Tentative Rulings for June 26, 2024
Department 502

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.***

22CECG02776 ***Lisa Sifuentes v. Fresno Community Hospital Medical Center*** **(Dept. 502) (Appearance is required on the motion to be relieved as counsel only. See below for the demurrers and motions to strike.)**

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)

<u>Tentative Rulings for Department 502</u>

Begin at the next page

(20) **Tentative Ruling**

Re: ***Joey Reyes v. Valley Chrome Plating, Inc.***
Superior Court Case No. 22CECG01415

Hearing Date: June 26, 2024 (Dept. 502)

Motion: Motion for Final Approval of Class Settlement

Tentative Ruling:

To continue the hearing to July 23, 2024, at 3:30 p.m. in Department 502. By July 12, 2024, class counsel shall submit supplemental declarations addressing the matters discussed below.

Explanation:

"Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement." (Cal. Rules of Court, rule 3.769(g).) "The trial court has broad discretion to determine whether a class action settlement is fair. It should consider factors such as the strength of plaintiffs' case; the risk, expense, complexity and likely duration of further litigation; the risk of maintaining class action status through trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." (*Reed v. United Teachers Los Angeles* (2012) 208 Cal.App.4th 322, 336.)

The court has already considered these factors and found the settlement to be fair and reasonable.

As a general rule, the lodestar method is the primary method for calculating the amount of class counsel's attorney's fees; however, the percentage-of-the benefit approach may be proper when there is a common fund. In some cases, it may be appropriate, when the monetary value of the class benefit can be determined with a reasonable degree of certainty, such as this one, for the judge to cross-check or adjust the lodestar amount in comparison to a percentage of the common fund to ensure that the fee awarded is reasonable and within the range of fees freely negotiated in the legal marketplace in comparable litigation. (See *Laffitte v. Robert Half Int'l, Inc*. (2016) 1 Cal.5th 480, 488–497; *Roos v. Honewell Int'l, Inc*. (2015) 241 Cal.App.4th 1472, 1490–1494; *In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557.)

The lodestar analysis is based on a "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.) 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* (2000) 22 Cal.4th 1084, 1095, italics added; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1134.)

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, emphasis added.)

Pursuant to the settlement agreement, counsel requests a fee award of $420,000, which amounts to 35% of the gross settlement. In granting preliminary approval of the settlement, the court directed plaintiff's counsel to submit a fully supported lodestar analysis.

Counsel says the firm Parker & Minne has spent 204.9 hours litigating this action at the rate of $750 per hour, for a current lodestar of $153,675. (Minne Decl., ¶¶ 58, 59.) Billing details have been provided. The firm Lawyers for Justice spent 230.6 hours on the case, and a Task and Time Chart is attached to the declaration. (Ghosh Decl., ¶ 9, Exh. A.) The proposed lodestar is based on a blended hourly rate of $800 per hour for the Lawyers for Justice firm, resulting in a lodestar for the firm of $184,480, and total lodestar for the two firms of $338,155, well shy of the $420,000 sought.

Insufficient information is provided to substantiate the lodestar as to the Lawyers for Justice firm. Counsel does not provide the billing rates for any attorney, and it is not clear which attorneys even worked on the case. The Ghosh Declaration describes the experience of seven different attorneys of the firm (Ghosh Decl., ¶¶ 12-18), but it is not clear which if any of these attorneys worked on this matter. Ghosh's description of their experience does not state that any of them worked on this matter (*ibid)*, and the Task and Time Chart does not state who did any of the work, or when (Exh. A). There is little foundation for the lodestar analysis for Lawyers for Justice.

Accordingly, the court is not inclined to approve any blended rate for the Lawyers for Justice attorneys, who did over half of the work on the case on plaintiff's side. The hearing is continued, with counsel directed to submit a supplemental declaration providing the court the information needed to perform a proper lodestar analysis.

