Tentative Rulings for July 17, 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.

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

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(Tentative Rulings begin at the next page)

Tentative Rulings for Department 502

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(20)

Tentative Ruling

Re: ***Michelle Ritchie v. Yrulegui & Roberts***
Superior Court Case No. 22CECG02057

Hearing Date: July 17, 2024 (Dept. 502)

Motion: By Defendants for Summary Judgment, or Alternatively for Summary Adjudication

Oral Argument, if timely requested, will be heard on Thursday, July 18, 2024 at 3:30 PM in Department 502.

Tentative Ruling:

To grant summary judgment in favor of defendants Joseph Yrulegui and Yrulegui & Roberts. Defendants are directed to submit to this court, within five days of service of the minute order, a proposed judgment consistent with the court's summary judgment order.

Explanation:

Plaintiff was employed as an attorney by the law firm Yrulegui & Roberts. Plaintiff was satisfied with her employment until the night of December 10, 2021, when the firm held a Christmas party. Plaintiff and seven or so other employees ended the night at a strip club. Because plaintiff was uncomfortable with the strip club atmosphere, and the conduct of partner Joseph Yrulegui, plaintiff quit her job and then filed suit, asserting the following causes of action

1. DISCRIMINATION ON THE BASIS OF SEX AND/OR GENDER;
2. HARASSMENT ON THE BASIS OF SEX AND/OR GENDER;
3. FAILURE TO PREVENT, INVESTIGATE, AND REMEDY DISCRIMINATION, HARASSMENT, OR RETALIATION;
4. AIDING, ABETTING, INCITING, COMPELLING, OR COERCING ACTS FORBIDDEN BY FEHA;
5. RETALIATION FOR OPPOSING PRACTICES FORBIDDEN BY FEHA;
6. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS;
7. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

The evidence shows that plaintiff drank alcohol throughout the night and voluntarily, of her own free will and choice, went to the strip club and participated in the activities there. Plaintiff has filed no response or opposition to the motion, which the court intends to grant for the reasons stated in the moving papers, as follows.

The first cause of action for gender discrimination fails because plaintiff did not suffer any adverse employment action, and the circumstances suggest no discriminatory motive.

To establish a *prima facie* case of discrimination, "the plaintiff must provide that: (1) she was a member of a protected class; (2) she was qualified for the position she sought or was performing competently in the position he or she held; (3) she suffered an adverse action, such as termination, demotion, or denial of an available job; and (4) some other circumstances suggest discriminatory motive." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.)

Plaintiff quit her employment with defendants, and was not terminated. "In order to establish a constructive discharge, an employee must plead and prove … that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251.) Plaintiff's contention that she was constructively discharged is not supported by the evidence. Plaintiff's resignation was based on a single incident that plaintiff participated in by her own choice. Nor is there any evidence to suggest that there was any discriminatory or gender-based motive behind any actions that led to plaintiff's resignation.

The second cause of action is for sexual harassment. Plaintiff "must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex." (*McCoy v. Pac. Mar. Assn.* (2013) 216 Cal.App.4th 283, 293.)

Plaintiff testified that prior to the 2021 Christmas party, she had never gone to anyone at Yrulegui & Roberts to complain about Joseph Yrulegui and that she had no complaints about the way he treated her when she was working with him. (UMF 42.) Plaintiff really loved her job. (UMF 9.) Plaintiff even declined other job opportunities because "she had no complaints with the firm," "liked the people [she] was working with," "had a good workload," and "was just happy to be there." (UMF 6.) On the day of the Christmas Party, plaintiff voluntarily went to City Lights, which was strictly a social function. (UMF 43.) Mr. Yrulegui's conduct at City Lights was not directed at plaintiff, who chose to be at the venue and participate in the strip club activities.

The third cause of action for failure to prevent, investigate, and remedy discrimination, harassment, or retaliation fails because the evidence demonstrates that plaintiff was not subjected to harassment, discrimination, or retaliation.

To prevail on this claim plaintiff must establish that (1) she was subjected to discrimination, harassment, or retaliation; (2) the defendant failed to take all reasonable steps to prevent discrimination, harassment, or retaliation; and (3) the defendant's failure caused the plaintiff to suffer injury, damage, loss, or harm. (*Finder v. Employment Development Department* (E.D. Cal. 2017) 227 F.Supp.3d 1123, 1143.) If plaintiff has no claim for discrimination, harassment, or retaliation, there is no claim for failure to prevent same. (See *Featherszone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1166; *Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4th 1307, 1314.) For the reasons stated herein, plaintiff is unable to show that she was subjected to

discrimination, harassment, or retaliation by defendants, rendering the failure to prevent cause of action without merit.

The fourth cause of action is for aiding, abetting, inciting, compelling, or coercing acts in violation of FEHA. (See Gov. Code, §12940, subd. (i).) Again, the cause of action requires that there first be discrimination, sexual harassment and retaliation, which is not found here. Thus, there are no viable FEHA claims for Yrulegui & Roberts to have had knowledge about.

The fifth cause of action alleges retaliation for opposing practices forbidden by FEHA. Plaintiff must show: (1) she engaged in protected activity; (2) the employer subjected plaintiff to an adverse employment action; and (3) a causal link existed between the protected activity and the employer's action. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.) Here, plaintiff engaged in protected activity of making a report of what occurred at the strip club, but that report was made *after* plaintiff resigned. Plaintiff alleges that defendants retaliated against her by interfering with potential employment opportunities in the Fresno area.

