Tentative Rulings for June 13, 2024
Department 403

For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)

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).)
The above rule also applies to cases listed in this "must appear" section.

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

Begin at the next page

(41)

Tentative Ruling

Re: ***Brian Ching v. Ebony Bolton***
Superior Court Case No. 20CECG02633

Hearing Date: June 13, 2024 (Dept. 403)

Motion: Default Prove-up

Tentative Ruling:

To grant. The court intends to sign and enter the proposed judgment submitted with the default judgment application. No appearances are necessary.

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: JS on 6/4/2024.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Guzman v. Zepeda, et al.***
Superior Court Case No. 23CECG04604

Hearing Date: June 13, 2024 (Dept. 403)

Motion: Default Prove-Up

Tentative Ruling:

To deny without prejudice. On its own motion, the court orders plaintiff to record a notice of the pendency of the action (lis pendens) in the office of the Fresno County Recorder, and orders the action stayed until proof of such recording is filed in this action. Evidence of the recordation shall be filed with the court, after which plaintiff may file an ex parte application for the stay to be lifted (submitted on papers only, with no need to reserve an ex parte hearing date).

Explanation:

The complaint for partition of real property must set forth: 1) a description of the subject property, including both its legal description and its street address; 2) all interests the plaintiff has or claims in the property; 3) all interests of record or actually known to the plaintiff, and all persons plaintiff "reasonably believes will be materially affected by the action, whether the names of such persons are known or unknown to the plaintiff" (i.e., this includes "persons unknown" to be served by publication); 4) the estate as to which partition is sought and a prayer for partition of the interests therein; and 5) where the plaintiff seeks sale of the property, an allegation of the facts justifying such relief in ordinary and concise language. (Code Civ. Proc., § 872.230.) The complaint here includes all the necessary allegations.

The complaint alleges the Jacquelin Guzman and Emmanuel Zepeda each hold an undivided one-half interest in the property as joint tenants. (Complaint, ¶ 32.) This is reflected in the grant deed attached to the complaint. (Complaint, ¶ 11, Exh. A.)

The mortgagor, PennyMac Loan Services, LLC has answered the complaint and the parties have entered into a stipulated judgment that has been entered by the court as of February 21, 2024.

No title report is attached to the complaint, so there is no documentary evidence presented showing there are no other interested persons (i.e., "interests of record") who should have been named as defendants. A request for dismissal of "all person unknown claiming title" was filed concurrent with the prove up documents. The complaint a is silent with regard to whether there are liens or encumbrances on the property. Evidence of the absence of liens and/or other encumbrances on the property should be provided.

Additionally, there is no allegation, or anything else in the court record or presented in the default packet, showing that plaintiff recorded the required lis pendens immediately after filing the complaint, as required by Code of Civil Procedure section 872.250:

> (a) Immediately upon filing the complaint, the plaintiff shall record a notice of the pendency of the action in the office of the county recorder of each county in which any real property described in the complaint is located.
>
> […]
>
> (c) If the notice is not recorded, the court, upon its own motion or upon the motion of any party at any time, shall order the plaintiff or person seeking partition of the property, or another party on behalf of the plaintiff or other person, to record the notice and shall stay the action until the notice is recorded. The expense of recordation shall be allowed to the party incurring it.

(Code Civ. Proc., § 872.250, subds. (a) and (c).)

Therefore, the court on its own motion must require a lis pendens to be recorded, and will stay the action until this is done. If a lis pendens has already been recorded, plaintiff may call for a hearing to so inform the court, and no stay will be ordered.

Interlocutory Judgment needed at this time

In this case, plaintiff is seeking partition by sale. The partition statutes (Code Civ. Proc., §§ 872.010 - 874.240) have no special provisions for obtaining default judgment, so plaintiffs must follow the procedures to obtain default in a civil action (Code Civ. Proc., §§ 585-587.5). In particular, with any partition action (whether by default or by contest), the judgment proceeds in two stages, interlocutory and final. Plaintiff's brief and supporting evidence focuses exclusively on the accounting, which is part of the final judgment. Additionally, the proposed judgment is not designated as an interlocutory judgment, and it does not contain all the necessary information for an interlocutory judgment. After the recitals the proposed judgment states only that judgment shall be entered for plaintiff and against defendant.

