are not consistent. Attorney needs to submit a petition with the correct amounts in the proper categories.

3) Net Balance of Proceeds:

The minor's settlement is being split into two sums. It appears \$1,000 as listed in Item 19(a)(1) is going to be delivered to minor's guardian of estate, and \$5,980.87 as listed in Item 19(b)(9) will be distributed within the courts discretion. Attachment 19(b)(9), which is supposed to specify the proposed conditions of distribution, is not provided. Attorney has provided no explanation for the division of minor's settlement. Also, if all the numbers provided in the breakdown in item 17 are correct, the proper amount left to minor would be \$6,548.69, not \$6,980.87 (or \$5,980.87 + \$1,000) . In addition, if this sum is to be put into an account for the minor, the bank in which the blocked account will be is not provided.

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: _____ **KCK** _____ on **7/17/2013** _____
(Judge's initials) (Date)

(18)

Tentative Ruling

Re: ***Robert Desch v. Medtronic, Inc., et al.***
Case no. 12CECG03562

Hearing Date: **July 18, 2013 (Dept. 403)**

Motion: Demurrer to the first amended complaint ("FAC")

Tentative Ruling:

Pursuant to California Code of Civil Procedure ("CCP") section 430.10(e), as to defendant Medtronic, Inc. ("Medtronic") to: (1) sustain with leave to amend the demurrer to the 1st, 5th, 6th, 8th, and 9th causes of action; and (2) sustain without leave to amend the demurrer to the 7th cause of action. Also pursuant to CCP section 403.10(e), as to defendants Marc Garner, Dave Meyer, and Jackie Sorenson (together, Garner, Sorensen and Meyer are the "supervising employee defendants"), to sustain with leave to amend the demurrer to the 8th cause of action. As to all defendants, pursuant to CCP section 430.10(f), to overrule the demurrer for uncertainty. The court grants plaintiff 30 days leave to amend. Boldface type must indicate any new text in the second amended complaint.

Explanation:

1st cause of action for retaliation

Employees who are fired for reporting suspicions of illegal activity to their employer in connection with California Whistleblower Statutes, Labor Code section 1102.5, *et seq.*, may have a tort claim for wrongful discharge. (*Green v. Ralee Eng. Co.* (1988) 19 Cal.4th 66, 87.) Because the employer's violation of a statute on a particular subject also is a violation of public policy, firing an employee for reporting the violation to appropriate authorities violates public policy. (*Jie v. Lian Tai Knitwear Co.* (2001) 89 Cal.App.4th 654, 660-661.) The standards that govern adverse employment actions in retaliation lawsuits under Fair Employment and Housing Act ("FEHA") also apply in whistleblower lawsuits. (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387.

It is well established that a plaintiff in a retaliation case need only prove that a retaliatory animus was at least a substantial or motivating factor in the adverse employment decision. (*George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1492.) Plaintiff alleges sufficient facts at ¶s 26-40 to establish conduct that plaintiff believes to be protected by whistleblower laws. However, plaintiff does not plead sufficient facts to demonstrate causation between his termination following from any communication of his objections to the allegedly unlawful activities to an agent of Medtronic or to the supervising employee defendants. In ¶102 plaintiff alleges that he was "terminated when he voiced his concerns and reservations about" alleged

HIPAA violations. For that reason, plaintiff has not pled sufficient fact to establish a connection between the alleged retaliatory and the termination of plaintiff's employment. Leave to amend is granted.

5th cause of action for hostile work environment harassment

The standards that govern adverse employment actions in retaliation lawsuits under FEHA also apply in whistleblower lawsuits. (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387. "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409.) "Harassment consists of a type of conduct not necessary for performance of a supervisory job. Instead, harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job." (*Reno v. Baird* (1998) 18 Cal.4th 640, 645–646.) The allegation that Sorenson "often shouted" at plaintiff during phone conversations is not enough to establish harassment. "In determining what constitutes 'sufficiently pervasive' harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 610.)

There are insufficient facts pled to establish the pervasiveness element. It is not clear from the FAC whether the shouting was occasional, isolated or sporadic. For example, it is not clear over what period of time Sorenson "often shouted" at plaintiff during phone conversations. Also it is not clear from the FAC whether it was occasional, isolated or sporadic. Further, the allegations involving the volume and response time of messages, as alleged, do not constitute harassment. Leave to amend is granted.

6th cause of action for failure to prevent harassment and retaliation

When there has been no actual discrimination or harassment there can be no independent cause of action for failure to prevent or correct harassment under FEHA, Gov. Code § 12940(k). (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 283-284.) (Retaliation is a form of discrimination actionable under Gov. Code § 12940(k). (*Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal.App.4th 1216, 1240, disapproved on other grounds in *Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158.)) Since the court should rule that there are insufficient facts pled to establish harassment and retaliation, the court finds that there are insufficient facts to establish a cause of action for failure to prevent harassment and retaliation. Leave to amend is granted.