Regarding the one instance of interference alleged in the Complaint (see paragraph 43), the moving papers show that the firm could not hire plaintiff due to a conflict of interest because it was representing defendants. Plaintiff acknowledged in her deposition that this circumstance precluded the firm from hiring plaintiff. (See UMF 54-57.) There is no viable claim for retaliation.

The sixth cause of action is for intentional infliction of emotional distress. Plaintiff must establish the following elements, "(1) outrageous conduct by defendant, (2) intention to cause or reckless disregard of the probability of causing emotional distress, (3) severe emotional suffering and (4) actual and proximate causation of the emotional distress." (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1376.) "[I]t is generally held that there can be no recovery for mere profanity, obscenity, or abuse, without circumstances of aggravation, or for insults, indignities or threats which are considered to amount to nothing more than mere annoyances." (*Yurick v. Superior Court* (1989) 209 Cal.App.3d 1116, 1128.)

Plaintiff alleges that "intentional infliction of emotional distress occurred when PLAINTIFF was provided excessive alcoholic drinks by the FIRM, was encouraged to engage with the strippers, defendant JOSEPH YRULEGUI encouraged employees to place money in the strippers' lingerie while they were topless, and PLAINTIFF was required to submit to a lap dance with a stripper which was paid for by the FIRM." (Complaint ¶ 87.) However, the undisputed material facts show that plaintiff voluntarily chose to consume alcoholic beverages throughout the night at each venue, where non-alcoholic beverages were available. (UMF 58-60.) When provided with money for the lap dance, plaintiff did not decline the lap dance, nor did she indicate that this was something she did not want to do. (UMF 29.) No one teased or said anything to plaintiff about waving off the lap dancer. (UMF 61.) Furthermore, plaintiff was not the only individual that was provided money for a lap dance – Joseph Yrulegui paid for two of a male coworker's lap dances. (UMF 62.) There was no pressure for plaintiff to stay at the strip club; she could have left at any time. The court finds there was no outrageous conduct on the part of defendants.

The seventh cause of action is for negligent infliction of emotional distress. "The negligent causing of emotional distress is not an independent tort, but the tort of negligence." (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1072.) "The traditional elements of duty, breach of duty, causation, and damages apply." (*Levy v. Only Cremationsfor Pets, Inc*. (2007) 57 Cal.App.5th 2013, 217.) Assumption of risk is an affirmative defense to negligence. "To warrant the application of the doctrine (of assumption of risk) the evidence must show that the victim appreciated specific danger involved. He does not assume any risk he does not know or appreciate. ... Stated another way, before the doctrine is applicable, the victim must have not only general knowledge of a danger, but must have knowledge of the particular danger, that is, knowledge of the magnitude of the risk involved." (*Ewing v. CloverleafBowl* (1978) 20 Cal.3d 389, 406.)

The evidence shows that plaintiff understood and appreciated the risks of consuming alcohol and going to a strip club. Plaintiff had experience drinking previous to the Christmas party, and getting intoxicated with coworkers. (UMF 63, 64.) Yet plaintiff chose to order and drink alcoholic beverages throughout the night despite non-alcoholic beverages being available to her. (UMF 14, 19, 26.) Though this was plaintiff's first time going to a strip club, plaintiff had a general understanding of what a stip club was and what went on there. (UMF 23, 24, 43.) Plaintiff knew that she could have left City Lights like two of her coworkers, but chose to stay until she noticed her father watching her from the bar area. (UMF 33.) Whatever risks were involved; they were assumed knowingly by plaintiff.

The court finds that defendants have met their burden as the moving parties of showing that required elements of each cause of action cannot be established. Plaintiff has not met her burden, having failed to file any response to the motion. Accordingly, the court intends to grant the motion.

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 07/15/24.
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***Fadi Abboud v. Gary Yep***
Superior Court Case No. 22CECG03765

Hearing Date: July 17, 2024 (Dept. 502)

Motion: Plaintiffs' Motion for Attorney's Fees and Costs

Oral Argument, if timely requested, will be heard on Thursday, July 18, 2024 at 3:30 PM in Department 502.

Tentative Ruling:

To grant plaintiffs' motion for attorney's fees in the amount of $14,815.00, and costs in the amount of $1,258.00.

Explanation:

First, plaintiffs have met their burden of showing that they are the prevailing party on the action on the contract, and therefore they are entitled to an award of attorney's fees under the language of the easement agreement and the court's judgment.

Under Civil Code section 1717, subdivision (a), "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

Here, the easement contract contains a clause that provides for an award of reasonable attorney's fees to the prevailing party in the event that a legal action or arbitration is filed to enforce the agreement. (Tipton decl., Exhibit A, § 6.) "The prevailing party shall be the party that obtains any of the remedies sought in the action." (*Ibid*.) The court entered a judgment in favor of plaintiffs after a court trial. (Plaintiffs' Request for Judicial Notice, Exhibit 1. The court intends to take judicial notice of the judgment under Evidence Code section 452(d).) The judgment also states that plaintiffs are the prevailing parties for the purpose of awarding attorney's fees and costs, and that defendants shall pay plaintiffs their reasonable attorney's fees and costs according to proof. (*Ibid*.) Therefore, plaintiffs have shown that they are the prevailing parties and that they are entitled to an award of their reasonable attorney's fees and costs.

