TENTATIVE RULINGS
LAW & MOTION CALENDAR
Wednesday, January 10, 2024, 3:00 p.m.
Courtroom 16 –Hon. Patrick M. Broderick
3035 Cleveland Avenue, Suite 200, Santa Rosa

TO JOIN "ZOOM" ONLINE,
Courtroom 16
Meeting ID: 161-460-6380
Passcode: 840359
https://sonomacourt-org.zoomgov.com/j/1614606380?pwd=NUdpOEZ0RGxnVjBzNnN6dHZ6c0ZQZz09

TO JOIN "ZOOM" BY PHONE,
By Phone (same meeting ID and password as listed above):
(669) 254-5252 US (San Jose)

The following tentative rulings will become the ruling of the Court unless a party desires to be heard. If you desire to appear and present oral argument as to any motion, YOU MUST notify the Court by telephone at **(707) 521-6729**, and all other opposing parties of your intent to appear by 4:00 p.m. the court day immediately before the day of the hearing.
Parties in motions for claims of exemption are exempt from this requirement.

PLEASE NOTE: The Court WILL NOT provide a court reporter for this calendar. If there are any concerns, please contact the Court at the number provided above.

1. SCV-267872, Norguard Insurance Company v Shepherd

Cross-Defendant Craft Contracting dba Craft General Construction ("Craft") moves pursuant to CCP section 437c for summary judgment in its favor as to the Second Amended Cross-Complaint ("SAXC") filed by Cross-Complainant Shep Concrete Pumping and Kyle Shepherd ("Shep"). **The motion is GRANTED.**

On August 8, 2023, Shep filed its SAXC. The SAXC alleges causes of action against Craft for Express Indemnity and Declaratory Relief. Shep alleges that at all relevant times, a written contract existed between Shep and Craft wherein Craft agreed to hold Shep harmless and indemnify them for its costs, fees, expenses, and liabilities it incurs as a result of this action.

1. Objections in Reply

The court declines to rule on the objections as they are not material to the disposition of this motion. (CCP section 437c(q).

2. Labor Code section 3864

Craft argues that Labor Code section 3864 bars Shep's causes of action because the indemnity agreement is not signed by both parties.

Section 3864 provides: "If an action as provided in this chapter prosecuted by the employee, the employer, or both jointly against the third person results in judgment against such third person, or settlement by such third person, the employer shall have no liability to reimburse or hold such third person harmless on such judgment or settlement in absence of a written agreement so to do executed prior to the injury."

The express release clauses that support the cause of action for express indemnity are attached to the first amended cross-complaint filed on August 30, 2022. The documents are service invoices from Shep to Craft and are signed by Craft's representative Juan Sanchez. (SAXC, ¶24; FAXC, Exhibits A, B.)

Labor Code section 3864's use of the term "executed" means "signed." (*Hansen Mechanical, Inc. v. Superior Court* (1995) 40 Cal.App.4th 722, 729.) To be properly executed under Labor Code section 3864, the indemnity agreement must be signed by both parties. (*Id.,* at 730-732.) In *Hansen,* supra, third-party Northridge sued the injured employee's employer, Hansen, for express indemnity. While an employee of Hansen signed a rental agreement containing an indemnity clause, the agreement was not signed by Northridge. Therefore, it was not properly executed pursuant to Labor Code section 3864 and the trial court should have granted summary judgment in Hansen's favor on Northridge's indemnity claims.

The circumstances in this case are the same as in *Hansen.* Here, while Craft's employee signed an invoice containing the indemnity agreement, Shep did not sign it. Therefore, it is not enforceable under Labor Code section 3864.

In opposition, Shep argues that Guerrero was not Craft's employee. In its motion, Craft has not provided evidence that Guerrero was its employee. It is only stated in Norguard Insurance Company's complaint that Craft is the employer of injured worker, Dorian Guerrero. (Complaint, ¶¶1, 2.) However, Shep has provided evidence that Craft did not have an employment agreement with Guerrero. (Shep's additional material facts, number 1.)

Shep argues that because Craft's subcontractor, Mauricio Mora ("Mora"), brought Guerrero to the project that day, Guerrero was not Craft's employee but Mora's employee. Shep argues that, as a result, Labor Code section 3864 is inapplicable.

In reply, Craft argues that this court already determined that it is protected by Labor Code section 3864 when it sustained Craft's demurrer to Shep's first amended cross-complaint and thus the law-of-the-case bars Shep's equitable indemnity claim. Craft misstates the ruling on the demurrer.

