**Tentative Rulings for December 19, 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)**

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

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

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**(Tentative Rulings begin at the next page)**

# Tentative Rulings for Department 502

Begin at the next page

(03)

**Tentative Ruling**

Re: ***Pentamerous v. Priest***
Case No. 21CECG02205

Hearing Date: December 19, 2024 (Dept. 502)

Motion: Dr. James Barnett's Motion to Set Aside Default Judgment

**If oral argument is timely requested, it will be entertained on Thursday, December 19, 2024, at 1:30 p.m. in Department 502.**

**Tentative Ruling:**

To grant Dr. James Barnett's motion to set aside the default judgment. The court also intends to grant Dr. Barnett leave to intervene in the action in his capacity as Successor Trustee of the Shubin Family Trust of 1989, and to file an answer on behalf of the Trust. Dr. Barnett shall file and serve the answer within 10 days of the date of service of this order. Finally, the court intends to grant the motion for relief from the court's prior order requiring Virginia Shubin Barnett to pay monetary sanctions to plaintiff.

**Explanation:**

First, while Dr. Burnett has not expressly moved to intervene in the action, it does appear that he is seeking to intervene in order to represent the interests of the Shubin Family Trust, which is the entity that allegedly owns the real property for which plaintiff is seeking to quiet title. Dr. Barnett seeks leave to set aside the default and file an answer on behalf of the Trust, which means that he also needs to intervene in the action in order to have standing to seek other relief, as he and the Shubin Family Trust are not presently named as parties to the action.

Under Code of Civil Procedure section 387, subdivision (b), "An intervention takes place when a nonparty, deemed an intervenor, becomes a party to an action or proceeding between other persons by doing any of the following: … Uniting with a defendant in resisting the claims of a plaintiff." (Code Civ. Proc., § 387, subd. (b)(2).) "The court shall, upon timely application, permit a nonparty to intervene in the action or proceeding if either of the following conditions is satisfied: … The person seeking intervention claims an interest relating to the property or transaction that is the subject of the action and that person is so situated that the disposition of the action may impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by one or more of the existing parties." (Code Civ. Proc., § 387, subd. (d)(1), (A, (B), paragraph breaks omitted.) The use of the word "shall" indicates that intervention is mandatory and must be allowed if either of the standards under section 387(d)(1) are met.

Also, "The court may, upon timely application, permit a nonparty to intervene in the action or proceeding if the person has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both." (Code Civ. Proc., § 387, subd.

(d)(2).) Thus, section 387(d)(2) gives the court discretion to grant intervention in the event that it finds that a nonparty has a sufficient interest in the proceeding.

"It is well settled that the intervener's interest in the matter in litigation must be direct, not consequential, and that it must be an interest which is proper to be determined in the action in which intervention is sought. The 'interest' referred to in section 387, subdivision (a), 'must be of such direct or immediate character, that the intervener will either gain or lose by the direct legal operation and effect of the judgment.'" (*Simpson Redwood Co. v. State of California* (1987) 196 Cal.App.3d 1192, 1199–1200, citations omitted.)

Here, Dr. Barnett has shown that he is entitled to intervene under either the mandatory or permissive portions of the intervention statute. Dr. Burnett has been named the Successor Trustee of the Shubin Family Trust of 1989, which is allegedly the true owner of the subject real property that plaintiff claims to have purchased, and for which plaintiff has obtained a quiet title judgment. Dr. Barnett claims that the purchase agreement was obtained through fraud or other false means, and that the judgment of quiet title needs to be set aside. Therefore, since Dr. Barnett has a direct interest in the subject matter of the case, the court intends to permit him to intervene in the action.

Next, the court also intends to grant Dr. Barnett's motion to set aside the default entered against defendant Virginia Shubin Barnett and the Virginia Shubin Barnett Living Trust of 1989. Dr. Barnett moves for relief from the default under Code of Civil Procedure section 473, subdivision (b). Section 473(b) provides for discretionary relief from a default or default judgment that has been entered due to mistake, surprise, inadvertence, or excusable neglect. (Code Civ. Proc. § 473, subd. (b).) The party seeking relief must bring his or her motion within a reasonable time, not to exceed six months from the date of entry of the default or default judgment. (*Ibid*.)

"Where the mistake is excusable and the party seeking relief has been diligent, courts have often granted relief pursuant to the discretionary relief provision of section 473 if no prejudice to the opposing party will ensue. In such cases, the law 'looks with [particular] disfavor on a party who, regardless of the merits of his cause, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary.'" (*Ibid*, internal citations omitted.)

"'[T]he provisions of section 473 of the Code of Civil Procedure are to be liberally construed and sound policy favors the determination of actions on their merits.' [Citation.]" (*Zamora v. Clayborn Contracting Group, Inc*. (2002) 28 Cal.4th 249, 256.) "[B]ecause the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default." (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233.)

In determining whether the default was entered against the defendant as a result of his or her reasonable mistake, inadvertence, surprise or excusable neglect, the court must look at whether the mistake or neglect was the type of error that a reasonably prudent person under similar circumstances might have made. (*Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 276.) However, the court will not grant relief if the defendant's default was taken as a result of mere carelessness or other inexcusable neglect. (*Luz v. Lopes* (1960) 55 Cal.2d 54, 62.)

"It is the policy of the law to favor, whenever possible, a hearing on the merits. Appellate courts are much more disposed to affirm an order when the result is to compel a trial on the merits than when the default judgment is allowed to stand. Therefore, when a party in default moves promptly to seek relief, very slight evidence is required to justify a trial court's order setting aside a default." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478, citations omitted.)