Defendants do not dispute that plaintiffs are the prevailing parties in the action or that they are entitled to an award of their reasonable attorney's fees and costs. However, they contend that plaintiffs' counsel has not submitted sufficient evidence to support the requested amount of fees and show that the amount is reasonable. They point out that, in its order denying the last motion for fees without prejudice, the court found that plaintiffs' counsel had not submitted evidence showing the amount of hours that counsel worked on the case, which tasks were performed, and who performed

them, so it could not determine whether the requested amount of fees was reasonable. (Defendants' Request for Judicial Notice, Exhibit A. The court intends to take judicial notice of its order under Evidence Code section 452(d).) Defendants contend that plaintiffs' new motion does not cure the defects of the last motion, and therefore plaintiffs have still failed to show that the requested fees are reasonable. Also, defendants object that the requested $225 per hour rate for plaintiffs' counsel's law clerk is excessive and should not be approved.

However, plaintiffs' counsel has now provided the court with enough information to make a determination of whether the requested fees are reasonable. In *Serrano v. Priest* (1977) 20 Cal.3d 25, the California Supreme Court stated: "'The starting point of every fee award, once it is recognized that the court's role in equity is to provide just compensation for the attorney, must be a calculation of the attorney's services in terms of the time he has expended on the case. Anchoring the analysis to this concept 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, supra*, at p. 48, fn. 23, citation omitted.)

"In *Serrano IV*, applying the same principles to the statutory fee award under Code of Civil Procedure section 1021.5, we reiterated that fee awards should be fully compensatory. We approved the calculation of attorney fees beginning with a lodestar figure based on the reasonable hours spent, multiplied by the hourly prevailing rate for private attorneys in the community conducting *no contingent* litigation of the same type. We remarked that the reasonable value of attorney services is variously defined as the '"hourly amount to which attorneys of like skill in the area would typically be entitled."' We noted that the lodestar figure was subject to augmentation based on factors including the contingent nature of the litigation. We held in *Serrano IV* that, absent circumstances rendering the award unjust, an attorney fee award should ordinarily include compensation for *all* the hours *reasonably spent*, including those relating solely to the fee." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133, citations and paragraph break omitted, italics in original.)

"[I]n *PLCM Group, Inc. v. Drexler,* we instructed: '[T]he fee setting inquiry in California ordinarily begins with the "lodestar," i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate.... The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary.'" (*Id.* at p. 1134, citations omitted.)

"'The matter of reasonableness of attorney's fees is within the sound discretion of the trial judge. Determining the weight and credibility of the evidence, especially credibility of witnesses, is the special province of the trier of fact.' 'In determining what constitutes a reasonable compensation for an attorney who has rendered services in connection with a legal proceeding, the court may and *should* consider "the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney's efforts, his learning, his age, and his experience in the particular type of work demanded ... ; the intricacies and importance of the litigation, the labor and necessity for skilled legal training and ability in trying the cause, and the time consumed."'" (*Stokus v. Marsh* (1990)

217 Cal.App.3d 647, 656-657, citations omitted, italics in original; see also *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 659.)

While the party moving for a fee award does not have to submit detailed billing records, they do have to provide a declaration from counsel attesting to the time spent by the attorney on the case, the tasks performed, and his or her billing rate in order to support the court's lodestar calculation. (*Sommers v. Erb* (1992) 2 Cal.App.4th 1644, 1651.) "For determining attorney fees, '*[a]ny* rational calculation method is permissible.' 'The law is clear ... that an award of attorney fees may be based on counsel's declarations, without production of detailed time records.' Billing documentation is not required. (*People v. Kelly* (2020) 59 Cal.App.5th 1172, 1183, citations omitted, italics in original.)

Here, plaintiffs seek an award of $16,135 in attorney's fees and $1,258.16 in costs. Plaintiffs' counsel states that her hourly rate is $300, and that her law clerk's rate is $225 per hour. Counsel's rate appears to be reasonable and consistent with the rates charged by other attorneys of similar skill, education, and experience in the Fresno area. Therefore, the court will approve counsel's hourly rate of $300.

On the other hand, plaintiffs' counsel has provided very little information about the education, background, skill and experience of her law clerk. She states that her clerk has worked with her for almost 15 years, and that he is particularly adept at real property matters, which made him well-suited to work on this case. (*Id*. at ¶¶ 7, 8.) He did a great deal of work in the case, and he was instrumental in getting a judgment for plaintiffs. (*Id*. at ¶ 8.) He drafted the trial brief, reply brief, did research, and wrote legal arguments for plaintiffs' counsel. (*Ibid*.) Counsel performed only nominal revisions on his work. (*Ibid*.)

However, counsel says nothing about the clerk's education, background, or experience, aside from the fact that he has worked for counsel for about 15 years and that he has skill in real property matters. Given the rather high requested rate of $225 per hour for a law clerk, counsel needs to provide more information about her clerk's background, education and experience to justify the requested rate. Also, it is notable that Judge Simpson approved a rate of $150 per hour for the same clerk about four years ago. (See Tipton April 24, 2024 reply decl., ¶ 9.) However, plaintiffs' counsel now requests a rate of $225 per hour, which is considerably higher than the rate approved by Judge Simpson in 2020. Counsel has not shown why her clerk's rate has increased $75 per hour in only four years, nor has she provided any evidence that law clerks in the Fresno area are now billing at rates of $225.