The content of the interlocutory judgment in a partition action varies according to the issues being adjudicated. In general, the judgment must set forth the ownership interests in the property or estate affected by the partition to be made, and order the partition. (See Code Civ. Proc., § 872.720, subd. (a).) Common additional provisions are:[1]

- An order that the property be partitioned by division or by sale (unless the mode of partition has not then been decided). (§872.720, subd. (a).)
- Appointment of a referee or referees. (§§ 873.010 - 873.030.)
- Specification of the principal terms of sale. (§ 873.610.)
- Specification of the manner of sale (public or private). (§ 873.520.)

[1] All statutory references are to the Code of Civil Procedure.

- Orders for payment of liens (if the property is not to be sold subject to liens). (§ 872.630.)
- Protective provisions for unknown owners or parties having uncertain or contingent interests. (§ 872.640.)
- An order to impound part of the sale proceeds for later awards for costs of partition or money judgments on claims for incidental relief. (§ 874.110.)
- An order for a bond for the referee, if a bond is necessary. (§ 873.010, subd. (b)(1).)
- A provision reserving jurisdiction on matters that would ordinarily be adjudicated at the time of the interlocutory judgment.

Monetary award and costs is not made until after the sale

Plaintiff requests a monetary award of $48,210.71 to be paid from defendant's half of the proceeds of sale, prior to distribution. This figure includes half of the monthly mortgage payments from December 2020 through May 2024, property taxes and repairs, and rent proceeds paid solely to defendant from May 1, 2023 to present. The figure additionally includes attorney's fees and litigation costs incurred. These cannot be included on the interlocutory judgment, since by statute this judgment is only to provide for finding whether plaintiff is entitled to partition, and if so, the respective interests of the parties in the land, and ordering the partition of the property, and the manner of partition. (Code Civ. Proc., § 872.720, subd. (a); *Harrington v. Goldsmith* (1902) 136 Cal. 168, 170 (costs cannot be included on the interlocutory judgment).)

When the complaint requests relief in the form of an accounting or a monetary award to the plaintiff for paying common expenses on the defendant's behalf, the default judgment is subject to Code of Civil Procedure section 585, and as with any default judgment, the court must not award more than the amount prayed for in the complaint. (*Finney v. Gomez* (2003) 111 Cal.App.4th 527, 535-536 (finding section 580 [now section 585] limits the monetary relief available on a default judgment in a partition action to *the specific dollar amount requested in the complaint*." Emphasis added).)

The amounts requested do not appear to exceed those amounts identified in the complaint at this time. Following the sale and at the time of entry of final judgment the amount to be paid to plaintiff from defendant's half of the proceeds cannot exceed those amounts in the complaint of which defendant has notice.

Determination of the need for appointment of referee

In the usual case, a referee will need to be nominated and appointed for the interlocutory stage. In fact, the statutory scheme for partition actions appears to make this mandatory. (See, *e.g.,* Code Civ. Proc., § 873.010, subd. (a) ("The court *shall* appoint a referee to divide or sell the property as ordered by the court." Emphasis added.).) However, courts have held that the trial court has the discretion to examine the facts of a particular case and decide whether such appointment is necessary:

> The word "shall" as used in said section should be construed to require the appointment of a referee only where it is determined that a referee is necessary or would be desirable or helpful and that it should not be so

> strictly construed as to require the expense and time-consuming services of a referee where the court has adequate evidence before it to render its decision. The function of the interlocutory judgment is to permit the trial court to determine those matters which have been presented to it for determination, and which it can determine upon the evidence submitted to it without the necessity of a referee. The only function of a referee is to assist the court in determining those matters which cannot be so determined upon the evidence before it.

(*Richmond v. Dofflemyer* (1980) 105 Cal.App.3d 745, 755.)

Here, plaintiff requests the court allow the sale to go forward without a referee citing defendant having failed to appear in the case and the immense expense. The court agrees that a referee likely will not be necessary due to defendant's failure to participate in the action.