7th cause of action for negligent supervision

Workers' compensation generally is the exclusive remedy for claims based on the employer's alleged negligence in hiring, supervision or retaining employees who caused the injury. (*Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal.App.4th 1595, 1606.) Emotional distress injuries are subsumed under the workers compensation exclusive remedy provisions. (*Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 754.) Accordingly, the demurrer is sustained without leave to amend.

8th cause of action for intentional infliction of emotional distress

The 8th cause of action for negligent infliction of emotional distress is directed against all defendants. The supervising employee defendants may be held personally liable for intentional infliction of emotional distress. (*Sheppard v. Freeman* (1998) 67 Cal.App.4th 339, 343.) A cause of action for intentional infliction of emotional distress exists when there is "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001, 25 Cal.Rptr.2d 550; see *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) A defendant's conduct is "outrageous" when it is so "extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Potter, supra*, at 1001.) And the defendant's conduct must be "intended to inflict injury or engaged in with the realization that injury will result." (*Ibid.*)

Plaintiff alleges that defendants' conduct is outrageous because plaintiff worked for Medtronic for 10 years before being discharged to cover up deceptive, unfair and illegal corporate practices. "Behavior may be considered outrageous if a defendant (1) abuses a relation or position that gives him power to damage the plaintiff's interests; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress." (*Molko v. Holy Spirit Ass'n* (1988) 46 Cal.3d 1092.)

Although the employer-employee relationship is one that has been recognized as significantly contributing to the conclusion that particular conduct was outrageous (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 498, fn.2), there are insufficient facts pled as to all defendants to establish outrageous conduct. Leave to amend is granted.

Finally, demurrers for uncertainty will be sustained only where the complaint is so bad that the defendant cannot reasonably respond: that is, he cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him or her. (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.) Here, the complaint does not qualify as uncertain within the meaning of *Khoury*. As such, as to each defendant and each cause of action, the special demurrer for uncertainty is overruled pursuant to CCP section 430.10(f).

Tentative Ruling

(24)

Re: **DeSantis v. Sanger Works Factory, Inc.**
Court Case No. 12CECG01716

Hearing Date: **July 18, 2013 (Dept. 403)**

Motion: Thiele Technologies, Inc.'s Demurrer to Complaint

Tentative Ruling:

To overrule the demurrer to the breach of contract and conversion causes of action, and to sustain the demurrer to the negligent misrepresentation cause of action, with leave to amend. (Code Civ. Proc. 430.10(e).) Plaintiff is granted 10 days' leave to file the first amended complaint. The time in which the complaint can be amended will run from service by the clerk of the minute order. New allegations/language in the first amended complaint are to be set in **boldface** type.

Explanation:

As an initial matter, the court notes that defendant filed a Supplemental Request for Judicial Notice with its Reply brief, so plaintiff had no opportunity to respond to this or incorporate anything about this document in his opposition argument. If plaintiff requests it, the court will grant an extension of time to allow plaintiff to supplement his opposition before ruling on this motion.

Documents appropriate for judicial notice:

Defendant argues that the First and Second causes of action are barred by the doctrine of res judicata. A complaint is subject to general demurrer on this basis if the defense of res judicata appears from the face of the complaint or from matters of which the court may or must take judicial notice. (See Evid. Code Sects. 451, 452; Code Civ. Proc. Sect. 430.30; *Frommhagen v. Board of Supervisors* (1987) 197 Cal.App.3d 1292, 1298.) Thus, the initial question is what documents are appropriate for judicial notice.

Defendant has requested that the court take judicial notice of the following documents from Fresno Superior Court Case #08CECG04249, Pat DeSantis v. Sanger Works Factory (*et al.*): 1) the Complaint; 2) the Notice of Entry of Judgment, dated December 3, 2004, as to the default judgment entered on November 23, 2004 [hence, the court finds that defendant requests judicial notice of the judgment, as well]; 3) a Letter dated March 10, 2005 from plaintiff's counsel to the court, which is allegedly lodged in that file; 4) the Application for Entry of Court Judgment after Default filed October 15, 2004; 5) the Declaration of Pat DeSantis in support of application for default judgment, filed October 15, 2004; and 6) the Acknowledgment of Partial Satisfaction of Judgment filed March 22, 2005.