As a result, there is insufficient evidence to support the plaintiffs' request to approve the law clerk's rate of $225 per hour. Rather than denying the motion, however, the court intends to find that a reasonable rate for the law clerk based on his skill and experience is $175 per hour, which is slightly higher than the $150 per hour rate approved by Judge Simpson in 2020.

Next, plaintiffs' counsel has now provided sufficient evidence of the number of hours she and her clerk spent on the case and the specific tasks that they performed to support the requested fees. Counsel has provided information about the various tasks performed throughout the case, and how many hours she and her law clerk worked at each stage of the case. (Tipton decl., ¶¶ 13-17.) Counsel incurred 4.2 hours of time and her clerk incurred 2.2 hours of time on the first stage of the case, up through the filing of

the complaint, for a total of $1,755 in fees. (*Id*. at ¶ 13.) Counsel incurred another 4.8 hours of time and her clerk incurred 5.3 hours of time from the filing of the complaint to the review of defendants' answer, for a total of $2,632.50 in fees. (*Id*. at ¶ 14.) In the next eight months between the filing of the answer and the trial, plaintiffs' counsel incurred another 4.6 hours of work and her clerk incurred 4.9 hours of work, plus .1 hours of legal assistant work, for a total of $2,495 in fees. (*Id*. at ¶ 15.) From November 1, 2023 to November 12, 2023, counsel incurred another 6.8 hours and her clerk worked 7.2 hours to prepare for the trial, for a total of $3,660 in fees. (*Id*. at ¶ 16.) Once the trial commenced, counsel incurred another 9.5 hours and her clerk worked 6.8 hours, for total fees of $4,392.50. (*Id*. at ¶ 17.) She also provides a breakdown of the specific tasks performed at each stage of the litigation. (*Id*. at ¶¶ 13-17.)

As a result, plaintiff has now provided enough information for the court to assess whether the requested fees are reasonable. While defendants argue that plaintiffs' counsel needs to provide billing records to allow a determination of the reasonableness of the fees request, counsel is not required to provide billing records to support her fees motion. She only needs to provide her declaration containing information regarding the hours worked and the tasks performed. (*People v. Kelly*, *supra*, 59 Cal.App.5th at p. 1183.) Here, she has provided her declaration that gives the court sufficient evidence to allow it to assess the reasonableness of the requested fees.

Next, it appears that the requested number of hours is reasonable. Counsel has claimed only 29.9 hours of billable time for herself for about one year of work on the case, including drafting and filing the complaint, conducting discovery, preparing for trial, and actually trying the case. Also, she seeks another 26.4 hours for her law clerk, who bills at a lower rate than she does. The amount of hours requested for the tasks performed appears to be reasonable, especially in light of the excellent results for her clients, who obtained a judgment entirely in their favor. Defendants have failed to point to any specific hours or tasks that were unreasonable, excessive, or duplicative. Thus, the court intends to approve the requested amount of hours as reasonable, and use the number of hours to calculate the lodestar fees.

Based on counsel's hourly rate of $300 and her hours of 29.9, the court intends to grant fees of $8,970 for her work. The court will also award fees of $4,620 for the law clerk's work based on a billing rate of $175 per hour and 26.4 hours of work billed. Finally, the court will award fees of $25 for the legal assistant's 0.2 hours of work billed at $125 per hour. Thus, total fees will be $13,615.00 for the work done on the case up to the present fees motion. The court also intends to grant counsel's request for fees to bring the fees motion, in the amount of $1,200 based on four hours of time to draft the motion, draft the reply, and appear at the hearing. As a result, the grand total fees will be $14,815.00

The court will also grant the requested costs of $1,258.16 based on the memo of costs. Notably, defendants have not objected to any of the requested costs or made any showing that the costs were not reasonably incurred to litigate the case. Therefore, the court intends to grant the requested costs in full.

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 07/15/24.
(Judge's initials) (Date)

(35)

Tentative Ruling

Re:	***Ronald Carter v. Paul Vial*** Superior Court Case No. 22CECG02025
Hearing Date:	July 17, 2024 (Dept. 502)
Motion:	by Defendant Paul Vial to Compel Further Responses; and Request for Sanctions

Oral Argument, if timely requested, will be heard on Thursday, July 18, 2024 at 3:30 PM in Department 502.

Tentative Ruling:

To grant in part, as to Request for Production, Nos. 2, 3, 4, 5, 14, 20, 22, 24, 26, 28, 30, 32, 36, 40, 42, 44, 46, 48, 50, 52, 54 and 56, as agreed upon by and between the parties. Plaintiffs Richard Gaestel and Cindee Gaestel Lopez as Successor Co-Trustees of the Robert J. and Bette C. Gaestel Family Revocable Trust are directed to serve verified responses to these requests, and produce all relevant documents within 20 days of service of the order by the clerk. For all documents subject to a claimed privilege, Plaintiffs Richard Gaestel and Cindee Gaestel Lopez as Successor Co-Trustees of the Robert J. and Bette C. Gaestel Family Revocable Trust shall produce a privilege log. To deny the motion on all other grounds.