The litigation costs of $19,810.57 (less than the $30,000 provided for in the Settlement Agreement) are documented at Exhibit B to the Ghosh Declaration. The bulk of the costs consists of a $15,000 mediation fee. It is unclear if this is the entire cost of mediation, or just half of the total cost (with the cost split between plaintiff and defendant). The court would not expect the class to bear defendant's litigation costs. This should be clarified in the supplemental declaration. The court will only authorize half of the mediation fee to be borne by the class.

Plaintiff requests a $7,500 enhancement payment. The court finds that $5,000 would generously compensate plaintiff for his efforts and time expended, and risks taken in pursuing this action.

The settlement administration expense is approved as requested.

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: KCK on 06/24/24 .
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Rudy Scaife v. Orange Wood Plaza***
Superior Court Case No. 23CECG02325

Hearing Date: June 26, 2024 (Dept. 502)

Motion: Defendant Boom Boom Properties, LLC's Demurrer to the First Amended Complaint

Tentative Ruling:

To grant demurring defendant's request for judicial notice and sustain the demurrer, with leave to amend. Should plaintiff desire to amend, the Second Amended Complaint shall be filed within ten (10) days from the date of this order. The new amendments shall be in **bold print**.

Explanation:

A demurrer challenges defects apparent from the face of the complaint and matters subject to judicial notice. (*Blank v. Kirwan* (1985) 30 Cal.3d 311, 318.) A general demurrer is sustained where the pleading is insufficient to state a cause of action or is incomplete. (Code Civ. Proc., § 430.10, subd. (e); *Estate of Moss* (2012) 204 Cal.App.4th 521, 535.)

A special demurrer, though disfavored, is nevertheless sustained where a pleading is so uncertain that the defendant cannot reasonably respond to the subject pleading. (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616; *A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 694.) Similarly, failure to comply with rules promulgated to promote clear and understandable pleadings "may render a complaint confusing and subject to a special demurrer for uncertainty." (*Williams v. Beechnut Nutrition Group* (1986) 185 Cal.App.3d 135, 139 fn. 2.)

Under long-settled rules, a demurrer "admit[s] all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) In other words, "*[w]e disregard legal conclusions in a complaint; they are just a lawyer's arguments*." (*Wexler v. California Fair Plan Association* (2021) 63 Cal.App.5th 55, 70, emphasis added.)

Plaintiff emphasizes the liberal construction afforded to pleadings, and concludes that the First Amended Complaint ("FAC") "sets forth all the facts needed to support Plaintiff's allegations, and adequately places Defendants on notice." (Opp. at p. 3:25-26.) However, even with liberal construction, the FAC fails to allege facts reasonably demonstrating demurring defendant's ownership or control of the premises during the times when the alleged habitability defects were suffered. In essence, considering plaintiff alleges he suffered the habitability issues throughout his ten-year tenancy, simply alleging demurring defendants have "clear successor liability" appears to be a broad conclusion, especially considering the judicially noticeable grant deed demonstrating

that demurring defendant only acquired the property at the very end of plaintiff's tenancy (and during plaintiff's eviction proceeding).

Therefore, the special demurrer on the basis of uncertainty is sustained. Considering the liberality afforded to amendment, and that there are numerous typographical and grammatical errors accentuating the FAC's uncertainty, amendment is granted.

In addition, the court also notes that the hearing on this demurrer was continued to allow counsel an additional meet and confer opportunity – a point specifically raised in plaintiff's opposition. Yet, despite plaintiff's counsel's purported willingness to meet and confer (see Parmenter, Decl. *passim*), defense counsel's declaration regarding meet and confer compliance indicates otherwise. Although not a basis for sustaining of the demurrer, this court reminds counsel of their statutory responsibility to meet and confer prior to pleading challenges.

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: KCK on 06/24/24 .
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Lisa Sifuentes. v. Fresno Community Hospital and Medical Center***
Superior Court Case No. 22CECG02776

Hearing Date: June 26, 2024 (Dept. 502)

Motions: Defendants' Demurrers and Motions to Strike the Fourth Amended Complaint;

Tentative Ruling:

To sustain Community Hospital and Medical Center dba Community Regional Medical Center's demurrer to each cause of action, without leave to amend.