On May 3, 2023, this court sustained the equitable causes of action in Shep's first amended cross-complaint. This court stated under Labor Code section 3864, the employer of an employee who is injured as the result of the joint negligence of the employer and a third party is no longer required to indemnify the third party in the absence of an express indemnification agreement. (*Gonzales v. R. J. Novick Constr. Co.* (1978) 20 Cal.3d 798, 807-808.) Thus, the demurrer to all of Shep's causes of action except the cause of action for express indemnity were sustained without leave to amend. This court did not determine that Shep's express indemnity cause of action was barred by Labor Code section 3864.

Craft also argues that it would go against the legislative intent of Labor Code section 3864 for Craft to have to pay its insurance obligations via paying worker's compensation premiums and to also have to pay damages to Guerrero for the same injury. This misstates Shep's cause of action. Craft has not paid anything to Guerrero. Shep's cause of action merely alleges that if they are found liable to reimburse Norguard for the amounts it paid to Guerrero, then Craft must indemnify Shep based upon the express indemnity agreement. Labor Code section 3864 allows for parties to shift liability via written indemnity agreements. (*Gonzales v. R. J. Novick Constr. Co.*, *supra*, 20 Cal.3d at 807-808.)

Based upon the foregoing, a triable issue of material fact exists with respect to whether Guerrero was Craft's employee which determines whether Labor Code section 3864 is applicable.

3. Site and Subsurface Conditions

Craft next argues that the express indemnity clause is only applicable to "site," "soil," or "subsurface conditions. The indemnity clause provides:

> The undersigned represents that it has carefully examined the site and is familiar with the site conditions, including subsurface conditions. The undersigned has directed SHEP Concrete Pumping to set up its equipment with the understanding that the location is stable and safe to do so. Not being familiar with the site condition, SHEP Concrete Pumping requests direction from you the customer as to a safe location to set up its equipment. By signing this document the undersigned assumes the risk of any foreseen or unforeseen events which may occur due to the instability of the soils or other conditions. Please carefully read this document before signing it. By signing this document you are assuming any and all liability in the event an accident occurs due to site conditions.

(UMF No.12)

Here, the subject accident had no relationship to the instability of soils or subsurface conditions. (UMF, Nos. 1, 9.) w

Shep has not addressed this issue in their opposition. Therefore, they have not established that a triable issue of material fact exists with respect to whether the indemnity clause should be applied to this case.

4. Conclusion and Order

The express terms of the indemnity clause do not apply to the facts of this case. Guerrero was not injured as a result of soil or subservice conditions. Therefore, Craft's motion for summary judgment is GRANTED.

Craft's counsel is directed to submit a written order to the court consistent with this ruling and in compliance with California Rules of Court, Rule 3.1312.

2. SCV-270208, Halaweh v Vert Software, Inc

Defendant Vero Software, Inc. dba Vero, Inc. ("Defendant") moves to dismiss the complaint filed by Plaintiffs Ala Halaweh and Blue Line Interiors, Inc. ("Plaintiffs") pursuant to Civil Code of Procedure section 410.30(a) on the grounds that the courts of England and Wales have exclusive jurisdiction over this action per a valid mandatory forum selection clause. **The motion is DENIED.**

Plaintiffs' complaint is based upon its purchase of cabinet building software, "Cabinet Vision." Plaintiffs allege that the software was defective, crashed constantly, and did not cut the cabinet pieces at the specifications stated by the software.

Forum non conveniens is an equitable doctrine, codified in Code of Civil Procedure section 410.30, under which a trial court has discretion to stay or dismiss a transitory cause of action that it believes may be more appropriately and justly tried elsewhere. (*Animal Film, LLC v. D.E.J. Productions, Inc.* (2011) 193 Cal.App.4th 466, 471.) The inquiry is whether "in the interest of substantial justice an action should be heard in a forum outside this state." (Code Civ. Proc., § 410.30, subd. (a).)

In a contract dispute in which the parties' agreement contains a forum selection clause, a threshold issue in a forum non conveniens motion is whether the forum selection clause is mandatory or permissive. (*Animal, supra,* at 471.) To be mandatory, a clause must contain language that clearly designates a forum as the exclusive one. (*Korman v. Princess Cruise Lines, Ltd.* (2019) 32 Cal.App.5th 206, 215.) "A mandatory clause ordinarily is 'given effect without any analysis of convenience; the only question is whether enforcement of the clause would be unreasonable." (*Ibid*.) California law presumes a contractual forum selection clause is valid and places the burden on the party seeking to overturn the forum selection clause. (*Ibid*.)