To grant the request for sanctions and impose monetary sanctions in the reduced amount of $1,350.00 in favor of Defendant Paul Vial and against Plaintiffs Richard Gaestel and Cindee Gaestel Lopez as Successor Co-Trustees of the Robert J. and Bette C. Gaestel Family Revocable Trust, payable within 30 days of service of the order by the clerk to counsel for Defendant Paul Vial.

Explanation:

At issue are disputes arising out of a partnership and its written agreement to own and operate a private duck club. Plaintiffs Ronald Carter, and Richard Gaestel and Cindee Gaestel Lopez as Successor Co-Trustees of the Robert J. and Bette C. Gaestel Family Revocable Trust, filed the instant action for four causes of action: (1) breach of fiduciary duty; (2) breach of partnership agreement; (3) accounting; and (4) as to plaintiff Ronald Carter only, financial elder abuse. The action is brought against defendants Paul Vial, James Anderson, James Larson, Bob Gilbertson, Gary Smith, and Robert Acker.

Defendant Paul Vial ("Defendant") now seeks to compel further responses to requests for production of documents from plaintiffs Richard Gaestel and Cidndee Gaestel Lopez as Successor Co-Trustees of the Robert J. and Bette C. Gaestel Family Revocable Trust (together "Plaintiffs"). The parties appear to set the requests at issue into five general categories: (1) Requests 2, 3, 4, and 5, relating to the partnership agreement; (2) Requests 6 and 7 relating to the formation documents and amendments of the Robert J. and Bette C. Gaestel Family Revocable Trust (the "Trust"); (3) Requests 8 and 9 relating

to tax documents for the Trust; (4) Requests 14, 20, 22, 24, 26, 28, 30, 32, 40, 42, 44, 46, 48, 50, 52, 54 and 56 relating to communications relating to the partnership; and (5) Request 36 relating to an action in Merced County Superior Court.[1]

Request Nos. 2 through 5

These requests pertain to "all documents" related to the partnership agreement that is the subject of the lawsuit, in its original, first amended, second amended, and third amended iterations. Plaintiffs objected to these requests as overbroad, irrelevant, attorney-client or work-product privileged, invades the right of privacy, and is vague as to time. In meet and confer efforts, Defendant agreed to limit the requests to within five years before or after the creation of the document in question. (Jeffcoach Decl., ¶ 6, Ex. C.) Plaintiffs in the exchange did not expressly agree to address the requests with the limitations offered. (*Id.*, ¶ 7, Ex. D.) Plaintiffs instead offered to limit the production from "all documents" to communications by or among the partners, or by and between their legal counsel, as to the terms of the agreements or any amendments thereof. (*Ibid.*) Defendant thereafter agreed to Plaintiffs' proposal. (*Id.*, ¶ 8, Ex. E.)

From the above, while the objections were initially well-taken, the parties agreed to limitations on the production. No evidence or argument suggests that Plaintiffs were dissatisfied with the terms they suggested, which were agreed to by Defendant. Defendant offers, and Plaintiffs do not contest, that Plaintiffs served supplemental responses following the above meet-and-confer efforts. (Jeffcoach Decl., ¶ 9.) A review of those supplemental responses do not address the requests, limited by the meet-and-confer, in principal. The motion is granted as to Requests 2, 3, 4, and 5. Plaintiffs are directed to supplement their responses in accordance with the agreed limitations as set forth by the parties' meet-and-confer efforts. To the extent that privileges are claimed, Plaintiffs must produce a privilege log. (*Catalina Island Yacht Club v. Superior Court* (2015) 242 Cal.App.4th 1116, 1125-1127.)

Request Nos. 6 and 7

These requests pertain to "all documents" related to the Trust, and its amendment. Plaintiffs objected on the grounds of overbroad, irrelevant, attorney-client or work-product privilege, right of privacy, and vague as to time. Meet-and-confer efforts did not result in any limitations, despite Defendant's characterization that the requests were limited to just a list of assets. No such offer was made. (*See* Jeffcoach Decl., ¶¶ 6, 8, and Exs. C, E.) Nor would this limitation cure the issues of relevancy and privacy.

Defendant is entitled to discover the information as long as it is reasonably calculated to lead to the discovery of admissible evidence. (Code Civ. Proc. § 2017.010.) While discovery is broad, the right to discovery is not absolute. The California Constitution protects the individual's reasonable expectation of privacy against a serious invasion. (*Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 370.) A reasonable expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms. (*Hill v. Nat'l Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 37.)

[1] Defendant's Request for Judicial Notice is granted, only to the extent that such records exist. (*Steed v. Dept. of Consumer Affairs* (2012) 204 Cal.App.4th 112, 120-121.)