"The 'surprise' referred to in section 473 is defined to be some 'condition or situation in which a party to a cause is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against.' The 'excusable neglect' referred to in the section is that neglect which might have been the act of a reasonably prudent person under the same circumstances. A judgment will not ordinarily be vacated at the demand of a defendant who was either grossly negligent or changed his mind after the judgment." (*Baratti v. Baratti* (1952) 109 Cal.App.2d 917, 921, citations omitted.)

Also, the moving party must show that they were diligent in seeking relief from the default, and that they sought relief within a reasonable time after they learned of the default. "This court has held that what a 'reasonable time' is in any case depends primarily on the facts and circumstances of each individual case, but definitively requires a showing of diligence in making the motion after the discovery of the default. In other words, the moving party must not only make a sufficient showing of 'mistake, inadvertence, surprise, or neglect' in order to excuse the original default, but must also show diligence in filing its application under section 473 after learning about the default. If there is a delay in filing for relief under section 473, the reason for the delay must be substantial and must justify or excuse the delay." (*Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1181, citations omitted.)

In the present case, Dr. Barnett filed his motion to set aside the judgment on September 26, 2024, about four months after the entry of judgment against Virginia and her Trust on May 29, 2024. Thus, the motion was brought within six months of entry of the judgment. He also states in his reply declaration that he first learned of the case in the beginning of 2024, and that he attempted to hire a California attorney to represent him in the case, but the first attorney was not able to take the case, which led to further delays until he found a new attorney. He then filed his petition to be appointed as Successor Trustee for the Shubin Family Trust in June of 2024, and the petition was granted in August of 2024. He filed the present motion to set aside about a month later. Thus, Dr. Barnett has made an adequate showing that he was diligent in seeking relief.

Next, Dr. Barnett claims that the default and default judgment were entered as a result of the mistake, surprise, or excusable neglect of Virginia, as she was not mentally competent and lacked the capacity to defend her interests and the interests of the Trust in the case. Dr. Barnett claims that plaintiff obtained a default judgment against Virginia and the Trust through fraud, and that the true owner of the subject property is the Shubin Family Trust of 1989. He also claims that Virginia is incompetent to manage her own affairs, and that she has allowed her default to be entered as a result of her inability to manage her own legal affairs.

Dr. Barnett's evidence is somewhat vague as to the exact nature of her incapacity, although he seems to be claiming that she may be suffering from some form of mental illness. He admits that she has not been diagnosed with a mental illness by a

professional, but he claims that she is no longer managing any of the Trust's assets, and that several properties have been taken by the State due to failure to pay property taxes. He also alleges that she no longer has a regular abode, shows signs of paranoia, and has been neglecting her duties as the Trustee of her Trust. Dr. Barnett states that he has obtained an order from the Fresno County Probate Court appointing him as the Successor Trustee of the Trust due to Virginia's inability to manage the Trust's affairs. Also, in his reply declaration, Dr. Barnett states that he has had "infrequent and intermittent contact with Virginia over approximately the last five years, and I found her statements to me to be largely incoherent." (Reply decl. of Dr. Barnett, ¶ 2.)

In its opposition, plaintiff contends that Dr. Barnett's evidence is vague about many details and is not based on direct personal knowledge of Virginia's present mental state. Plaintiff notes that Dr. Barnett has been divorced from Virginia since 1988 and he now lives in Mississippi, so he has no direct personal knowledge of her current mental state or competency. Plaintiff also points out that Virginia has never been diagnosed with a mental disorder. It contends that Dr. Barnett's self-serving lay opinion of her mental capacity is worth little, especially since it appears that he has not had much contact with Virginia since their divorce 36 years ago. Also, plaintiff points out that Virginia had enough mental capacity to hire attorneys, file an answer, and take other actions to defend herself in the present case. Her former attorneys never raised any concerns with the court about her mental capacity. Therefore, plaintiff concludes that Dr. Barnett has not met his burden of showing that Virginia lacks the capacity to defend herself in the case and that the default judgment was the result of her lack of capacity.

Mental incapacity has long been recognized by the courts as a valid reason to set aside a default judgment, either due to mistake if the plaintiff was unaware of the defendant's incapacity, or extrinsic fraud if the plaintiff was aware of the incapacity and sought to take advantage of it. "Incompetency which, as in the present case, is alleged to render a defendant wholly devoid of understanding and incapable of transacting business of any nature is a condition which exists independently of a judicial determination of that fact. Where the defendant is under such a legal disability and the plaintiff has knowledge of his condition, a duty rests upon the plaintiff to disclose such matters to the court and to have a guardian appointed for the purpose of the proceeding. If the plaintiff knows of the defendant's incompetency but conceals such information from the court and, to prevent a true adversary hearing, proceeds to a default judgment by taking advantage of defendant's condition, his conduct constitutes a fraud upon the court as well as upon the incompetent defendant. Since the direct effect of such concealment is to prevent the incompetent from presenting whatever defense he has to the court, it is clear that the fraud is extrinsic in nature. If the other requirements for equitable relief are present, therefore, allegations such as those found in the present complaint are sufficient to state a cause of action in equity on behalf of the incompetent." (*Olivera v. Grace* (1942) 19 Cal.2d 570, 577, citations omitted.)