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: JS on 6/11/2024.
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Castro v. Pham et al.***
Superior Court Case No. 23CECG03449

Hearing Date: June 13, 2024 (Dept. 403)

Motion: By Defendant to Compel Arbitration

Tentative Ruling:

To deny.

Explanation:

Plaintiff alleges a dozen causes of action all arising from allegations of sexual harassment, battery and assault during her employment with defendants. The harassing conduct began December 24, 2019 and continued until plaintiff's resignation on June 13, 2023. (See Complaint ¶¶ 15-34.)

Pursuant to the Federal Arbitration Act ("FAA"),

> A written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(9 U.S.C., § 2.)

The parties appear to be in agreement that the FAA applies. (See MPA pp. 2-3; Oppo. pp. 12-15.)

"In recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that the FAA pre-empts state laws which 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'" (*Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University* (1989) 489 U.S. 468, 478, internal citations omitted.)

"California courts traditionally have maintained a strong preference for arbitration as a speedy and inexpensive method of dispute resolution. To this end, 'arbitration agreements should be liberally construed', with 'doubts concerning the scope of arbitrable issues [being] resolved in favor of arbitration.'" (*Market Ins. Corp. v. Integrity Ins. Co*. (1987) 188 Cal.App.3d 1095, 1098, internal citations omitted.) "This strong policy has resulted in the general rule that arbitration should be upheld 'unless it can be said with assurance that an arbitration clause is not susceptible to an interpretation covering the asserted dispute. [Citation.]' [Citations.] [¶] It seems clear that the burden must fall upon the party opposing arbitration to demonstrate that an arbitration clause *cannot* be

interpreted to require arbitration of the dispute….'" (*Bono v. David* (2007) 147 Cal.App.4th 1055, 1062.)

> [W]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable. Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement—either fraud in the execution voiding the agreement, or a statutory defense of waiver or revocation (see [Code Civ. Proc.,] § 1281.2, subds. (a), (b))—that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense.

(*Rosenthal v. Great Western Fin. Securities Corp*. (1996)14 Cal.4th 394, 413.)

According to defendant Giai Pham, on January 7, 2019, plaintiff was asked to review the Arbitration Agreement, and plaintiff subsequently signed a document acknowledging the arbitration agreement. (Pham Decl., ¶ 3, Exhs. A, B.)

The Arbitration Agreement states that it is an agreement entered into between plaintiff and defendant Giai V. Pham, DMD, Inc. It recites that "Employee and Employer voluntarily and knowingly enter into this Arbitration Agreement" to arbitrate all disputes between them. The final paragraph of the Arbitration Agreement states that, "*By signing this Arbitration Agreement*, Employee acknowledges that he or she is knowingly and voluntarily waiving the right to file a lawsuit or other civil proceeding relating to Employee's employment with Employer as well as the right to resolve disputes in a proceeding before a judge or jury, except as describe above …" (Pham Decl., Exh. A, ¶ 12, emphasis added.) However, there is no signature line on the Arbitration Agreement. Defendants make no showing that plaintiff signed the document that constitutes the Arbitration Agrement, even though the document explicitly states that it would be signed by the employee.

Plaintiff admits that she received and signed a separate document, the "Acknowledgement of Arbitration Agreement" (Pham Decl., Exh. B), but states that she was never provided nor shown a copy of the Arbitration Agreement, never signed it, and was never asked to sign it. (Castro Decl., ¶¶ 3-4.) The Acknowledgement document does reference agreeing to arbitration, but the full agreement is in the Arbitration Agreement, not the Acknowledgement, and without having been presented with the Arbitration Agreement itself, plaintiff could not have known what she was agreeing to by signing the Acknowledgement.

Signing an acknowledgment of receipt of an arbitration agreement is not sufficient, without specifically agreeing to the arbitration contract, to bind an employee to arbitrate claims pursuant to the arbitration agreement. (See *Nelson v. Cyprus Bagdad Copper Corp.* (9th Cir. 1997) 119 F.3d 756; *Romo v. Y-3 Holdings, Inc.* (2001) 87 Cal.App.4th 1153. The Acknowledgment document that plaintiff did sign specifically provides that

"[t]his provision is not the agreement itself, but the arbitration agreement has been given separately." (Pham Decl., Exh. B.)