The invasion of privacy must be serious in nature, scope, and actual or potential impact to constitute an egregious breach of social norms. (*Ibid.*) If the invasion is serious, the invasion must be measured against legitimate and important competing interests. (*Id.* at p. 38.) If the intrusion is limited and confidential information is carefully shielded from disclosure except to those who have a legitimate need to know, privacy concerns are assuaged. (*Ibid.*)

"All documents", as Plaintiffs contend, capture far more than the documents Defendant appears to intend to request. Defendant appears to seek documents that would tend to establish whether the Trust acquired a partnership interest. Instead, Defendant requested all documents without limitation as to subject matter or as to time. As Plaintiffs suggest, the requests as propounded unnecessarily captures private information, including the other contents of the Trust such as unrelated estate plans and financial records. (*See Estate of Gallio* (1995) 33 Cal.App.4th 592. 598 [privacy of estate plans]; *SCC Acquisitions, Inc. v. Superior Court* (2015) 243 Cal.App.4th 741, 754 [financial information].) Accordingly, the court turns to a balancing test to determine whether the disclosure is required. (*SCC Acquisitions, Inc. v. Superior Court*, *supra*, 243 Cal.App.4th at pp. 754-755.) As Defendant offers no reasons as to why he is entitled to all documents, and only offers reasons for the specific documents he seeks regarding the existence of the partnership interest in the Trust, the court finds that the requests as propounded are subject to the right of privacy. The motion is denied as to Requests 6 and 7.

Request Nos. 8 and 9

These requests pertain to five years of federal tax returns of decedent Robert Gaestel ("Decedent"), and the Trust. Plaintiffs objected on the grounds, among others, of tax return privilege. Meet-and-confer efforts did not place any limitations on these requests. (*See* Jeffcoach Decl., ¶¶ 6, 8, and Exs. C, E.)

Personal income taxes are protected under the official information privilege, entitling parties to refuse to disclose information that they have furnished to governmental entities. (*Webb v. Standard Oil Co. of Cal.* (1957) 49 Cal.2d 509, 513.) The privilege is not absolute. (*Weingarten v. Superior Court* (2002) 102 Cal.App.4th 268, 274.) The privilege will not be upheld where the circumstances indicate an intentional waiver of the privilege, the gravamen of the lawsuit is inconsistent with the privilege, or a public policy greater than that of the confidentiality of the tax returns is involved. (*Ibid.*)

Defendant does not contest that he seeks personal returns of both Decedent and the Trust. Defendant suggests that the tax returns have been placed at issue by the filing of this lawsuit. Nothing on a plain reading of the First Amended Complaint supports the contention. Plaintiffs contend that the Trust is among other individuals who entered into a written partnership agreement. (Defendant's Request for Judicial Notice, Ex. A, ¶ 10.) Plaintiffs contend that Defendant does not recognize the Trust as having an interest in the written partnership agreement. (*Id.*, Ex. A, ¶ 21.) Plaintiffs contend that the Trust is owed an accounting of the partnership. (*Id.*, Ex. A, ¶¶ 43-48.) Nowhere in the FAC are there any allegations regarding the Trust's financial status, its income, expenses, deductions, or any other information reported in a tax return. Earnings by Decedent and Trust are not at issue. Earnings by the partnership are at issue.

While the returns might be helpful, as Defendant suggests, to confirm whether the partnership was ever an asset listed on these returns, this is not enough. (*See Weingarten v. Superior Court*, *supra*, 102 Cal.App.4th at p. 277 ["The fact that financial records are difficult to obtain or that a tax return would be helpful, enlightening or the most efficient way to establish [a fact] is not enough."]) Less intrusive means exists to obtain the information sought than complete tax returns. The motion is denied as to Requests 8 and 9.

*Request Nos. 1*4, 20, 22, 24, 26, 28, 30, 32, 40, 42, 44, 46, 48, 50, 52, 54 and 56

These requests pertain to communications between trustees of the Trust and other individuals. As to each request, the request seeks "all communications" between the individuals named. Plaintiffs objected on the grounds of overbroad, relevance, and vague as to time. On meet-and-confer, Defendant offered to limit the inquiries to five years preceding the passing of Decedent, and only those communications that pertain to the selling, purchasing, and/or transferring of Decedent's interest in the partnership. (Jeffcoach Decl., ¶ 6, Ex. C.) As to Request No. 14, Plaintiffs did not agree to the limitation. (*Id.*, ¶ 7, Ex. D.) As to the remaining requests, Plaintiffs agreed to supplement. (*Ibid.*) As to every request in this category, no supplemental responses were given. (*Id.*, ¶ 9, Ex. F.)

As above, while the objections are initially well-taken, the parties have agreed to place certain limitations on the requests as propounded. As limited, the requests are reasonably calculated to lead to the discovery of admissible evidence, seeking communications that pertain merely to the selling, purchasing, and/or transferring of Decedent's interest in the partnership, made in the five years prior to Decedent's passing. If there are no responsive documents, as Plaintiffs suggest in their opposition that Decedent "simply put the partnership interest in his Trust", they may verify a response to that effect. The motion is granted as to Requests No. 14, 20, 22, 24, 26, 28, 30, 32, 40, 42, 44, 46, 48, 50, 52, 54 and 56.

Request No. 36

This request pertains to "all documents" related to a lawsuit filed in Merced County Superior Court. Plaintiffs objected on the grounds of attorney-client and work-product privilege, relevance, vague and ambiguous. From meet-and-confer efforts, Plaintiffs acknowledged that Defendant is entitled to publicly filed documents, but restated the assertion of privilege. (Jeffcoach Decl., ¶ 7, Ex. D.) In response, Defendant acknowledged that the request will except communications between Plaintiffs and their counsel at that time. (*Id.*, ¶ 8, Ex. E.) No supplemental response to this request was made. (*Id.*, ¶ 9, Ex. F.) The motion is granted as to Request No. 36. Plaintiffs are directed to supplement their responses in accordance with the agreed limitations as set forth by the parties' meet-and-confer efforts. To the extent that privileges are claimed, Plaintiffs must produce a privilege log. (*Catalina Island Yacht Club v. Superior Court*, *supra*, 242 Cal.App.4th at pp. 1125-1127.)