Where the issue being analyzed is the bar of res judicata, the proper goal of judicial notice is to determine: 1) whether a final judgment on the merits was entered; and 2) the cause(s) of action pled (or the primary rights involved) and 3) the facts upon which such relief depended. Therefore, in addition to the judgment, judicial notice of the complaint is also proper. (See *Frommhagen v. Board of Supervisors* (1987) 197 Cal.App.3d 1292, 1301, taking judicial notice of complaint.) Courts have also taken judicial notice of other court documents, as appropriate. (See, e.g., *Planning and Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 225—finding judicial notice of “pertinent records” from earlier action proper, including the request to dismiss the action, the ex parte application to set aside dismissal, and the reporter’s transcript from the hearing on the application). However, the cases indicate that notice is limited to documents that have been *filed* with the court. (See, e.g., *Henry v. Clifford* (1995) 32 Cal.App.4th 315, 322—even though judicial notice of complaint was proper, judicial notice of a letter lodged with the court was not.)

From the above authority, the court finds it appropriate to take judicial notice of the complaint, the Notice of Entry of Judgment (together with the Judgment), the Application for Entry of Court Judgment, the Declaration of Pat DeSantis, and the Acknowledgement of Partial Satisfaction of Judgment. However, the request to take judicial notice of the lodged letter is denied.

In the analysis below, the complaint in the earlier action will be referred to as the “2003 Complaint,” the Declaration of Pat DeSantis will be referred to as the “Declaration,” and the Judgment in that action will be referred to as the “2004 Judgment.” The term “defendant” or “defendants” will be utilized generically to refer to both the current defendant and its successors-in-interest, in the interest of simplicity, unless context otherwise requires.

Res Judicata:

Four elements must be satisfied for the bar of res judicata to apply; there must be: (1) a final judgment, (2) on the merits, (3) between the same parties, or persons in privity, and (4) upon the same cause of action. (*Olwell v. Hopkins* (1946) 28 Cal.2d 147, 152; *Chicot County Dist. v. Bank* (1940) 308 U.S. 371, 378; see also *Agarwal v. Johnson* (1979) 25 Cal.3d 932; *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795.)

The parties in the earlier action are the same parties, or in privity with the parties of the earlier action, since plaintiff is the same, and defendant is the successor-in-interest to the defendants in the earlier action. (See Code Civ. Proc. Sect. 1908, subd. (a)(2).)

However, the judgment in question was not a “final judgment” for purposes of applying the doctrine of res judicata here. A default judgment is a final judgment for purposes of res judicata/collateral estoppel. (*English v. English* (1937) 9 Cal.2d 358, 363.) But that is not the issue. Rather, the 2004 judgment appears to have been void as it pertains to the “Railroad Property.” Namely, even if the earlier action sought redress for defendant’s failure to acquire and transfer the “Railroad Property” to the plaintiff, and breaches and torts regarding that property are also the subject of this current action,

defendant does not establish how the court had any power to award a judgment granting plaintiff title to property defendant *did not own* (i.e., a judgment of specific performance requiring defendant to transfer the property to plaintiff).

The 2003 complaint alleged a breach of the contract, and for purposes of analysis herein the court assumes, *arguendo*, that the contract in question was what plaintiff now refers to as the “second contract,” evidenced by the Escrow Agreement dated June 23, 2003 (obviously, the contract dated January 2, 2003 was also alleged, but this is not at issue in the analysis herein). While the “second contract” may have only been obliquely referred to in the 2003 complaint (at ¶17, with breach of same referred to in ¶19), this was arguably clarified in the Declaration, where plaintiff referred to the June 23, 2003 escrow contract, and attached a copy of it. The *remedy* sought for this breach of contract was specific performance of the contract, and not money damages.

Both the complaint in the earlier action and the Declaration in support of default judgment make it clear that the Defendants were to acquire the “property included in the railroad right of way.” (See 2003 Complaint at ¶16 and Declaration at ¶12, emphasis added.) This adequately alleged (and proved) that defendants did not own the property in question at the inception of the contract. Plaintiff further alleged and declared that the railroad *agreed to transfer* that property (with an exception as to a portion). (See 2003 Complaint at ¶17 and Declaration at ¶13.) However, plaintiff *neither alleged nor proved* that the railroad did transfer the property to defendant (i.e., no proof that defendant ever acquired the property). Indeed, plaintiff alleges in his current complaint that defendant never did acquire it, and on this basis he seeks the return of his purchase money, plus other consequential damages.

Moreover, defendant agrees in its argument that it does not *and never has* acquired the property in question. At page 4, lines 6-13 of its argument, it states that its obligation under the subject contract was contingent on it first acquiring the separate parcel, and that plaintiff “does not (and cannot) allege that Sanger Works or Thiele ever acquired the separate parcel triggering the obligation.” (Emphasis added.)

But the point is that at the time the judgment was requested in 2004, absent the plaintiff proving that defendant had acquired title to the property, the court did not have jurisdiction over the *res* in question in order to make an order of specific performance requiring transfer of the property. That renders the Judgment of specific performance void for lack of jurisdiction. Where a judgment is void because the superior court has no power to make the order in question, it is “absolutely void as a final judgment.” (*Grannis v. Superior Court of City and County of San Francisco* (1905) 146 Cal. 245, 247.)