To sustain Syeda Zaidi, D.O., James McCue, M.D., Emily Jane Poole, M.D., Cassandra Morgan DeWitt, M.D., Vijay P. Balasubramanian, M.D., Waqas Aslam, M.D., and Eyad Almasri, M.D.'s joint demurrer to the first, second, and sixth causes of action, without leave to amend.

The motions to strike are rendered moot.

The prevailing parties are directed to submit directly to this court, within 7 days of service of the minute order, a proposed judgment dismissing the action as provided above.

Appearance is required for the Motion to be Relieved as Counsel only, as set forth above. If oral argument is required, the parties must adhere to the tentative ruling procedure set forth in Rule 3.1308(a)(1) of the California Rules of Court.

Explanation:

Defendant Fresno Community Hospital and Medical Center dba Community Regional Medical Center ("CRMC") generally and specially demurs to each cause of action of the Fourth Amended Complaint ("4AC").

Also, defendants Syeda Zaidi, D.O., James McCue, M.D., Emily Jane Poole, M.D., Cassandra Morgan DeWitt, M.D., Vijay P. Balasubramanian, M.D., Waqas Aslam, M.D., and Eyad Almasri, M.D. (collectively, the "Physician Defendants") demur to each cause of action asserted against them in the 4AC: the first, second, and sixth causes of action.

The grounds for the demurrers are the same for all defendants: (1) defendants are immune from liability pursuant to the Federal Public Readiness and Emergency Preparedness Act, 42 U.S.C. §§ 247d-6d, 247d-6e, ("PREP Act"); (2) defendants are immune from liability pursuant to California Government Code, section 8659, and (4) the allegations are uncertain and insufficient to state a cause of action.

Prep Act

The PREP Act offers "covered person[s]" immunity "from suit and liability" for claims "caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure[.]" (42 U.S.C. § 247d-6d(a)(1).) That immunity "applies to any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure[.]" (*Id*. § (a)(2)(B).) The Act's immunity lies dormant until the Secretary of Health and Human Services "makes a determination that a disease … constitutes a public health emergency" and "make[s] a declaration, through publication in the Federal Register," that the Act's immunity "is in effect[.]" (*Id*. § (b)(1).) In March 2020, the Secretary did just that, declaring that COVID-19 "constitutes a public health emergency" and that "immunity as prescribed in the PREP Act" was "in effect" for the "manufacture, testing, development, distribution, administration, and use of the Covered Countermeasures." (Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15198, 15202 (Mar. 17, 2020).)

"[T]he sole exception to the immunity from suit and liability of covered persons … shall be for an exclusive Federal cause of action against a covered person for death or serious physical injury proximately caused by willful misconduct … by such covered person." (42 U.S.C., § 247d-6d(d)(1).) Such an action "shall be filed and maintained only in the United States District Court for the District of Columbia." (*Id*. § (e)(1).)

Defendants contend that they are immune under the PREP Act, because they are "covered person[s]" under the Act, the use of the drug Veklury (Remdesivir) is a "covered countermeasure," and plaintiffs' claims are for loss "caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure." (*Id*. § (a)(1).)

- *Covered Persons*

The definition of a "covered person" under the PREP Act includes manufacturers, distributors and program planners of covered countermeasures, as well as their officials, agents and employees, and any "qualified person who prescribed, administered, or dispensed" a covered countermeasure. (*Id*. subd. (i)(2).) A program planner includes any person "who supervised or administered a program with respect to the administration, dispensing, distribution, provision, or use of a security countermeasure or a qualified pandemic or epidemic product, including a person who has established requirements, provided policy guidance, or supplied technical or scientific advice or assistance or provides a facility to administer or use a covered countermeasure in accordance with a declaration under subsection (b)." (*Id*. subd. (i)(6).) Also, "[t]he term 'person' includes an individual, partnership, corporation, association, entity, or public or private corporation, including a Federal, State, or local government agency or department." (*Id*. subd. (i)(5).)