In the context of forum selection clauses, enforcement is considered unreasonable where "the forum selected would be unavailable or unable to accomplish substantial justice" or there is no "rational basis" for the selected forum. (*Ibid*.) Mere inconvenience or additional expense is not the test of unreasonableness. (*Ibid*.) A clause is reasonable if it has a logical connection with at least one of the parties or their transaction. (*Ibid*.)

A forum selection clause contained in a contract of adhesion, and thus not the subject of bargaining, is enforceable absent a showing that it was outside the reasonable expectations of the weaker or adhering party or that enforcement would be unduly oppressive or unconscionable. (*Ibid.*)

Relevant factors considered in determining whether the chosen forum is "unreasonable" include: (1) whether the forum was chosen by one party to discourage claims by the other (i.e. a 'remote alien forum'); (2) whether the contesting party's consent was obtained by fraud or overreaching; (3) whether the dispute is an essentially local one inherently more suitable to resolution in one state than any other; and (4) whether the contesting party had adequate notice of the provision. (*Carnival Cruise Lines, Inc. v. Shute* (1991) 499 US 585, 590.)

Defendant was founded in Alabama and has its headquarters in Tuscaloosa. (Chappell decl., ¶2.) In 2021, Defendant merged with Hexagon Manufacturing Intelligence, Inc. whose headquarters are located in North Providence, Rhode Island. (*Ibid*.) In 2019, the software Cabinet Vision was operating under parent licenses from and/or developed in England. (*Id.,* ¶3.)

In August of 2019, when Plaintiffs purchased the Cabinet Vision software, they were required to accept the terms and conditions, including the forum selection clause, of Defendant's End of User License Agreement ("EULA"). (Chappell decl., ¶5.) If Plaintiffs had not agreed to these terms, the software would not have continued to set up. (*Ibid*.)

Section 12 of the EULA provides:

12. GOVERNING LAW AND JURISDICTION

12.1 This Licence (*sic*), its subject matter and its formation, are governed by English law.

12.2 Subject to Clause 12.3 you and we both agree that the courts of England and Wales will have exclusive jurisdiction over any claim or dispute arising from this Licence (*sic*).

12.3 Unless you are an individual entering into this Licence (*sic*) on your own behalf, nothing will prevent us from bringing a claim against you in any jurisdiction in which you are incorporated, have an office or hold any assets.

Plaintiffs argue that the forum selection clause was, unbeknownst to Plaintiffs, buried deep within the EULA. The EULA attached to the Chappell declaration shows that the forum selection clause is located at section 12 on page 5 of the 10-page agreement. (Chappell decl., Exhibit A.) There is nothing in that section that draws attention to the fact that the party accepting the agreement is consenting to England and Wales having exclusive jurisdiction over "any claim or dispute arising" from the license. (*Id.,* ¶12.)

The only connection to England and/or Wales is the software's parent license. However, this is not a dispute over licensing. This dispute over a defective product, which is inherently more suitable to resolution in California. Plaintiff is a California resident, the equipment effected by the allegedly defective software is located in California, as are the witnesses. It makes no sense to try this matter in England or Wales. The purpose of including the subject forum selection clause appears to be to make it more difficult, if not impossible, to bring a suit against Defendant. Defendant admits that Plaintiff was required to agree to the forum selection clause in order to install and use the software. The fact that in 2019 Cabinet Vision was operating under parent licenses from and/or developed in England does not make it reasonable or rational to require Plaintiff to litigate this matter in England or Wales.

The motion is DENIED. Plaintiff's counsel is directed to submit a written order to the court consistent with this ruling and in compliance with California Rules of Court, Rule 3.1312.

3. <u>SCV-266907, Cutting Edge Solutions, LLC v Shimadzu Scientific Instruments, Inc</u>

Cross-Defendant Cutting Edge Solutions International Inc., an Oregon corporation ("Oregon Corp."), moves for an order quashing service of summons in this action on the grounds of lack of personal jurisdiction. **The motion is GRANTED.**

On July 12, 2023, defendant and cross-complainant Shimadzu Scientific Instruments, Inc. ("Shimadzu") filed its second amended cross-complaint against plaintiff Cutting Edge Solutions, LLC ("Cal LLC") and the Oregon Corp. The cross-complaint alleges that Cal LLC and Shimadzu entered into agreements wherein Shimadzu agreed to sell Cal LLC certain scientific equipment. Shimadzu alleges that Cal LLC has failed to pay all invoices. In addition, Shimadzu alleges that Cal LLC transferred personal property to the Oregon Corp. without receiving the reasonable value of the assets. Shimadzu alleges that the Oregon Corp. now carries on the former business of Cal. LLC.