However, this only applies to that portion of the 2004 judgment. Clearly, the court had the power to render a judgment as to defendant's property, and to make a money judgment as to separate breaches by defendant (failure to make promised repairs). (See *Michel v. Williams* (1936) 13 Cal.App.2d 198, 199—costs awarded in default judgment of quiet title void, so the court properly vacated this part of the order, but not the whole judgment.) But to the extent that the 2004 Judgment purports to adjudicate the parties' rights and duties as to the “Railroad Property,” it is void, and

therefore not a “final judgment” for purposes of applying the doctrine of res judicata to this current action.

Statute of Limitations:

Defendant also argues that all of the complaint's causes of action are barred by the applicable statutes of limitation because the conduct complained of occurred in 2003. However, plaintiff has alleged that defendant (or its predecessors in interest) made continual representations that it would acquire the subject property until June 1, 2009, when its representative first informed plaintiff that defendant would not be acquiring title or transferring the property to plaintiff. (2012 Complaint, ¶12.) It is sufficiently implied in this allegation that plaintiff consented to extending defendant's time for performance. (See *Harvey v. Holtville* (1969) 271 Cal.App.2d 816, 819—General demurrer admits not only the facts expressly alleged but also facts essential to a cause of action which the facts alleged supply by implication or inference.)

This allegation does not implicate the discovery rule, as defendant argues on Reply, since plaintiff is not alleging that he only *discovered* in June 2009 that defendant did not intend to continue to attempt acquisition of the Railroad Property. Rather, plaintiff alleges that defendant *continued to promise* it would acquire the property until June 2009. Those are two very different things.

In the face of the void judgment, this allegation of a continuing promise to perform is sufficient to extend the start of the applicable limitations periods.

General Demurrer to Breach Count:

Defendant also argues that plaintiff fails to properly allege his breach of contract action, in not setting forth verbatim or attaching the initial contract between the parties (at ¶15) and for failure to properly allege breach given the contingent nature of defendant's promise. Essentially, defendant argues that it had no obligation at all under the contract (at least, under plaintiff's allegations), since it was only required to perform (i.e., transfer title) if it was able to acquire the property. Thus, no breach can be stated, which causes the entire cause of action to fail.

However, the failure to attach the original real estate contract is not crucial, as that is not the contract that plaintiff claims was breached. Thus, it can be generally described. Furthermore, the defendant has asked the court to take judicial notice of the 2003 complaint, which does attach a copy of that contract, and therefore, any “gap” in failing to append this document to the current complaint is filled. (*Mohlmann v. City of Burbank* (1986) 179 Cal.App.3d 1037, 1040—Improper “evidence” attached to defendant's demurrer cured defect in complaint's allegations.)

As for the argument that breach was not adequately alleged, this is not the case. Defendant was under an obligation to at least attempt the purchase of the subject property, since that was (as defendant concedes) the point of severing the escrow from the sale of the defendant's property. The complaint alleges that the parties' initial agreement included the leased property. Upon opening the separate

escrow and signing the escrow instructions on June 23, 2003, plaintiff alleges that he agreed to pay \$60,000 to Defendants as consideration for their acquiring and transferring the property to plaintiff. (Complaint ¶19.) The acquisition was not alleged as a condition precedent to defendant having any contractual duties, but was alleged as part of the basis of the consideration plaintiff furnished. Thus, the failure to acquire the property can properly be alleged as a breach. The uncertainty that existed as to defendant being *able* to acquire the property (i.e., that it was possible that it would not be able to), may impact the amount of money damages that can be awarded for breach, as all contract damages must be foreseeable. (Civ. Code Sect. 3300.) Nonetheless, the breach cause of action is sufficiently stated, and the demurrer to this count will be overruled.

General Demurrer to Negligent Misrepresentation Count:

Defendant argues that plaintiff fails to state the alleged misrepresentation with sufficient specificity required of a fraud-based cause of action. Most specifically, he fails to allege who, what, when, where, and to whom the alleged negligent misrepresentation was made, as required. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) Instead, plaintiff merely alleges that unspecified "defendants" represented that they would transfer or be able to acquire and transfer the Railroad Property to plaintiff.

It also argues that plaintiff has not adequately alleged justifiable reliance, since he knew when he sued defendant's predecessor in 2003 that any further assurances about acquiring the property could not be relied upon. Plaintiff knew that any ability to transfer the property to him was contingent on defendant acquiring the property. In *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1332, the court found that as a matter of law the plaintiff could not allege "justifiable" reliance on a statement made by an adversary. Thus, the court can look at the circumstances and find that allegations of justifiable reliance are not sufficient as a matter of law.

However, the justifiable reliance alleged in this cause of action was as to the statements which induced plaintiff to deposit the \$60,000 in the first place. Given the allegation that the Railroad had consented to the transfer, plaintiff's reliance was then reasonable. Defendant presents no authority that plaintiff must plead continuing reliance. Therefore, this allegation is sufficient.