Sanctions

Defendant seeks monetary sanctions under Code of Civil Procedure sections 2023.010 and 2031.310, the former providing for permissive monetary sanctions (Code

Civ. Proc. § 2023.030, subd. (a)), and the latter, mandatory (Code Civ. Proc. § 2031.310, subd. (h)). From the above, the court finds that Plaintiffs have not engaged in the misuse of the discovery process, and denies imposing monetary sanctions under Code of Civil Procedure section 2023.010. The court however finds that Plaintiffs have unsuccessfully opposed the present motion in part, and did not provide an explanation as to why supplemental responses to these requests at issue were not served as agreed upon. While the objections to the discovery requests were initially well-founded, the parties' efforts reduced those issues to what was an agreeable degree. Plaintiffs however failed to provide supplemental responses in spite of the limitations. The court imposes mandatory monetary sanctions in favor of Defendant and against Plaintiffs, but in the reduced amount of $1,350.00.

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 07/15/24.
(Judge's initials) (Date)

(46)

Tentative Ruling

Re: ***John Gonzales v. Ashley Global Retail, LLC***
Superior Court Case No. 23CECG03985

Hearing Date: July 17, 2024 (Dept. 502)

Motion: by Plaintiff John Gonzales for Orders Compelling Defendant Stoneledge Furniture, LLC to Provide Initial Verified Responses to Form Interrogatories, Set One; Special Interrogatories, Set One; Demand for Production of Documents, Set One; Deeming Matters in Requests for Admissions Admitted, Set One; and Imposing Monetary Sanctions.

Oral Argument, if timely requested, will be heard on Thursday, July 18, 2024 at 3:30 PM in Department 502.

Tentative Ruling:

To continue these motions to Wednesday, July 31, 2024, at 3:30 p.m. in Department 502. Plaintiff must file copies of the propounded discovery, proofs of service for the propounded discovery, and the unverified responses. Such documentation must be filed by Friday, July 19, 2024 at 5:00 p.m.

Explanation:

Unverified Responses

Responses to initial discovery requests must be signed under oath by the party to whom the discovery was directed. (Code Civ. Proc., §§ 2030.250 subd. (a), 2031.250 subd. (a), 2033.240 subd. (a).) Unsworn responses are tantamount to no responses at all. (*Appleton v. Superior Court* (1988) 206 Cal.App.3d 632, 636.) Where there are both responses and objections, both the party and the attorney must sign the response. If the responses consist entirely of objections, only the attorney's signature is required. (Code Civ. Proc., §§ 2030.250 subd. (a), (c); 2031.250 subd. (a), (c); 2033.240 subd. (a), (c).)

Here, defendant has not served plaintiff with verifications for the discovery responses. However, plaintiff has not claimed or demonstrated in his motions that the responses provided are not solely objections, which would render verifications unnecessary. It is not possible at this time to determine where a verification may be required and where it is not, since the responses to the propounded discovery were not attached to the motions.

Lack of Proof of Properly Served Responses

A propounding party may move for an order compelling response to its propounded interrogatories and/or demand. (Code Civ. Proc., §§ 2030.290, 2031.300.) A propounding party may move for an order that the genuineness of any documents

and the truth of any matters specified in the requests for admissions be deemed admitted. (Code Civ. Proc., § 2033.280.) Timely and verified responses are due from the party on which discovery is propounded within 30 days after service. (Code Civ. Proc. §§ 2030.260, 2031.260.) Failing to respond to discovery within the 30-day time limit waives objections to the discovery, including claims of privilege and work product protection. (Code Civ. Proc., §§ 2030.290 subd. (a), 2031.300 subd. (a), 2033.280 subd. (a).)

A motion to compel initial responses must show that the discovery was properly served on the opposing party, that the time to respond has expired, and that no response of any kind has been served. (*Leach v. Superior Court* (1980) 111 Cal.App.3d 902, 905-06, *see Sinaiko Healthcare Consulting, Inc. v. PacificHealthcare Consultants* (2007) 148 Cal.App.4th 390, 404.) If the responses are ones that require verification (i.e. answers with or without objections), the lack thereof is tantamount to no responses at all. (*Appleton v. Superior Court*, *supra*, 206 Cal.App.3d 636.)

Here, plaintiff argues that the unverified responses received on May 3, 2024 are equivalent to no responses received. Even should this prove to be correct and verifications are required, plaintiff has not demonstrated that the propounded discovery requests were properly served. Plaintiff has not attached the propounded discovery and no proof of service that shows the method and date of service of the discovery requests. Defendant has not filed opposition or otherwise appeared in a manner that would effectively waive insufficient notice. (See *Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 7.) The court cannot yet rule on the merits of plaintiff's motion because counsel's declaration does not attach the propounded discovery (or defendant's responses thereto) nor the proof of service of the discovery requests.

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 07/15/24.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Roseann Molina v. Lithia NC, Inc.***
Superior Court Case No. 22CECG00160

Hearing Date: July 17, 2024 (Dept. 502)

Motion: by Plaintiff for Attorney Fees and Costs

Oral Argument, if timely requested, will be heard on Thursday, July 18, 2024 at 3:30 PM in Department 502.