In its motion, the Oregon Corp. argues that the cross-complaint fails to allege any facts establishing personal jurisdiction, in part, because Shimadzu has no evidence supporting its allegations.

If the nonresident defendant does not have substantial and systematic contacts in the forum sufficient to establish general jurisdiction, he or she still may be subject to the specific jurisdiction of the forum, if the defendant has purposefully availed himself or herself of forum benefits and the "controversy is related to or 'arises out of' a defendant's contacts with the forum." (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 446.) In such instances, it is fair to subject the defendant to specific jurisdiction because their forum activities should put them on notice that they will be subject to litigation in the forum. (*Ibid*.) In addition, California has "a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." (*Id.,* at 447.)

When a defendant moves to quash service of process on jurisdictional grounds, the plaintiff has the initial burden of demonstrating facts justifying the exercise of jurisdiction. (*Vons, supra,* at 449.) The burden is on the plaintiff to demonstrate by a preponderance of the evidence that all jurisdictional criteria are met. (*Ziller Electronics Lab GmbH v. Sup.Ct. (Grosh Scenic Studios)* (1988) 206 Cal. App. 3d 1222, 1232.) Once facts showing minimum contacts with the forum state are established, it becomes the defendant's burden to demonstrate that the exercise of jurisdiction would be unreasonable. (*Vons, supra,* at 449; *Buchanan v. Soto* (2015) 241 Cal. App. 4th 1353, 1362.)

Here, Shimadzu has failed to oppose this motion, Therefore, it has not met its burden of demonstrating facts justifying the exercise of jurisdiction over the Oregon Corp. Accordingly, the motion is GRANTED. The court will sign the proposed order.

4. <u>MCV-261350, Looney v Nguyen</u>

Plaintiff Gary E. Looney, dba Collectronics of California ("Plaintiff") moves for an order appointing a receiver to enforce the judgment entered on July 11, 2023, against defendant Elaine Nguyen, individually and dba Royal Banquet ("Judgment Debtor"), in the amount of $7,236.70 by appointing a receiver to seize the Judgment Debtor's liquor license, license number 523498. **The unopposed motion is GRANTED.** Landon McPherson is appointed receiver to seize and sell Judgment Debtor's liquor license. Mr. McPherson shall post an undertaking in the amount of $1,000.00 upon his appointment. Plaintiff is directed to submit a written order to the court consistent with this ruling.

5. MCV-255197, Capital One Bank v Armatis

Plaintiff Capital One Bank, N.A. ("Plaintiff"), moves for an order vacating the dismissal entered in this case and entering judgment pursuant to the terms of its settlement agreement with Defendant David Armatis ("Defendant"). **The motion is GRANTED.**

On May 19, 2023, Plaintiff and Defendant entered into a settlement agreement ("the Agreement"). Per the terms of the Agreement, Defendant agreed to pay Plaintiff a minimum of $240.00 on or before the 18th day of each month beginning in May 2023; followed by a minimum of $274.00 on or before the 18th day of each month beginning April 2024; followed by a final payment of $246.32 on or before August 18, 2024. (Exhibit A.) If Defendant timely made 12 of the 16 payments, then $1,074.32 of the total judgment amount of $4,474.32 would be forgiven. (*Ibid*.) The parties agreed that this court retained jurisdiction pursuant to CCP section 664.6 to enforce the Agreement. (*Id.,* at ¶7.) The parties agreed that if Defendant defaulted on his payment obligations, this court would vacate any dismissal and enter judgment for the total judgment amount less credit for payments made. (*Ibid*.)

As of the date of this motion, Defendant has not made any payments. (Langedyk decl., ¶8.) As Defendant is in breach of the Agreement, the motion is GRANTED. The court will enter judgment in the principal sum of $4,474.32, plus costs of $402.00, for a total judgment of $4,876.32. The court will sign the proposed orders.

6. SCV-273260, Sonoma Pacific Homebuilders, Inc v Osborne

The motion of Glenn M. Smith, David J. Leonard, and Smith Dollar PC to be relieved as counsel for defendants Sonoma Pacific Homebuilders, Inc. and Issac Aimaq is **GRANTED**. The court will sign the proposed order.