Because the Acknowledgement form stated that "this provision is not the agreement itself," and the Arbitration Agreement contemplated a signature by the employee, it is not established that plaintiff entered into the Arbitration Agreement. Signing the acknowledgment of receipt of the standalone Arbitration Agreement is not sufficient to bind plaintiff to the Arbitration Agreement.

The opposition also contends that the Arbitration Agreement is unenforceable under the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (9 U.S.C. §§ 401, 402) (the "EFAA"), which became law on effective March 3, 2022. The EFAA provides:

> Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute . . . no predispute arbitration agreement of predispute joint-action waiver shall be valid or enforceable *with respect to a case* which is filed under Federal, Tribal, or State law and ***relates to the sexual assault dispute or the sexual harassment dispute***.

(9 U.S.C., § 402, subd. (a), emphasis added.)

Defendants do not dispute that the causes of action brought by plaintiff fall within the scope of the EFAA. Rather, defendants contend that the EFAA does not preclude arbitration of plaintiff's claims because the Complaint includes allegations of conduct occurring before the effective date of the EFAA. See *Walters v. Starbucks Corp.* (S.D.N.Y. 2022) 623 F.Supp.3d 333, 337-338, holding that the EFAA applies only to claims that accrued after enactment, even if the complaint was filed after enactment.

However, plaintiff points to authority holding that the EFAA applies to actions in which some sexual harassment occurred both before and after the effective date of the EFAA. (See *Turner v. Tesla, Inc.* (N.D. Cal. 2023) 686 F.Supp.3d 917, 924.) In *Turner*, the plaintiff employee complained of and experienced some sexual harassment prior to the effective date of the EFAA, and that continued past the effective date, culminating in her termination. While the claims based on the plaintiff's termination accrued after the EFAA went into effect, the court also found that sexual harassment claims encompassing pre- and post-effective date conduct were "temporally within the scope of the EFAA." (*Id.* at p. 924.)

Moreover, as defendants point out, EFAA applicability depends on when the cause of action "accrues" (see *Walters, supra*). Plaintiff alleges that she experienced ongoing harassment continuing well after the effective date of the EFAA. (Complaint ¶¶ 15-34.) Accordingly, the court finds that the continuing violation doctrine applies. (See *Fahnestock v. Waggoner* (9th Cir. 2017) 674 Fed.Appx. 708, 710; *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823.) The Complaint and all causes of action therein fall under the purview of the EFAA (9 U.S.C., § 402, subd. (a)), rendering the Arbitration Agreement (if it had been agreed to by plaintiff) unenforceable. Defendants purport to distinguish *Fahnestock* and *Richards* because they concerned statutes of limitations rather than

EFAA. But because the pertinent issue was accrual of the cause of action, they are instructive as to when the causes of action here accrued for purposes of EFAA.

Defendants contend that the question of enforceability of the Arbitration Agreement is delegated to the arbitrator pursuant to paragraph 6 of the Agreement and Rule 6(a) of the AAA Employment Rules. Defendants rely on *Rodriguez v. Am. Technologies, Inc.* (2006) 136 Cal. App. 4th 1110, 1123, where the court held that "the parties clearly and unmistakably agreed to have the arbitrator determine the scope of the arbitration clause" because "[t]he contract mandates arbitration in accordance with the American Arbitration Association's [] Rules." (*Id.* at p. 1123.)

Defendants' argument presupposes the existence of an executed arbitration agreement. "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." (*Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 553.) Inasmuch as the court finds that plaintiff did not agree to the Arbitration Agreement (see Castro Decl., ¶ 4), there is no agreement to submit the question of enforceability of the agreement to an arbitrator.

Moreover, the EFAA provides that "[t]he applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator." (9 U.S.C. § 402, subd. (b).) Even if there was an executed agreement to arbitrate, the EFAA renders unenforceable the delegation clause.

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: JS on 6/12/2024 .
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Christina Casarez v. Andre Hill***
Superior Court Case No. 19CECG03758

Hearing Date: June 13, 2024 (Dept. 403)

Motion: (1) By Defendant DMG Consulting & Development, Inc. for Summary Adjudication of Punitive Damages

(2) By Defendant Dragos Sprinceana for Summary Adjudication of Punitive Damages

(3) By Defendant SIO Logistics, LLC for Summary Adjudication

Tentative Ruling:

To deny the motions by DMG Consulting & Development, Inc. and Dragos Sprinceana.