However, the court agrees that this cause of action is not adequately stated in not adequately specifying the "who, what, where, when and to whom" of the representations made. Plaintiff must do more than merely state that "defendants" made the representations. Therefore, the demurrer to this cause of action must be sustained, with leave to amend.

This demurrer to this cause of action is also impacted by the discussion of the economic loss rule, as discussed below.

Conversion Count:

Conversion consists of the following elements: (1) plaintiff's ownership or right to tangible personal property at the time of conversion; (2) defendant's intentional and substantial interference with plaintiff's property by preventing plaintiff from having access to it; (3) such action was taken without plaintiff's consent; (4) plaintiff was harmed; and (5) defendant's conduct was a substantial factor in causing that harm. (Judicial Council of California Civil Jury Instruction VF-2100.)

Here, plaintiff has alleged that the conversion consisted of defendant's refusal to authorize the closing of escrow and return the monies to plaintiff, which prevented him from having access to his property, namely the \$60,000 plus interest. Therefore, this action was brought within the 3-year statute of limitations period. (Civil Code Sect. 338.) The cause of action is sufficiently alleged.

Economic Loss Rule

The plaintiff's misrepresentation claim would appear to be barred by the economic loss doctrine. In *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 988, the defendant not only breached the contract by supplying nonconforming parts, after years of correctly performing its contractual duties, but it hid this fact from plaintiff, and it also actively concealed the fact by supplying false FAA certificates of performance for the helicopters. Further, the court noted that this exposed plaintiff to liability for personal damages if a helicopter crashed, and to disciplinary action by the FAA. (*Id.* at p. 991.) This provided a basis independent of the parties' contractual relationship to allow plaintiff to obtain tort recovery.

The rationale behind the rule is to make a meaningful distinction between tort and contract remedies, and only allow tort claims where the conduct warrants it. "If every negligent breach of a contract [gave] rise to tort damages the limitation would be meaningless, as would the statutory distinction between tort and contract remedies." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 554.) Therefore, the general rule is that "conduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law." (*Butler-Rupp v. Lourdeaux* (2005) 134 Cal.App.4th 1220, 1227.)

Here, the only act the plaintiff alleges as tortious in the Negligent Misrepresentation cause of action was defendant's promise to acquire and then transfer the Railroad Property to plaintiff, i.e., defendant's duty under the contract. No conduct is alleged independent of that contract duty that would appear to make the tort claim viable. Therefore, the demurrer to this cause of action will be sustained. However, leave to amend will be granted. Plaintiff argues that defendant (i.e., SWF) "led Plaintiff on for years that it would obtain and transfer the adjoining strip of land to plaintiff." If this was merely a reiteration of the same contractual promise it made at the inception of the contract, this may not be sufficient. However, plaintiff will be given leave to amend in the event he can allege fraudulent conduct sufficient to support an independent tort cause of action.

Tentative Rulings for Department 501

03

Tentative Ruling

Re: **Cervantes v. Saleh**
Case No. 12 CE CG 03950

Hearing Date: July 18th, 2013 (Dept. 501)

Motion: Plaintiff's Application for Default Judgment

Tentative Ruling:

To deny the application for default judgment without prejudice, unless plaintiff appears at the hearing or provides a declaration addressing the issues discussed below.

Explanation:

First of all, it is unclear whether plaintiff is suing for breach of the lease or breach of the stipulated judgment. While the complaint and application both allege a breach of the lease, it appears that plaintiff's only remedy may be to sue on the stipulated judgment in the unlawful detainer action. The judgment was entered on October 22nd, 2012, and found that the parties were entering into a new one year lease agreement with defendant to pay plaintiff \$2,750 per month, that the lease could be renewed for another year after the expiration of the first year, that plaintiff and his employees would not harass or interfere with defendants and their employees or enter the subject property without notice, that defendant would obtain fire and liability insurance for the property, and that defendant would pay plaintiff \$9,609 on or before September 1st, 2012 for rent for the months of June, July and August 2012, along with legal fees and costs. (Exhibit B to Plaintiff's declaration, Stipulated Judgment of October 22nd, 2012, ¶¶ 1, 4, 5, 6, 7.) The parties also agreed that any lockout date would be stayed until or unless defendant defaults on the terms of the judgment. (*Id.* at ¶ 8.) If defendant defaulted, then plaintiff was allowed to enforce the judgment accordingly. (*Id.* at ¶ 9.) Also, defendant agreed to pay plaintiff \$2,950 or return "certain equipment to plaintiff as identified in a letter from plaintiff to defendant dated June 27, 2012." (*Id.* at ¶ 10.)