"In cases such as the one here presented, however, where there has been no adversary proceeding at all, the right of the incompetent defendant to equitable relief may be established if the plaintiff's ignorance of defendant's legal disability prevented a true adversary hearing as well as where the plaintiff's fraud prevented such a hearing. Courts have granted such relief on behalf of incompetent defendants aside from the element of fraud on the part of the plaintiff if, in fact, no adversary hearing was held. Some courts, it is true, have referred to this situation as 'constructive fraud' which entitles

the incompetent defendant against whom a default judgment has been taken to relief in equity. We think it more accurate, however, to characterize such a situation as extrinsic mistake, which is a recognized ground for the intervention of equity where the mistake has prevented a fair adversary hearing… Thus, even if no actual fraud on the part of the defendant could be proved in the present action, the facts set forth are sufficient to justify the intervention of a court of equity if the other requirements for equitable relief can be established." (*Id.* at pp. 577–578, citations omitted; see also *Winslow v. McCarthy* (1918) 39 Cal.App. 337, 339–340.)

Under Probate Code section 811, subdivision (a), "A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, …. shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b), and evidence of a correlation between the deficit or deficits and the decision or acts in question: (1) Alertness and attention… (2) Information processing… (3) Thought processes. … (4) Ability to modulate mood and affect." Also, under Probate Code section 811, subdivision (b), "A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question." "In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment." (Prob. Code, § 811, subd. (c).) In addition, "The mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act." (Prob. Code, § 811, subd. (d).)

"'In California, a party is incompetent if he or she lacks the capacity to understand the nature or consequences of the proceeding, or is unable to assist counsel in the preparation of the case.' Under California law, evidence of incompetence may be drawn from various sources, but the evidence relied upon must 'speak ... to the court's concern ... whether the person in question is able to meaningfully take part in the proceedings.' California law adopts a broad view of relevance, and a state court of appeal has emphasized a trial judge's 'duty...to clearly bring out the facts.' The court's first-hand observations of and interactions with the person may inform a court's decision." (*AT&T Mobility, LLC v. Yeager* (E.D. Cal. 2015) 143 F.Supp.3d 1042, 1050, citations omitted.)

"Federal courts in this circuit have found that a broad range of evidence may inform the court's decision: a report of mental disability by a government agency; the sworn declaration of the person or those who know him; the representations of counsel; a review of medical records; the person's age, illnesses, and general mental state; and the court's own observations of the person's behavior, including the person's 'manner and comments throughout the case' that suggest he does not 'have a grasp on the nature and purpose of the proceedings'." (*Ibid,* citations omitted.)

Here, there is evidence to support Dr. Barnett's claim that the default judgment was the result of Virginia's lack of mental capacity, and thus the court should grant relief from the default judgment. Dr. Barnett has been appointed Successor Trustee of the Shubin Family Trust due to Virginia's apparent incapacity. Also, Dr. Barnett, who is Virginia's ex-husband and remains in periodic contact with her despite their divorce, states that Virginia has become homeless, suffers from apparent paranoid delusions, and

is no longer able to conduct coherent conversations with him.[1] While she has not been diagnosed with a mental illness, it appears that Virginia is no longer capable of managing her own affairs or the affairs of the Trust.

Thus, it appears that Virginia's failure to respond to discovery, appear for her deposition, or comply with court orders was the result of her mental incapacity, and not due to a willful refusal to participate in the litigation. Likewise, the default judgment was entered against her and the Trust due to her lack of capacity, which constitutes either extrinsic fraud, extrinsic mistake, or surprise. It is unclear whether plaintiff is aware of her mental condition or not. If plaintiff was aware of her incapacity and sought to take advantage of it, then the default judgment was the result of extrinsic fraud. However, even if plaintiff was unaware of her incapacity, the court nevertheless finds that the entry of default judgment against Virginia due to her incapacity constitutes the type of extrinsic mistake that justifies setting aside the default judgment.[2]

In addition, the court intends to set aside the entry of the default against Virginia for the same reasons, as the default was obtained through surprise, extrinsic mistake, or fraud. It would make no sense to set aside the default judgment here due to mistake or fraud, but then allow the default to stand if it was also obtained due to mistake or fraud.

Also, while plaintiff contends that Dr. Barnett's motion is untimely to the extent that he seeks to set aside the default because the default was entered over a year before the motion was filed, if the default was entered due to extrinsic fraud, then the court has the inherent equitable power to set it aside even if Dr. Barnett did not move for relief within six months. (*Olivera v. Grace*, *supra*, 19 Cal.2d at pp. 577-578.)

Plaintiff has objected that it would be inequitable to grant relief from the default judgment here because it has expended tens of thousands of dollars to purchase the property from Mr. Priest, as well as expending considerable time and energy obtaining the default judgment of quiet title, so the court should not grant the requested relief. However, plaintiff has not presented any evidence of payments made to Mr. Priest after the quiet title judgment was granted. In any event, any money paid by plaintiff can presumably be recovered from Mr. Priest if plaintiff is unable to prevail on its quiet title and specific performance claims against Virginia the Trust. On the other hand, Virginia, the Trust, and the beneficiaries of the Trust will likely suffer irreparable harm if relief is not granted, since they will lose their ownership rights to the subject real properties. Such loss of real property rights is considered to be irreparable harm, since real property is unique and its loss cannot be adequately compensated for with money damages. (*Union Oil Co. of California v. Greka Energy Corp.* (2008) 165 Cal.App.4th 129, 134.) Therefore, the

[1] Plaintiff has objected to Dr. Barnett's declaration on various grounds, including lack of foundation, relevance, improper lay opinions, and hearsay. The court intends to overrule all of the objections.

[2] Since the court intends to grant relief from the default judgment based on mistake or fraud, it does not need to address Dr. Barnett's alternative argument that the judgment is void due to being an improper default judgment in a quiet title action in violation of Code of Civil Procedure section 764.010. (*Paterra v. Hansen* (2021) 64 Cal.App.5th 507, 532.) However, the court notes that it did conduct a live evidentiary hearing before entering the judgment of quiet title, so it does not believe that the judgment violated section 764.010.

court intends to find that plaintiff would not suffer undue prejudice if relief is granted, and that the balance of harms weighs in favor of granting relief here.