To grant the motion by SIO Logistics, LLC. SIO Logistics, LLC is directed to submit to the court a proposed judgment consistent with the summary judgment rulings within ten (10) days from the date of this order.

Explanation:

Summary Judgment/Adjudication Generally

A trial court shall grant summary judgment where there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., §437c, subd. (c); *Schacter v. Citigroup* (2009) 47 Cal.4th 610, 618.) "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 of Civ. Proc., § 437c subd. (f)(1); see also *Catalano v. Superior Court* (2000) 82 Cal.App.4th 91, 97 [piecemeal adjudication prohibited.].)

In determining a motion for summary judgment or adjudication, "'we view the evidence in the light most favorable to plaintiffs'" and "'liberally construe plaintiffs' evidentiary submissions and strictly scrutinize defendant['s] own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiffs' favor.'" (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 96-97, citations omitted.) The court does not weigh evidence or inferences (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 856), nevertheless, "'[w]hen opposition to a motion for summary judgment is based on inferences, those inferences must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork.'" (*Waschek v. Department of Motor Vehicles* (1997) 59 Cal.App.4th 640, 647, citation omitted; Code Civ. Proc., § 437c, subd. (c).)

"A defendant bears the burden of persuasion that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850.) In particular, for purposes of summary judgment, "[a] defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action." (Code Civ. Proc., §437c, subd. (p)(1).)

Motion for Summary Judgment/Adjudication by DMG Consulting & Development and Dragos Sprinceana

DMG Consulting & Development, Inc. ("DMG") moves for "summary adjudication of punitive damages" (Mot. at p. 3:3) contending that plaintiff is unable to demonstrate evidence that DMG's "officer, director, or managing agent" authorized, ratified, or even knew, of semi-tractor trailer driver's unfitness. DMG asserts evidence that it required the driver to attend a power point presentation and perform introductory written and practical tests. (UMF Nos. 38-42.) DMG also contends its review of the driver's records did not produce disqualifying incidents. (UFM Nos. 20-34.) Ultimately, DMG concludes that its principal (Dragos Sprinceana) simply could not "possibly monitor every load" (Mot. at p. 17:19) and thus no conscious disregard can be demonstrated.

Plaintiff's opposing evidence is largely based on Dragos Sprinceana's own deposition testimony, which states that DMG hired the driver in March, 2019. (Little Decl., Ex. 1 at p. 60.) There was no probationary period or practice to observe new drivers. (*Id*. at p. 67.) No one at DMG was responsible for monitoring log books to ensure compliant driving durations. (*Id*. at p. 24.)

DMG appears to object to plaintiff's assertions of Dragos Sprinceana's deposition testimony on various grounds. (See e.g. Rep. Objections, Nos. 12, 19 and 30.) However, Drago Sprinceana specified that he founded DMG, was the only person with management responsibility, and was the sole officer, director and shareholder. (Little Decl. Ex. 1 at pp. 13, 26-27.) Considering his level of company oversight, management and obvious involvement, Dragos Srinceana's deposition testimony demonstrates personal knowledge and relevance. To that extent, DMG's objections Numbers 12, 19 and 30 are overruled. Furthermore, Dragos Sprinceana's confirmation that new drivers were not observed and were not required to satisfy a probationary period is evidence which the trier of fact could reasonably find a conscious disregard for driver competence and, by extension, their ability to safety operate vehicles on roadways shared with the general public. Consequently, plaintiff's evidence is sufficient to demonstrate triable issues of fact regarding DMG's authorization or approval of the driver's conduct.

Motion for Summary Judgment/Adjudication by Dragos Sprinceana

Plaintiff's opposition largely relies on the undercapitalization prong of the alter-ego doctrine. Plaintiff asserts evidence of an annual report from Illinois, which defendant objects to on grounds of hearsay, authentication, and foundation. This report, however, is an official record, and it bears indicia of self-authentication including official seal and

comprehensive corporate information. Accordingly, defendant's objections are overruled.