7. SCV-271497, Villara Corporation v Morgan Properties Inc.

Defendant Morgan Properties, Inc. ("Defendant") moves to compel Plaintiff to arbitrate this matter. **The motion is GRANTED.**

Plaintiff Villara Corporation ("Plaintiff") brought this action against Defendant for breach of contract, open book account, reasonable value, and to recover on release bond. Plaintiff alleges that on or about February 15, 2021, Plaintiff entered into a master contract with Defendant to furnish labor, materials, services, and equipment for the purpose of completing plumbing work at Defendant's development at 1639 and 1641 Tecado Drive in Santa Rosa. The parties entered into an addendum to the agreement on February 19, 2021. Plaintiff alleges that it performed as required and that, as a result, Defendant was required to pay Plaintiff $375,440.00. Plaintiff alleges that Defendant only paid $339,324.40 so that $36,115.60 remains outstanding.

The subject contract is attached to the original complaint and to the declaration of Daniel H. Morgan. Defendant argues that section 19.1 requires the parties to arbitrate their disputes. Section 19.1 is entitled "Mediation." It requires the parties to attempt in good faith to settle their dispute by non-binding arbitration administered by JAMS before resorting to another method to resolve the

dispute, such as litigation. Plaintiff's opposition fails to raise any viable defense to enforcing the mediation clause in the parties' agreement.

The motion is GRANTED. The parties are ordered to undergo non-binding arbitration as set forth in their agreement at section 19.1. The action is stayed pending arbitration.

Defendant's counsel is directed to submit a written order to the court consistent with this ruling and in compliance with California Rules of Court, Rule 3.1312.

8. <u>SCV-270874, De Leon Cifuentes v Chang</u>

Defendants George Chang and William Chang ("Defendants") move to compel Plaintiff Guilder De Leon Cifuentes ("Plaintiff") to serve verified responses, without objections, to Defendants' Request for Admissions, Set One, and request sanctions in the amount of $410.00. Defendants also move to compel Plaintiff to serve verified responses, without objections, to Defendants' Form Interrogatories, Set One. Defendants also request sanctions in the amount of $410.00 on the second motion. **The motions are DENIED.**

1. Request for Admissions, Set One

Defendants' counsel states that on August 15, 2022, Plaintiff was served by and through his attorney of record with Defendants' Request for Admissions, Set One. (Peebles decl., ¶3.) However, Plaintiff has been self-represented throughout this entire action. In addition, while the proof of service of Defendants' Requests for Admissions has an attached "Service List" which lists Plaintiff, his address, and his email address, the body of the proof of service only indicates that service was made by email on jessica.albanese@farmersinsurance.com. (*Id.*, Exhibit A.) The proof of service is signed by Jessica Albanese. Thus, it appears that Ms. Albanese only served herself with the request for admissions. There is no statement in the body of the proof of service indicating that those on the "Service List" were actually served and in what manner. Moreover, while proof of service of this motion also lists Plaintiff on a "Service List," the body of the proof of service only establishes that this motion was served on "luisa.pineda@farmersinsurance.com." Again, there is no indication that those on the "Service List" were actually served.

Defendants have not established that they served Plaintiff with their Requests for Admissions, Set One, or that they served Plaintiff with this motion. Accordingly, the motion is DENIED.

As no opposition has been filed, Defendants' counsel is directed to submit a written order to the court consistent with this ruling.

2. Form Interrogatories, Set One

This motion suffers from similar issues as Defendants' first motion. Defendants' counsel's declaration indicates that service was made on Plaintiff's counsel of record—which he never had. Proof of service of the Form Interrogatories indicates that service was made on jessica.albanese@farmersinsurance.com. The proof of service is signed by Jessica Albanese,

making it appear that she only served herself. Service of the motion was made on stacy.m.mcgregor@farmersinsurance.com, and that proof of service is signed by Stacy McGregor.

While the proof of service for this motion also indicates that the motion documents were placed in a sealed envelope, "addressed as set forth below," and Plaintiff's address is listed on a "Service List," in light of the other defects in service, whether the documents were actually mailed to Plaintiff is suspect. Regardless, Defendants have not established that they properly serviced Plaintiff with their form interrogatories.

For the reasons stated above, the motion is DENIED.

As no opposition has been filed, Defendants' counsel is directed to submit a written order to the court consistent with this ruling.