Finally, the court intends to permit Dr. Barnett to file an answer on behalf of the Trust so that he can defend against the plaintiff's claims. The court will also grant the order relieving Virginia from having to pay the money sanctions previously ordered by the court, as her failure to obey the earlier discovery orders was the result of her mental incapacity rather than any willful refusal to respond to discovery or obey the court's orders.

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 12/13/24.**
(Judge's initials) (Date)

(35)

**Tentative Ruling**

Re: ***Ramon Torres v. Fruit Fillings Holdings, Inc.***
Superior Court Case No. 24CECG02575/COMPLEX

Hearing Date: December 19, 2024 (Dept. 502)

Motion: By Plaintiff Ramon Torres to Compel Initial Responses to Request for Production, Set One

**If oral argument is timely requested, it will be entertained on Thursday, December 19, 2024, at 1:30 p.m. in Department 502.**

**Tentative Ruling:**

To grant. Within ten days of service of the order by the clerk, defendant Fruit Fillings Holdings, Inc. shall serve verified responses, without objections, to Request for Production of Documents, Set One, and produce all documents responsive to the Request for Production.

To impose monetary sanctions in the total amount of $460 against defendant Fruit Fillings Holdings, Inc. in favor of plaintiff Ramon Torres. Within 30 days of service of the order by the clerk, defendant Fruit Fillings Holdings, Inc. shall pay sanctions to plaintiff Ramon Torres' counsel.

**Explanation:**

On July 15, 2024, plaintiff Ramon Torres ("Plaintiff") served the discovery at issue. (Miner Decl., ¶ 2.)[1] As of the date of filing the present motion, no responses were served. (*Id.*, ¶ 13.) Accordingly, an order compelling defendant Fruit Fillings Holdings, Inc. to provide initial responses is warranted. (Code Civ. Proc. § 2031.300 subd. (b).) All objections are waived. (*Id.* § 2031.300, subd. (a).)

Sanctions are mandatory unless the court finds that the party acted "with substantial justification" or other circumstances that would render sanctions "unjust." (Code Civ. Proc. § 2031.300, subd. (c).) Given the lack of opposition, the court finds no circumstances that would render the mandatory sanctions unjust. The hourly rate by counsel for Plaintiff, at $600, is high. (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1095 [finding that the reasonable hourly rate is that prevailing in the community for similar work].) Counsel for Plaintiff submits no information to justify the billing rate. Moreover, the amount of time spent on the motion is excessive. The court approves a rate of $400 per hour, and imposes monetary sanctions in the amount of $460, inclusive of costs, in favor of Plaintiff Ramon Torres and against Defendant Fruit Fillings Holdings, Inc.

[1] The moving papers integrate additional discovery propounded by way of special interrogatories, and attaches several immaterial meet and confer efforts regarding the special interrogatories that are not at issue in the present 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 12/16/24.**
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Imidacloprid Cases***
Superior Court Case No. 22JCCP05241

Hearing Date: December 19, 2024 (Dept. 502)

Motion: M.C. Watte Ranches' Motion for Sanctions

**If oral argument is timely requested, it will be entertained on Thursday, December 19, 2024, at 1:30 p.m. in Department 502.**

**Tentative Ruling:**

To deny monetary sanctions. To grant issue/evidence sanctions as specified below. (Code Civ. Proc., § 2023.010.)

**Explanation:**

M.C. Watte Ranches ("M.C. Watte") moves for monetary ($50,372.55), evidence and issue sanctions for alleged discovery abuses by Nutrien Ag Solutions ("Nutrien") throughout the history of the litigation.

Under the Civil Discovery Act, the court "may impose a monetary sanction ordering that one engaging in the misuse of the discovery process ... pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct." (Code Civ. Proc., § 2023.030, subd. (a).) Section 2023.030, subdivision (b), provides the Court with authority to order evidentiary and issue sanctions such that "designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process. The court may also impose an issue sanction by an order prohibiting any party engaging in the misuse of the discovery process from supporting or opposing designated claims or defenses."

> Misuses of the discovery process include, but are not limited to, the following:
> ***
> (d) Failing to respond or to submit to an authorized method of discovery.
> (e) Making, without substantial justification, an unmeritorious objection to discovery.
> (f) Making an evasive response to discovery.
> ***
> (h) Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery.

(Code Civ. Proc., § 2023.010.) These are the parts relied upon by M.C. Watte.

While section 2023.010 does not limit misuses of the discovery process to those listed, it is a rather exhaustive list that the court intends to stick to.

Based on the arguments raised in the moving papers, the only part of section 2023.010 that might potentially apply is subdivision (d) – failing to submit to an authorized method of discovery. Other than the motion to compel production of the Incident Report that is also set for December 19 (which the court intends to deny), M.C. Watte has not brought any discovery motion in this case. There is no showing that Nutrien ever failed to respond to a discovery request. M.C. Watte identifies no unmeritorious objection that has been made to a discovery request, and has never made a motion directed at any such objection (again, other than today's motion to compel that lacks merit). M.C. Watte has never made a motion to compel a further response to discovery after Nutrien made an evasive response (and identifies no such responses in this motion for sanctions). And Nutrien has not unsuccessfully opposed a motion to compel or limit discovery.

M.C. Watte points out that under section 2023, California courts have routinely levied sanctions for discovery abuses such as false or evasive written discovery responses, false or evasive deposition testimony, meritless objections to discovery, and disobedience of a court order, citing *Dep't of Forestry & Fire Prot. v. Howell* (2017) 18 Cal.App.5th 154, 193. None of these circumstances have occurred or are alleged to have occurred in this case.