Here, defendant hospital and physicians undoubtedly fall within the definition of a "covered person" under the PREP Act, as it is alleged that the physicians prescribed and/or administered covered countermeasures, such as Remdesivir (as will be discussed below), and CRMC provided a facility in order for the physicians to do so.

- *Covered Countermeasure*

A "covered countermeasure" means "a qualified pandemic or epidemic product"; "a security countermeasure"; a "drug ..., biological product ..., or device ... that is authorized for emergency use in accordance with section 564, 564A, or 564B of the Federal Food, Drug, and Cosmetic Act"; or a "respiratory protective device that is approved by the National Institute for Occupational Safety and Health ... and that the Secretary determines to be a priority for use during a public health emergency declared under section 247d of this title." (*Id.* § 247d-6d(i)(1).) A "qualified pandemic or epidemic product" is defined as:

> [A] drug ..., biological product, ... or device ... that is (i) manufactured, used, designed, developed, modified, licensed, or procured to (I) diagnose, mitigate, prevent, treat, or cure a pandemic or epidemic or (II) limit the harm such a pandemic or epidemic might otherwise cause; (ii) ... manufactured, used, designed, developed, modified, licensed, or procured to diagnose, mitigate, prevent, treat, or cure a serious or life-threatening disease or condition caused by [such a drug, biological product, or device]; or (iii) a product or technology intended to enhance the use or effect of [such] a drug, biological product, or device.

(*Id*. § 247d-6d(i)(7)(A).)

Plaintiffs argue that Remdesivir falls outside the scope of a "covered countermeasure" under the PREP Act because it does not treat, cure, prevent, or mitigate COVID-19; it does not limit the harm that COVID-19 might otherwise cause; and it does not limit the transmission of COVID-19. However, the allegations indicate that Remdesivir received Emergency Use Authorization on or around May 2020. (4AC, ¶ 53.) Moreover, as highlighted by the federal district court in *Baghikian v. Providence Health & Services* (C.D. Cal., Feb. 6, 2024, No. CV 23-9082-JFW(JPRX)) 2024 WL 487769: "In fact, an HHS [Department of Health and Human Services] advisory opinion specifically lists Veklury as a countermeasure covered by the Act. … Advisory Opinion on the PREP Act, at 1 & n.2 (HHS Apr. 17, 2020, as modified May 19, 2020) (linking to a list of covered countermeasures that includes Remdesivir)." (Physician Defendants' Request for Judicial Notice, No. 7 at *4.) Accordingly, Remdesivir is unquestionably a "covered countermeasure."

- *Nexus*

It further appears that each of plaintiffs' claims are "for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual" of Remdesivir or its use in combination with other treatments. (42 U.S.C. § 247d-6d(a)(1).) Each of plaintiffs' claims are predicated on the alleged causal relationship between each decedent's injuries and the administration of Remdesivir, the "Remdesivir Protocol", and the use of other drugs in combination with Remdesivir. For example:

"Defendants engaged in Constructive Fraud and Fraudulent Concealment, by withholding information about a dangerous experimental drug known as Remdesivir (aka

Veklury) from Decedents, and by concealing information about safe and effective alternative treatments." (4AC, ¶ 20.)

"Each patient died shortly after being forced into the deadly Remdesivir Protocol." (4AC, ¶ 22.)

Thus, absent a claim of willful misconduct, the immunity afforded by the PREP Act applies to all defendants.

- *Willful Misconduct*

The term "willful misconduct" is defined as "an act or omission that is taken—[¶] (i) intentionally to achieve a wrongful purpose; [¶] (ii) knowingly without legal or factual justification; and [¶] (iii) in disregard of a known or obvious risk that is so great as to make it highly probable that the harm will outweigh the benefit." (42 U.S.C. § 647d-6d(c)(1)(A).) Such an action "shall be filed and maintained only in the United States District Court for the District of Columbia…" (*Id*. § (e)(1).); be plead with particularity (*Id*. § (e)(3).); and filed with verification by the plaintiff under oath, with certification by either a physician who did not treat the person on whose behalf the complaint was filed or medical records documenting the injury and causal connection. (*Id*. § (e)(4).) Moreover, an individual must exhaust the statutory remedies available under 42 U.S.C.A. section 247d-6e(a) prior to filing a civil action for alleged willful misconduct. (*Id*. § (d)(1).)