"The doctrine of res judicata gives conclusive effect to a former judgment in subsequent litigation between the same parties involving the same cause of action. A prior judgment for the plaintiff results in a merger and supersedes the new action by a right of action on the judgment." (*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 866–867, internal citations omitted.)

Here, plaintiff admits there was a prior judgment between the same parties on the same cause of action, i.e. the breach of the lease and damage to the property and fixtures. Thus, the stipulated judgment superseded the lease agreement, and it

Tentative Ruling

Re: **Munoz v. Gateway Auto Sales & Leasing, Inc. dba Champagne Quality Cars**
Case No. 12 CECG 03979

Hearing Date: July 18, 2013 (Dept. 501)

Motion:

Tentative Ruling:

To grant the motion and award 11,045.60 in fees and costs to plaintiffs Lisa and Hope Munoz by and against defendants Gateway Auto Sales & Leasing, Inc. dba Champagne Quality Cars and Larry Champagne.

Explanation:

Only a reasonable fee may be awarded by the court. First, attorney's fees are costs, and, by statute, all costs must be reasonable in amount. (Code Civ. Proc. §§ 1032, 1033.5, subd. (c)(3).) Second, Civil Code section 1780, subdivision (e) (the Consumer Legal Remedies Act) only provides for an award of reasonable attorney fees to the prevailing plaintiff. (*Hayward v. Ventura Volvo* (2003) 108 Cal.App.4th 509, 513.)

Calculating the Fees*The Lodestar*

A court assessing attorney's fees begins with a touchstone or lodestar figure, based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case.' (*Serrano v. Priest* (*Serrano III*) (1977) 20 Cal.3d 25, 48.) Here, plaintiff seeks a loadstar of \$19,215.¹ As our Supreme Court has repeatedly made clear, the lodestar consists of "the number of hours *reasonably expended* multiplied by the *reasonable* hourly rate. . . ." (*PLCM Group, Inc. v. Drexler, supra*, 22 Cal.4th at p. 1095, italics added; *Ketchum v. Moses, supra*, 24 Cal.4th at p. 1134.) The California Supreme Court has noted that anchoring the calculation of attorney fees to the lodestar adjustment method "'is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.'" (*Serrano III, supra*, 20 Cal.3d at p. 48, fn. 23.)

A. *Number of Hours Reasonably Expended*

In referring to "reasonable" compensation, the California Supreme Court indicated that trial courts must carefully review attorney documentation of hours

¹ The loadstar requested in plaintiffs' moving papers is \$15,945.00. Paul's Declaration indicates this is exclusive of the 4.90 hours preparing the instant motion and the anticipated 6 hours to prepare a reply, prepare for the hearing and attend the hearing. However, the billing entries clearly indicate that the total billing of \$17,415.00 includes the 4.90 hours of time preparing the instant motion for fees. Accordingly only \$1,800.00 has been added to the billing entries' total to calculate the loadstar.

expended; "padding" in the form of inefficient or duplicative efforts is not subject to compensation. (*Ketchum v. Moses, supra*, 24 Cal.4th at p. 1132.) The constitutional requirement of just compensation, "cannot be interpreted as giving the [prevailing party] carte blanche authority to 'run up the bill.'" (*Aetna Life & Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865, 880.) The person seeking an award of attorney's fees "is not necessarily entitled to compensation for the value of attorney services according to [his] own notion or to the full extent claimed by [him]. [Citations.]" (*Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 950.)

The prevailing party must make a "good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary." (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 434.) A district court should approach this reasonableness inquiry "much as a senior partner in a private law firm would review the reports of subordinate attorneys when billing clients" (*Ramos v. Lamm* (10th Cir. 1983) 713 F.2d 546, 555.)

The tension in this fee motion is the balancing point between the rates charged and the hours billed. Simply put, the rates charged by Mr. Krieg's firm are based on the assumption that the attorneys that charge them are highly experienced in a specialized field. (See Paul Decl. ¶¶ 6-7; Krieg Decl. ¶ 1.) As such, the time spent on various tasks should be extremely efficient. However in the court's opinion, based on a careful review of the billing entries, the actual documents prepared and the court's experience, there are a number of areas of billing laxity, including the time spent drafting the complaint, the time spent preparing and updating the damage calculations and settlement demands, the time spent on propounding responding to and analyzing discovery, and the time spent on the instant fee motion.

Accordingly, the court is inclined to reduce the hourly rate of the attorneys that worked on this case to reflect their reduced expertise in litigation, and leave the number of hours worked intact.

B. Reasonable Hourly Compensation

Reasonable hourly compensation is the "hourly prevailing rate for private attorneys in the community conducting noncontingent litigation of the same type" (*Ketchum v. Moses, supra*, 24 Cal.4th at p. 1133.) Ordinarily, "the value of an attorney's time . . . is reflected in his normal billing rate." (*Mandel v. Lackner* (1979) 92 Cal.App.3d 747, 761.)