M.C. Watte contends that Nutrien has engaged in misuse of the discovery process with regards to five categories of documents: "(i) the handwritten report Mr. McGee prepared (subject to multiple meet and confer, claimed lost, deposition taken, then found after a basic search in Toscano's office); (ii) the ETQ reports (highly relevant, establish Nutrien's liability, take five minutes to find, not produced until February 2024); (iii) email traffic related to the recommendation and computer software showing who created it (not produced until October 2023 and February 2024, after Watte deposed key fact witnesses); (iv) the employee consultation and drafts of it (allegedly lost, despite multiple witnesses testifying to its existence and making revisions to it in word); (v) communications regarding the consultation, including text messages (again, known to exist based on testimony, with text messages having been deleted)." (M.C. Watte's MPA, 14:18-26.)

As to the first four categories of documents, the alleged discovery abuse is due to delays in obtaining the documents after they were not initially identified or located. Nutrien acknowledges that discovery in this case has not been smooth. But in order to grant the sanctions requested the court would need to **assume** bad faith, deception and nefarious motives on the part of Nutrien's employees and its attorneys, where innocent explanations are just as likely. Sometimes obtaining discovery from a corporation is a process, and in this case the process may have been impacted in part due to the retirement of multiple Nutrien employees. Joe McGee, the Pest Control Advisor who issued the recommendation at issue, retired from Nutrien in December of 2021. Mr. McGee's immediate supervisor Bob Uyemura retired from Nutrien in April of 2023. Mr. Uyemura's immediate supervisor, John Toscano retired from Nutrien in May of 2023. In April of 2023, the attorney primarily responsible for document collection in this case left the firm for a new job. Difficulties and delays in locating documents are not surprising in light of these circumstances.

In this case the meet and confer process worked. When it came to light that additional documents existed, Nutrien and its counsel searched for and eventually found

them. While there were delays, M.C. Watte never had to bring a motion to obtain the discovery identified in this motion. Accordingly, the court does not intend to impose monetary sanctions as the delays in production do not appear intentional.

The only areas where the evidence sought was not obtained is the employee consultation, emails about the consultation, and communications on the cell phone used by Mr. Toscano. Regarding the latter issue, Mr. Toscano testified that after he retired his cell phone was "wiped clean" and that he was unaware as to whether his phone was imaged. (Toscano Depo. 50:25-51:2; 64:18-65:8.) M.C. Watte's motion does not describe any follow-up on this issue, and the factual record before the court is not highly developed. But Mr. Toscano did retire in May of 2023, well after this legal action was initiated, yet his cell phone was "wiped" after he retired. Nutrien's opposition offers no explanation for why the communications on Mr. Toscano's phone were destroyed.

The employee consultation document is apparently used by Nutrien to document employee misconduct, and in this case was used in relation to the Mr. McGee's alleged erroneous recommendation. There was deposition testimony from two employees about the employee consultation. Mr. Uyemura testified that he prepared the document, sent a copy to Mr. Toscano for revision. Mr. Uyemura testified that he printed the document, discussed it with Mr. McGee, had Mr. McGee sign it, and scanned and sent a copy of it to Mr. Toscano and Nutrien's HR department. (Sarabian Decl., ¶ 17, Exh. 7 [Uyemura Depo. 35:7-13; 82:4-9; 82:18-25].) Mr. Toscano corroborated this testimony, stating that he instructed Mr. Uyemera to fill out the employee consultation, that he saw the employee consultation, receiving it in some format that he could not recall, though he did say he made revisions to it in Word and sent it back to Mr. Uyemura. (Sarabian Decl., Exh. 20 [Toscano Depo. 89:22-92:17; 93:15-94:13].)

While it does appear that this document should exist, Nutrien states that it has "searched for that document in Mr. McGee's personnel file, in the hard copy records retained at the Corcoran branch office, in the email archive of Mr. Uyemura, and in the email archive for Mr. Toscano," and that it had "recently obtained the email archive for Mr. Holcomb and are presently in the process of ingesting that archive into our discovery management software so that it can be searched for any employee consultation form." (Sarabian Decl., ¶ 22, Exh. 17.) These searches did not lead to discovery of the document, and Nutrien maintains that it is lost or is not in the possession of Nutrien, believing that Mr. Uyemura was mistaken in his recollection of how he transmitted the document. (Sarabian Decl., ¶ 23, Exh. 18.)

The evidence supports the conclusion that the employee consultation was prepared, created in a Word document such that it should exist on Nutrien's computer system, likely was emailed and should be found in that format as well, and was forwarded to Human Resources to be included in Mr. McGee's employee file. The employee consultation should be found in multiple formats and locations. Nutrien at the very least failed to maintain evidence (employee consultation, related emails, and Mr. Toscano's cell phone data) when litigation was reasonably foreseeable and even pending.

"A party's duty to preserve arises when it has notice that the documents might be relevant to a reasonably-defined future litigation. Ultimately, the court's decision as to when a party was on notice must be guided by the particular facts of each case." (*Victor*

*Valley Union High Sch. Dist. v. Superior Court* (2023) 91 Cal.App.5th 1121, 1153.) If a party spoliates evidence, the trial court has "broad discretion in selecting discovery sanctions. The trial court should consider both the conduct being sanctioned and its effect on the party seeking discovery and, in choosing a sanction, should attempt to tailor the sanction to the harm caused by the withheld discovery." (*Id*. at p. 1158.)