The exclusive federal jurisdiction of these claims is highlighted in *Saldana v. Glenhaven Healthcare LLC* (9th Cir. 2022) 27 F.4th 679, 688: "Subsection (d) is the only subsection that explicitly states that there shall be an "exclusive Federal cause of action," limited to claims against "covered persons" for "willful misconduct," as the terms are defined in the Act. [Citation.]" (*Ibid.,* citation omitted.) "The text of the statute shows that Congress intended a federal claim … for willful misconduct claims…" (*Ibid*.)

Here, plaintiffs allege that "defendants' conduct was undertaken intentionally and to achieve a wrongful purpose." (4AC, ¶¶ 159, 175, 232.) "Defendants deliberately … capitalized on secret/hidden financial incentives in the process…" of following the "Remdesivir Protocol." (4AC, ¶¶ 20-25.) "They acted knowingly and without legal or factual justification for the actions described herein and in flagrant disregard of known and/or obvious risks that were so great as to make it highly probable that the harm done to the Decedents would outweigh any possible benefit to the Decedents."(4AC, ¶ 175.) CRMC "mandated, instructed, incentivized, or otherwise coerced physicians under threat of loss or privileges, loss of employment or agency, or other forms of coercion, to administer Remdesivir…" (4AC, ¶ 213.)

It is clear that the plaintiffs' claims are based on defendants' alleged willful misconduct. Although plaintiffs contend that this case is premised in material part on the defendants' *inaction*, i.e., the defendants' failure to disclose the risks of Remdesivir, the core of plaintiffs' complaint stems from the administration of Remdesivir to the decedents, which cannot be characterized as "inaction". Accordingly, plaintiffs' own pleadings establish that this court does not have jurisdiction on their claims.

Voluntary Participation

Next, plaintiffs rely on 42 U.S.C.A. section 247d-6e to argue that participation in the PREP Act is voluntary and that plaintiffs never participated in the immunities afforded by the PREP Act. Plaintiffs' argument is entirely without merit. The relevant provision of 42 U.S.C.A. section 247d-6e provides as follows:

> The Secretary shall ensure that a State, local, or Department of Health and Human Services plan to administer or use a covered countermeasure is consistent with any declaration under 247d-6d of this title and any applicable guidelines of the Centers for Disease Control and Prevention and that potential participants are educated with respect to contraindications, the voluntary nature of the program, and the availability of potential benefits and compensation under this part.

(*Id*. § (c).)

However, this section describes the voluntary nature of participation in the administrative compensation fund designated as the "Covered Countermeasure Process Fund" "for purposes of providing timely, uniform, and adequate compensation to eligible individuals for covered injuries directly caused by the administration or use of a covered countermeasure…" (*Id*. § (a).) Nothing in the statute suggests that plaintiffs' voluntary participation in the PREP Act is required in order to afford immunity to the defendants. Nor have plaintiffs provided any authority to support such a contention.

Unconstitutional Taking

Plaintiffs contend that the immunity afforded by the PREP Act constitutes an unconstitutional taking under the Fifth Amendment of the United States Constitution. In particular, plaintiffs argue that their causes of action are their property, and to bar them from bringing such causes of action infringes upon their constitutional rights. However, it appears that plaintiffs may seek relief for its claims for the defendants' alleged willful misconduct, only that plaintiffs have brought the claim in the improper forum. (See 42 U.S.C. § 247d-6d(e)(1).)

For the above reasons, the defendants' demurrers are sustained to each cause of action for which they are asserted, without leave to amend.[1]

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

Tentative Ruling
Issued By: KCK on 06/24/24 .
(Judge's initials) (Date)

[1] Based on the present findings, the court does not address the parties' further arguments.