Eric M. Kapigian, was admitted in 2005, giving him approximately eight years of experience. He is still an associate. He bills at a rate of \$375, the same rate that William Krieg was asking for himself in September of 2010. Given that Krieg has renown in lemon law and consumer protection, and has engaged in plaintiff's civil litigation for 35 years; he has been awarded that rate. Krieg has also had 40 or so civil jury trials and "numerous" court trials. Mr. Paul does not say if Kapigian has any special experience save for working for Krieg since before he has been admitted (January of 2004) and attendance at specialized MCLE and belonging to organizations. In the court's experience, a fair rate of per hour for Mr. Kapigian would be \$300.

Jeremiah L. Paul got his Bachelor of Arts for University of Utah and his J.D. from San Joaquin School of Law in 2012. He was admitted to the Bar on December 5, 2012. Meaning, he has 8 months of practice experience as an attorney. In the court's opinion, he is not yet ready to bill as a specialist. After due consideration, and based on the court's experience with rates in the community and in reviewing fee motions, the court fixes the reasonable rate for Mr. Paul at \$175 per hour.

Despite defendants' failure to introduce any evidence of other prevailing rates; the court may disregard plaintiffs' affidavits to set its own reasonable rates. The "experienced trial judge is the best judge of the value of professional services rendered in his court." (*Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 832.) Based on a consideration of various factors, the trial court may rely on its own expertise and knowledge to calculate reasonable attorney fees. (*Niederer v. Ferreira* (1987) 189 Cal. App. 3d 1485, 1507.) "When the trial court is informed of the extent and nature of the services rendered, it may rely on its own experience and knowledge in determining their reasonable value." (*In re Marriage of Cueva* (1978) 86 Cal. App. 3d 290, 300.) The court is not limited to the affidavits submitted by the attorney. (*Melnyk v. Robledo* (1976) 64 Cal. App. 3d 618, 625.)

C. *Multiplier*

The court declines to award a multiplier in this case.

Once the lodestar amount is determined, the court may consider a variety of other factors justifying augmentation or reduction of the award. (*Press v. Lucky Stores, Inc.* (1983) 34 Cal. 3d 311, 322.) "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.)

Factors to consider include: (1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award; (4) the fact that an award against the state would ultimately fall upon the taxpayers; (5) the fact that the attorneys in question received public and charitable funding for the purpose of bringing law suits of the character here involved; (6) the fact that the monies awarded would inure not to the individual benefit of the attorneys involved but the organizations by which they are employed" (*Serrano III, supra*, 20 Cal.3d at p. 49, fn. omitted.) Nothing in *Serrano III* nor in any other California Supreme Court opinion has carved these factors into concrete, or barred consideration of other relevant and nonduplicative factors. On the contrary, the court in *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19 observed that in *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322, fn. 12, the California Supreme Court had described the *Serrano III* factors as among those the trial court may consider in adjusting the lodestar figure. Moreover, the California Supreme Court has emphasized, "that when determining the appropriate

enhancement, a trial court should not consider these factors to the extent they are already encompassed within the lodestar." (*Ketchum v. Moses, supra*, 24 Cal. 4th at p.1138.) Further, the party seeking the fee enhancement bears the burden of proof. (*Ibid.*)

1. *Novelty and Complexity of the Issues*

In *Blum, supra*, the Supreme Court discussed what might be a basis for an upward adjustment to the lodestar. (*Blum, supra*, 465 U.S. at p. 886.) The Court noted that certain suggested bases for an upward adjustment were not warranted because they were already reflected in the lodestar. (*Id.* at p. 898.) Specifically, "[t]he novelty and complexity of the issues presumably were fully reflected in the number of billable hours recorded by counsel and thus do not warrant an upward adjustment in a fee based on the number of billable hours times reasonable hourly rates." (*Ibid.*) Plaintiffs' counsel asserts that this case "involved complex consumer protection statutes, containing nuanced requirements with most counsel outside of the specialized area of consumer auto sales are unfamiliar" and "this case required both specialized knowledge of applicable law and litigation skills." This is not shown in either the work product or the billing. Although specialized legal knowledge is demonstrated in the complaint, the court presumes this was drafted from a template, given the firm's extensive experience in this type of litigation. None of the settlement demand letters made any analysis of the relevant law. Indeed, it appeared that defendants agreed to the rescission early on in the litigation, however, the parties disagreed as to the value of the settlement, leading to some six months of desultory litigation. The litigation did not require extensive litigation skills or practice area knowledge. Plaintiffs' claim that "Gateway is a large, sophisticated corporation whose attorneys are well trained and experienced in litigation involving deceptive business practices," is not apparent from the material before the court.