Here, litigation was contemplated from the outset of M.C. Watte's complaint about Mr. McGee's recommendation. The employee consultation is a relevant response to the erroneous recommendation. Nutrien does not contend otherwise, though it argues that other evidence at issue in the motion is of little value. There is no explanation from Nutrien as to why Mr. Toscano's phone was wiped after he retired.

Because the consultation documents the nature and extent of Mr. McGee's error, M.C. Watte seeks issue sanctions preventing Nutrien from introducing evidence of or arguing that Mr. McGee's recommendation was proper. M.C. Watte also seeks evidence sanctions in the form of a jury instruction which explains: (i) the reason Nutrien issues employee consultations; (ii) that an employee consultation was issued to Mr. McGee for his erroneous recommendation to M.C. Watte; (iii) that Nutrien had a legal obligation to preserve the consultation and email traffic related to it; (iv) that Nutrien failed to preserve the consultation and; (v) that the jury must accept as true the fact that the consultation was unfavorable to Nutrien and established that Mr. McGee made an erroneous recommendation to M.C. Watte.

The court agrees that the jury instruction appears to be best tailored to address the apparent spoliation of evidence. The missing and/or destroyed evidence would appear to support M.C. Watte's contention that Mr. McGee's recommendation was made in error. The specific jury instruction will be fleshed out via *in limine* motion prior to trial.

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 12/16/24 .**
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Imidacloprid Cases***
Superior Court Case No. 22JCCP05241

Hearing Date: December 19, 2024 (Dept. 502)

Motion: M.C. Watte Ranches' Motion to Compel Production of Incident Report

**If oral argument is timely requested, it will be entertained on Thursday, December 19, 2024, at 1:30 p.m. in Department 502.**

**Tentative Ruling:**

To deny.

**Explanation:**

M.C. Watte Ranches ("M.C. Watte") moves to compel Nutrien Ag Solutions to produce an incident report written by its employee Joe McGee regarding his imidaclprid application recommendation to M.C. Watte. Production of this report is sought pursuant to the September 19, 2024, Person Most Qualified deposition notice, document demand no. 6. The incident report has been withheld on grounds of attorney-client privilege, among others.

The attorney-client privilege is codified in Evidence Code section 954, which confers a privilege on the client to "refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer…" (Evid. Code, § 954.) In *D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, 736, the court articulated certain basic principles applicable to reports created in the corporate context, including:

> 1. When the employee of a defendant corporation is also a defendant in his own right (or is a person who may be charged with liability), his statement regarding the facts with which he or his employer may be charged, obtained by a representative of the employer and delivered to an attorney who represents (or will represent) either or both of them, is entitled to the attorney-client privilege on the same basis as it would be entitled thereto if the employer-employee relationship did not exist;
> ***
> 4. Where the employee's connection with the matter grows out of his employment to the extent that his report or statement is required in the ordinary course of the corporation's business, the employee is no longer an independent witness, and his statement or report is that of the employer;
> 5. If, in the case of the employee last mentioned, the employer requires (by standing rule or otherwise) that the employee make a report, the privilege of that report is to be determined by the employer's purpose in requiring the same; that is to say, if the employer directs the making of the report for

> confidential transmittal to its attorney, the communication may be privileged;
> 6. When the corporate employer has more than one purpose in directing such an employee to make such report or statement, the dominant purpose will control, unless the secondary use is such that confidentiality has been waived; …

"[T]he dominate-purpose test determines whether the relationship between the attorney and the corporate employee is an attorney-client relationship; if the corporation's dominate purpose in requiring the employee to make a statement is the confidential transmittal to the corporation's attorney of information emanating from the corporation, the communication is privileged." (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 735.)

Here, Nutrien supports the opposition with sufficient evidence to satisfy the court that the incident report was prepared for the dominant purpose of conveying the information to counsel for Nutrien.

After Mr. McGee was told that his recommendation had left excessive pesticide residues, he reported the allegation to his direct supervisor Bob Uyemura (Bullock Decl., ¶ 4, Exh. C [McGee Depo.] at 99:17–24), who in turn reported it to his own supervisor John Toscano (Bullock Decl. ¶ 2, Exh. A [Toscano Depo.] at 68:5–16.) Mr. Toscano then contacted his own supervisor and then had a call with legal counsel due to the chance of litigation. (Id. at 79:2–80:20.) Mr. Toscano subsequently instructed Mr. McGee's direct supervisor, Mr. Uyemura, to obtain a written statement about the incident from Mr. McGee for the purpose of providing that statement to Nutrien's counsel. (Id. at 77:6–8.) Mr. McGee complied with this instruction by drafting the incident report at issue and providing it to his supervisor, Mr. Uyemura. (Id. at 78:1-18.) Mr. Uyemura then gave it to Mr. Toscano who subsequently forwarded it to counsel. (Id. at 78:1–18.) Mr. Toscano's initial instruction prompted Mr. McGee to create the incident report, and he testified: "I had him just jot some notes down and it was the intent it was for legal counsel. (Id. at 77:6–12.)

M.C. Watte relies heavily on the deposition of Nutrien's Person Most Qualified Anthony Engelsgaard. Asked if he "contends" that the report was prepared for counsel or in anticipation of litigation, Mr. Engelsgaard stated his feeling that "it was done just to help document the information." This statement does not strongly support M.C. Watte's position. The statement is somewhat ambiguous, and Mr. Engelsgaard testified that he was not involved in the request to prepare the statement. (Bullock Decl., ¶ 3, Exh. B [Engelsgaard Depo.] at 118:15–24.) Mr. Engelsgaard also stated that he did not doubt Mr. Toscano's testimony that the document was prepared specifically for counsel. (Id. at 151:11–16.)