Tentative Ruling:

To grant and impose a monetary sanction against defendants Lithia NC, Inc. and American Credit Acceptance, LLC in the amount of $10,157.20 in attorney fees and costs, payable no later than thirty (30) days from the date of service of this order.

Explanation:

On February 16, 2024 plaintiff Roseann Molina's motion to lift the stay on her action and vacate the court order compelling her to arbitrate her claims against defendants was granted. Monetary sanctions for the attorney fees and costs associated with bringing the motion were awarded at that time. Plaintiff now moves for additional monetary sanctions pursuant to Code of Civil Procedure section 1281.98 for the attorney's fees and expenses associated with the abandoned arbitration.

Code of Civil Procedure section 1281.98, subdivision (c) states:

> If the employee or consumer withdraws the claim from arbitration and proceeds in a court of appropriate jurisdiction pursuant to paragraph (1) of subdivision (b), both of the following apply:
>
> (1) The employee or consumer may bring a motion, or a separate action, to recover all attorney's fees and all costs *associated with the abandoned arbitration proceeding*. The recovery of arbitration fees, interest, and related attorney's fees shall be without regard to any findings on the merits in the underlying action or arbitration.
>
> (2) The court shall impose sanctions on the drafting party in accordance with Section 1281.99.

(Emphasis added.)

Section 1281.99, subdivision (a), states:

> The court shall impose a monetary sanction against a drafting party that materially breaches an arbitration agreement pursuant to subdivision (a) of

> Section 1281.97 or subdivision (a) of Section 1281.98, by ordering the drafting party to pay the *reasonable expenses*, including attorney's fees and costs, *incurred by the employee or consumer as a result of the material breach*.

(Emphasis added.)

In the present case, plaintiff submits all attorney fees and costs incurred during the now-abandoned arbitration to be awarded as monetary sanctions pursuant to Code of Civil Procedure section 1281.98, subdivision (c). Defendants argue the fees and costs related to discovery and general litigation tasks not specifically associated with the arbitration are not intended to be awarded under the language of the statute.

The court reads the qualifying language in both section 1281.98, subdivision (c)(1) and 1281.99, subdivision (a) as intended to limit the scope of fees and costs awarded to those incurred specifically as a result of the material breach and resulting withdrawal of the action from arbitration.

In reviewing the time entries challenged by defendants as unrelated to the arbitration, the court disagrees with the assessment that the 8/14/23 time spent reviewing the file and organizing for initial disclosures in arbitration is not associated with the arbitration. The court finds 20.3 hours of attorney time was associated with the arbitration abandoned as a result of defendants' material breach. Having previously found counsel's hourly rate reasonable, the court imposes a monetary sanction in the amount of $10,157.20 reflecting $10,150 in attorney's fees and costs of $7.20, against defendants Lithia NC, Inc. and American Credit Acceptance, LLC.

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 07/15/24.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Zachary Costi v. William Hanks, M.D.***
Superior Court Case No. 20CECG00415

Hearing Date: July 17, 2024 (Dept. 502)

Motion: Defendant Penumbra, Inc.'s Demurrer to the Second Amended Complaint

Oral Argument, if timely requested, will be heard on Thursday, July 18, 2024 at 3:30 PM in Department 502.

Tentative Ruling:

To sustain, with leave to amend. Should plaintiff desire to amend, the Third 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's operative Second Amended Complaint ("SAC") refers to its Exhibits A and B as identifying the allegedly defective medical equipment causing harm. (See, e.g., SAC, ¶¶ 11,12, and 16.) These exhibits, however, do not identify the alleged manufacturer, leaving Penumbra to unreasonably speculate which particular device it is being alleged to have been manufactured and/or controlled. (See *Sindell v. Abbot Laboratories* (1980) 26 Cal.3d 588, 597 ["[A]s a general rule, the imposition of liability depends upon a showing by the plaintiff that his or her injuries were caused by the act

of the defendant or by an instrumentality under the defendant's control."].) Although plaintiff substantively contends precision is unnecessary (Opp. at p. 5:10-14), considering the competiveness and numerosity of SAC Exhibits A and B, a more refined identification is required to inform Penumbra of the item it must defend. In light of the liberality offered to amendment, plaintiff is granted an opportunity to cure this uncertainty.

Plaintiff also contends the demurrer is untimely. "A person against whom a complaint or cross-complaint has been filed *may*, within 30 days after service of the complaint or cross-complaint, demur to the complaint or cross-complaint." (Code Civ. Proc., § 430.40, subd. (a).) The statute's use of the "permissive expression 'may'", as opposed to the mandatory term "must", has been applied to allow demurrers after expiration the time to respond to the complaint. (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 280; see also *Jackson v. Doe* (2011) 192 Cal.App.4th 742, 750.)

Penumbra has presented an email from plaintiff's counsel which reflects an agreement between counsel to allow plaintiff until October 31, 2023 to file another amended pleading. (See Perkins, Decl., Ex. B.) No amended pleading was filed, and Penumbra's counsel's claim of inadequate participation in the meet and confer process is unaddressed in plaintiff's opposition. Under these circumstances, Penumbra's demurrer was considered on its merits.

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 07/15/24.
(Judge's initials) (Date)