In addition, the Illinois annual report indicates only $100 in capital, which tends to support plaintiff's undercapitalization contention. (See *Automotriz Del Golfo De California S.A. De C.V. v. Resnick* (1957) 47 Cal.2d 792, 797 [noting treatise comments that "[i]f a corporation is organized and carries on business without substantial capital in such a way that the corporation is likely to have no sufficient assets available to meet its debts, it is inequitable that shareholders should set up such a flimsy organization to escape personal liability." Internal citations omitted].)

Defendant relies on a 1948 case which found $1,221.83 was sufficient capital. (*Carlesimo v. Schwebel* (1948) 87 Cal.App.2d 482, 485, (*Carlisimo*).) However, in addition to funds valued almost 80 years ago, *Carlesimo* emphasized that there was no evidence the funds ever flowed to the party principal. (*Id*. at 490.) Here, in contrast, plaintiff has produced evidence that Drago Sprinceana had the sole authority to make distributions from the corporate account (Little Decl., Ex. 1, at pp. 76-77) and that he founded DMG, was the only person with management responsibility, and was the sole officer, director and shareholder. (*Id*. Ex. 1 at pp. 13, 26-27.) Consequently, plaintiff's evidence is sufficient to demonstrate triable issues of fact regarding undercapitalization.

Motion for Summary Judgment/Adjudication by SIO Logistics

The Federal Aviation Authorization Administration Act ("Act") expressly preempts negligence claims against a broker and its hirer. (*Creagan v. Wal-Mart Transportation, LLC* (2018) 354 F.Supp.3d 808, 814 [holding that personal injury plaintiffs could proceed against a motor carrier, but not a broker and hirer].)

The Act includes a "safety exception" which provides that the Act "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." (49 U.S.C. § 14501(c)(2)(A).) This exception has been invoked on facts similar to the instant case where a motorist was killed in a collision with a semi-tractor trailer hired by a broker. (*Miller v. C.H. Robinson Worldwide, Inc.* (9th Cir. 2020) 976 F.3d 1016 (*Miller*).) *Miller* emphasized a presumption against preemption (*Id*. at p. 1021) and reasoned that the Act's "clear purpose" was to preempt "States' economic authority," not to "restrict the States' power over safety." (*Id*. at p. 1026.)

Since the Ninth Circuit's decision in *Miller*, the Seventh Circuit addressed "near identical facts" in *Ye v. GlobalTranz Enterprises, Inc*. (7th Cir. 2023) 74 F.4th 453 (*Ye*). There, the Seventh Circuit noted that there was "no mention of brokers in the safety exception itself or in Congress's definition of motor vehicles, which suggests that such claims may be outside the scope of the exception's plain text." (*Id*. at p. 460.) The court then analyzed and diverged from the Ninth Circuit's decision in *Miller* noting that the Ninth Circuit had later commented its reliance on the presumption against preemption did not fully addressed dispositive Supreme Court decisions. (*Id*. at 465 [citing to *R.J. Reynolds Tobacco Co. v. County of Los Angeles* (9th Cir. 2022) 29 F.4th 542, 553 n.6.) *Ye* ultimately concluded that the safety exception would not apply on a state negligent hiring claim.

In construing decisions arising from other jurisdictions, this court is guided by the principle that "'the decisions of the lower federal courts on federal questions are merely persuasive.... Where lower federal court precedents are divided or lacking, state courts must necessarily make an independent determination of federal law.'" (*Fair v. BNSH Railway Co.* (2015) 238 Cal.App.4th 269, 287, internal citations omitted; see also *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 879 ["In the absence of a controlling United States Supreme Court decision on a federal question, this court is free to adopt one of the divergent lines of authority."].)

Plaintiff's claim against SIO arises from nearly identical facts as those addressed in *Ye* and *Miller*. The factual similarity demonstrates a progression moving toward preemption, especially considering the Ninth Circuit's later comments in *R.J. Reynolds Tobacco Co. v. County of Los Angeles, supra,* 29 F.4th 542, 553 note 6. Accordingly, plaintiff's claim against SIO is barred by principles of preemption.

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: JS on 6/12/2024.
(Judge's initials) (Date)