Applying *D.I. Chadbourne, supra,* the court agrees with Nutrien's contention that at the time the statement was made, M.C. Watte's complaint could have been asserted with equal force against Mr. McGee or against Nutrien as his employer. The statement relates to the recommendation that is the subject of the lawsuit. And finally, the statement was obtained by Mr. Toscano who was a representative of Nutrien and delivered to Nutrien's attorney. Nutrien has made a sufficient showing to conclude that

the dominant purpose was to provide the statement to counsel to facilitate advice from counsel as to the anticipated claim by M.C. Watte. "[I]f the corporation's dominate purpose in requiring the employee to make a statement is the confidential transmittal to the corporation's attorney of information emanating from the corporation, the communication is privileged." (*Costco, supra*, 47 Cal.4th at p. 735.) Accordingly, the court intends to deny 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 12/16/24 .**
(Judge's initials) (Date)

(36) **Tentative Ruling**

Re: ***Maldonado, et al. v. Lopez, et al.***
Court Case No. 21CECG00916

Hearing Date: December 19, 2024 (Dept. 502)

Motion: Petition for Compromise of Minor

**If oral argument is timely requested, it will be entertained on Thursday, December 19, 2024, at 1:30 p.m. in Department 502.**

**Tentative Ruling**:

To grant. Orders signed.

**Explanation:**

Pursuant to California Rules of Court, Rule 3.1312 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** 12/17/24 .
(Judge's initials) (Date)

(37)

**Tentative Ruling**

| | |
|---|---|
| Re: | ***Juan Torres v. Rosalia Solis***<br>Superior Court Case No. 22CECG00075 |
| Hearing Date: | December 19, 2024 (Dept. 502) |
| Motion: | Plaintiff Juan Torres' Motions to Compel Defendant City of Parlier's Further Responses to Form Interrogatories—General (Set One), Form Interrogatories—Employment (Set One), Request for Production of Documents (Set One), Special Interrogatories (Set One), and for Monetary Sanctions |

**If oral argument is timely requested, it will be entertained on Thursday, December 19, 2024, at 1:30 p.m. in Department 502.**

**Tentative Ruling:**

To grant plaintiff's motion to compel further responses to Form Interrogatories—General, Set One, interrogatory numbers 7.1-7.3, 9.1-9.2, 12.1-12.7, and 13.1-13.2. Defendant, City of Parlier, shall serve verified supplemental responses within 10 days of the date of the service of this order.

To grant plaintiff's motion to compel further responses to Form Interrogatories—Employment, Set One, interrogatory numbers 201.1, 201.3, 201.4, 201.6, 204.6, 204.7, 207.2, 209.2, 211.1, and 217.1. Defendant, City of Parlier, shall serve verified supplemental responses within 10 days of the date of the service of this order.

To grant plaintiff's motion to compel further responses to Request for Production of Documents request numbers 13, 21, 22, 24, 61, 62, 63, 65, 67, 82, 84, 85, 86, and 88. Defendant, City of Parlier, shall serve verified supplemental responses within 10 days of the date of the service of this order.

To grant plaintiff's motion to compel further responses to Special Interrogatories interrogatory numbers 5-7, 9-25, and 27-35. Defendant, City of Parlier, shall serve verified supplemental responses within 10 days of the date of the service of this order.

To grant monetary sanctions against defendant City of Parlier in the total amount of $11,445. Monetary sanctions are ordered to be paid to plaintiff's counsel within 30 calendar days from the date of service of the minute order by the clerk.

**Explanation:**

*Good Faith Attempt at Informal Resolution*

Plaintiff has sufficiently met his burden to demonstrate a reasonable and good faith attempt at an informal resolution of the issues presented in these motions. (Code

Civ. Proc., § 2031.310, subd. (b).) Between May 13, 2024 and October 18, 2024, plaintiff made numerous attempts to address the discovery issues here. This included a meet and confer letter, several phone calls, and several emails. Defendant ultimately agreed to supplement a small portion of the Form Interrogatories, but failed to do so until September 30, 2024, and these responses remained incomplete. The court finds that plaintiff has met his burden in making a good faith attempt to informally resolve the issues here.

*General Information*

Preface/Definitions

For the special interrogatories, defendant asserts an objection for impermissible preface, instructions, and definitions. These interrogatories begin with the notice and explanation of general requirements for responding to interrogatories and then has definitions of terms that will be used in the interrogatories. In reviewing the interrogatories, defendant's objection asserting that the preface, instructions, and definitions make the interrogatories compound, conjunctive/disjunctive, or containing subparts is inaccurate. This objection is not valid as to any of the special interrogatories.

Good Faith Effort to Respond

For all of defendant's answers, defendant is obligated to provide as complete and straightforward a response as it is able. (Code Civ. Proc., § 2030.220.) A responding party is not to deliberately misconstrue interrogatories to provide evasive responses. (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 783.) Answers which only provide "a portion of the information sought [are] wholly insufficient." (*Ibid*.) Where an interrogatory is ambiguous, "the proper solution is to provide an appropriate response." (*Ibid*.) Where documents are responsive, the documents are to be identified and summarized. (*Ibid*.)

Official Information Privilege

Defendant asserts the Evidence Code section 1040 privilege in many of its responses. Personal recollections of a closed session are privileged. (*Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 335.) The court is not compelling defendant to include personal recollections of a closed session in any of its responses.