2. *The Skill Displayed*

In general, "special skill and experience of counsel should be reflected in the reasonableness of the hourly rates." (*Blum, supra*, 465 U.S. at p. 889.) As our Supreme Court has observed, "[t]he factor of extraordinary skill, in particular, appears susceptible to improper double counting; ... a more skillful and experienced attorney will command a higher hourly rate. (*Ketchum v. Moses, supra*, 24 Cal.4th at p. 1138-1139.) "Thus, a trial court should award a multiplier for exceptional representation only when the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation. Otherwise, the fee award will result in unfair double counting and be unreasonable." (*Id.* at p. 1139.) When a trial court takes the skill and experience of the attorneys and the nature of the work performed into account when it calculated the reasonable hourly rate, it cannot also use those factors to enhance or apply a multiplier to the award. (*Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 41, fns. 9, 10.)

Although the court has reduced the hourly rates of the associates who worked on this case, the court has left them at the high end of the going rate in the community based on the particular type of practice that they engage in.

3. *The Contingent Nature of the Case*

This is the most important factor in awarding a multiplier. Our Supreme Court has explained:

"[The multiplier] for contingent risk [brings] the financial incentives for attorneys enforcing important constitutional rights . . . into line with incentives they have to undertake claims for which they are paid on a fee-for-services basis." ... [I]t is intended to approximate market-level compensation for such services, which typically includes a premium for the risk of nonpayment or delay in payment of attorney fees."

(*Ketchum v. Moses*, *supra*, 24 Cal.4th at p. 1138.)

The Fifth District emphasized this point in *Horsford v. Board of Trustees* (2005) 132 Cal. App. 4th 359:

[T]he market value of the services provided by plaintiffs' counsel in a case of this magnitude must take into consideration that any compensation has been deferred for up to four years from the time an hourly fee attorney would begin collecting fees from his or her client; that the demands of the present case substantially precluded other work during that extended period, which makes the ultimate risk of not obtaining fees all the greater (since the attorneys must use savings or incur debt to keep their offices afloat and their families fed during the years-long litigation); and that a failure to fully compensate for the enormous risk in bringing even a wholly meritorious case would effectively immunize large or politically powerful defendants from being held to answer for constitutional deprivations, resulting in harm to the public.

(*Id.* at p. 399-400.)

This is the only significant factor in awarding a multiplier. However, plaintiffs' counsel only had to wait 6 months for their fee in this case. They were not terribly inconvenienced by the contingent nature of the case.

4. *Taxpayers Will Pay This Fee Award*

This is not a factor here.

5. *No Public Funding*

This is not a factor here.

6. *Fees Will Inure to the Public*

Any attorney's fees will go directly to Kemnitzer, Barron & Krieg, not to a public interest organization. Thus, there is no public benefit from increasing the fees.

7. Success

Although not a factor mentioned in *Serrano III*, several cases talk about the extraordinary results achieved in awarding a fee multiplier. "The amount involved and the results obtained are also factors." (*Aetna Life & Casualty Co. v. City of Los Angeles*, *supra*, 170 Cal.App.3d at p. 880-881; see also *Edgerton v. State Personnel Board* (200) 83 Cal.App.4th 1350.) "The 'results obtained' factor can properly be used to enhance a lodestar calculation where an exceptional effort produced an exceptional benefit." (*Thayer v. Wells Fargo Bank*, *supra*, 92 Cal.App.4th at p. 838.) Nevertheless, a quality result is not alone sufficient to justify a multiplier. "The California cases appear to incorporate the "results obtained" factor into the "quality" factor: i.e., high-quality work may produce greater results in less time than would work of average quality, thus justifying a multiplier." [Citation.]" (*Ibid.*)

The success achieved, \$6,537.02, including rescission of the contract, return of all monies paid and \$5,000 in emotional distress and inconvenience is respectable, but not extraordinary.

The court awards the hours billed according to the billing entries, at the reduced rates of \$325 and \$175, ($\$325 \times 10.2 = \$3,315$) and ($\$175 \times 40.4 = \$7,070$), for a total of \$10,385.

Costs & Expenses

Normally, a prevailing party would be limited to the items of costs allowable under Code of Civil Procedure section 1033.5. However, Civil Code section 1794, subdivision (d) permits an award of "the aggregate amount of costs and expenses." "[I]t is clear the Legislature intended the word 'expenses' to cover items not included in the detailed statutory definition of 'costs.'" (*Jensen v. BMW of North America Inc.* (1995) 35 Cal.App.4th 112, 137.) This includes expert fees. (*Ibid.*) Accordingly, since plaintiffs are the prevailing parties they may recover their more exotic costs, such a CarFax report, DMV report and postage, which would otherwise not normally be recoverable under Code of Civil Procedure section 1033.5. (See Code Civ. Proc. § 1033.5, subds. (b)(1) & (b)(3).)

The court awards the entire \$660.60 requested in the Memorandum of Costs.

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: **M.B. Smith** on **7/17/13** .
(Judge's initials) (Date)