For the deliberative process privilege, this is a "qualified, limited privilege not to disclose or to be examined concerning not only the mental processes by which a given decision was reached, but the substance of conversations, discussions, debates, deliberations and like materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated." (*Board of Registered Nursing v. Superior Court of Orange County* (2021) 59 Cal.App.5th 1011, 1040.) The question for the court to consider here is whether disclosure would expose how an agency makes decisions in a way that would discourage candid discussions within the agency. (*Ibid*.) The court would point out that this is meant to protect government officials in regards to their decisionmaking on policy matters. This would inherently NOT include any decision to cover up a crime committed by a city employee. The court sees no way in which such decisionmaking would impact policy for the city.

Veracity

It does appear that, at times, plaintiff seeks to compel further responses based on concerns regarding the veracity of the response. To the extent plaintiff disputes the veracity of the responses, this is the incorrect motion.

*Form Interrogatories—General*

The following are at issue for the Form Interrogatories—General, Set One: 1.1, 7.1, 7.2, 7.3, 9.1, 9.2, 12.1, 12.2, 12.3, 12.4, 12.5, 12.6, 12.7, 13.1, and 13.2. The court finds that defendant has answered, and will require no further response, to interrogatory number 1.1. Defendant is to provide further responses to interrogatory numbers 7.1-7.3, 9.1-9.2, 12.1-12.7, and 13.1-13.2.

For the 7.1 series and the 9.1 series, the court would note that there is no real dispute that funds were inappropriately taken from the City and that the City has indicated a belief that plaintiff is responsible. As such, this series of questions is applicable here. Defendant's assertion that the term "incident" is insufficiently defined is not well taken. Defendant is obligated to make a reasonable and good faith effort in responding. Defendant has not done so here.

For the 12.1 series, defendant's amended response does not fully answer each subpart in 12.1. Additionally, defendant's definition of "incident" as "termination" limits its responses to one specific moment in time where it is apparent the interrogatories are intended to contemplate more than just the moment of termination, but also the significant events leading up to the termination. As discussed above, defendant is obligated to make a reasonable and good faith effort to fully answer the interrogatories. Defendant has not done so here.

For the 13.1 series, the court would note the same concerns that defendant is obligated to make a reasonable and good faith effort to fully answer and has not done so for these.

*Form Interrogatories—Employment*

The following are at issue for the Form Interrogatories—Employment, Set One: 201.1, 201.3, 201.4, 201.6, 204.2, 204.3, 204.6, 204.7, 207.2, 209.2, 211.1, 215.1, 215.2, and 217.1. The court finds that defendant has answered, and will require no further response to, interrogatory numbers 204.2, 204.3, 209.1, 215.1, and 215.2. Defendant is to provide further responses to interrogatory numbers 201.1, 201.3, 201.4, 201.6, 204.6, 204.7, 207.2, 209.2, 211.1, and 217.1. For these, it is apparent that defendant has not made a reasonable and good faith effort to answer these interrogatories. Many of these responses appear incomplete or inappropriately reference documents without identifying and summarizing them.

*Production of Documents*

The following are at issue for the Request for Production of Documents, Set One: 8, 13, 16-18, 20-25, 28-30, 54-55, 59, 61-65, 67, 75-90, 95, 97-98. The court will require no

further response to request for production numbers 8, 16-18, 20, 23, 25, 28-30, 54-55, 59, 64, 75-81, 83, 87, 89, 90, 95, 97-98. Notably, for numbers 16-18, 28-30, 54-55, 95, and 97-98, these were not included in plaintiff's request for pretrial discovery conference. Defendant is to provide further responses to request numbers 13, 21, 22, 24, 61, 62, 63, 65, 67, 82, 84, 85, 86, and 88.

For request number 13, the court finds each of defendant's objections to be invalid. Certainly documents regarding plaintiff's job duties would be relevant in this employment matter.

For request numbers 21, 24, 61, 62, 63, 84, and 85 the court would direct defendant to the discussion regarding official information privilege above. Defendant also asserts attorney-client and work product privileges, but has failed to include any privilege logs.

For request number 22, it is apparent in this response that defendant has not made a reasonable and good faith effort to respond. Defendant can discern what is meant to be produced here even if there may be an incorrect label for the Division.

For number 65, to the extent the court has ordered further responses to Form Interrogatories—General, Set One, defendant should supplement here accordingly.

For request number 67, the court finds defendant's objections to be invalid. Defendant is obligated to make a reasonable and good faith effort to respond.

For request numbers 82 and 88, it appears that defendant has misconstrued the request. Defendant is obligated to make a reasonable and good faith effort to fully respond.

For request number 86, the court would note that defendant has not made a compelling argument to deem documents provided by Leist & Associates subject to the attorney-client or work-product privilege. This involves an *independent* investigation into allegations of embezzlement.

*Special Interrogatories*

The following are at issue for the special interrogatories: 5-7, 9-35. The court finds that interrogatory number 26 is too broad as there is no time frame included. Defendant is to provide further responses to interrogatory numbers 5-7, 9-25, and 27-35. The court would note that for the special interrogatories in particular, defendant's responses were evasive and often appeared nonresponsive to the interrogatory posed. Defendant has not made a reasonable and good faith effort to respond to these.

*Sanctions*

Code of Civil Procedure section 2033.290, subdivision (d) provides for sanctions for unsuccessfully opposing a motion to compel further responses, unless the court finds substantial justification or that other circumstances make imposing a sanction unjust. Here, while the court has occasionally found that plaintiff sought further responses based on an issue with perceived veracity, it was overwhelmingly apparent that defendant was

engaged in abuses of the discovery process. The court awards sanctions to include $240 in filing fees, 19.9 hours for preparation of the four motions, and 5 hours to review the oppositions and prepare replies. Counsel bills at $450 per hour. Thus, the court awards sanctions totaling $11,445. If a hearing is required, the court intends to add the time for the hearing to the total.

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 12/17/24.**
(Judge's initials) (Date)