TENTATIVE RULINGS: CIVIL LAW & MOTION

Wednesday, November 15, 2023 at 3:00 p.m.
Courtroom 18 – Hon. Christopher M. Honigsberg
Civil and Family Law Courthouse
3055 Cleveland Avenue
Santa Rosa, California 95403

The Court's Official Court Reporters are "not available" within the meaning of California Rules of Court, Rule 2.956, for court reporting of civil cases. CourtCall is not permitted for this calendar.

If the tentative ruling does not require appearances, and is accepted, no appearance is necessary.

Any party who wishes to be heard in response or opposition to the Court's tentative ruling **MUST NOTIFY** the Court's Judicial Assistant by telephone at **(707) 521-6723** and **MUST NOTIFY all other parties of their intent to appear, the issue(s) to be addressed or argued and whether the appearance will be in person or by Zoom**. Notifications must be completed **no later than 4:00 p.m**. on the court (business) day immediately before the day of the hearing.

TO JOIN "ZOOM" ONLINE,
Department 18 : https://sonomacourt-org.zoomgov.com/j/1607394368?pwd=aW1JTWlIL3NBeE9LVHU2NVVpQlVRUT09
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Unless notification of an appearance has been given as provided above, the tentative ruling shall become the ruling of the Court the day of the hearing at the beginning of the calendar.

1. SCV-267072, Freitas v. Entra Default Solutions, LLC

On September 16, 2020, plaintiffs Gary and Tami Freitas filed an action for wrongful foreclosure and other causes of action against four defendants: IRP Fund II Trust 2A; IRP REO II, LLC; Servis One, Inc. dba BSI Financial Services; and Entra Default Solutions, LLC. Defendant IRP REO II, LLC is the property owner of the subject property.

On October 16, 2020, plaintiffs recorded a lis pendens on the subject property.

On June 30, 2023, defendants IRP Fund II Trust 2A; IRP REO II, LLC; and Servis One, Inc. dba BSI Financial Services (all represented by same counsel) obtained an order for summary judgment in their favor. The fourth defendant (Entra Default Solutions) never appeared in the

action and their default was taken on November 29, 2021.

On July 28, 2023, defendant IRP REO II, LLC (the property owner) filed and served a CCP section 405.30 motion to expunge the lis pendens and for attorney's fees. The grounds for the motion were that, in light of the summary judgment in favor of defendants, plaintiffs cannot (as a matter of law) establish by a preponderance of the evidence the probable validity of their real property claim. The motion requested attorney's fees of $960.00 for fees/costs incurred in preparing the motion, plus an additional $300 if an opposition brief is filed requiring review and appearance at hearing. The motion was calendared for November 8, 2023.

While the motion to expunge was pending, this Court issued an OSC directing plaintiffs to show cause why their case against the fourth defendant (Entra Default Solutions) should not be dismissed for failure to timely obtain a default judgment against Entra Default Solutions.

On October 3, 2023, this Court called the OSC matter for hearing and no parties were present. This Court dismissed plaintiffs' case against Entra Default Solutions and vacated all future hearing dates, including the hearing date for IRP REO II, LLC's motion to expunge the lis pendens.

On October 13, 2023, this Court issued an order stating in relevant part:

> "Given the Court's dismissal of the Complaint, the lis pendens must be expunged pursuant to Title 4.5 of the Civil Code of Procedure. The only issue which remains to be decided is the issue of attorney's fees pursuant to CCP section 405.38. Accordingly, the lis pendens is hereby ordered expunged and Defendant's motion is reinstated on the law and motion calendar solely for determination of the issue of attorney's fees. The motion shall be heard on November 15, 2023 at 3:00 p.m. in Department 18."

A copy of this Court's October 13, 2023, order was mailed to plaintiffs and defense counsel (and also emailed to defense counsel) on October 13, 2023. However, the copy of the order that was mailed to plaintiffs was returned to the Court as undelivered with a notation that the Post Office was unable to forward the mail. The Court also ordered the defendant to provide notice to the plaintiff of the October 13, 2023, order. There is no proof of service in the file showing the defendant served the order on the plaintiff.

Neither defendant IRP REO II, LLC nor plaintiffs have filed any paperwork after the October 13th order.

In light of the fact that plaintiffs have not received actual notice of the November 15, 2023, hearing date (or notice of the purpose of the hearing), the matter is CONTINUED to December 13, 2023 at 3:00 p.m. in Department 18. Counsel for defendant is ordered to prepare and serve an order consistent with ruling. Counsel for defendant is further ordered to file proof of service of the

prepared order prior to the continued hearing date.

2. SCV-268056, Ulucan v. Bohemian Club

This matter is on calendar for the motion of Plaintiffs Robert Ulucan and Scott Haynes, on behalf of themselves and all others similarly situated, for an order entering judgment or, in the alternative, dismissing the class action. Defendant Bohemian Club has filed a statement of non-opposition to this motion. The matter is **CONTINUED** to December 20, 2023, AT 3:00PM. The Court orders Plaintiffs' counsel to file a proof of service and a detailed declaration containing the complete details of the payment of settlement amounts within the next ten (10) calendar days. The declaration of Gomez, filed January 10, 2023, does not contain the necessary details. The Court reviewed the file and cannot locate another declaration. If Plaintiffs' counsel previously filed a declaration that addresses the concerns listed in this tentative, the Court requests Plaintiffs' counsel contact the Court.

Following final approval, the Court-appointed settlement administrator, Simpluris, sent two rounds of settlement checks to Settlement Class Members. (Gomez Decl., ¶¶ 2-7 [filed 1/10/23].) Pursuant to the Court-approved settlement agreement, remaining funds in the amount of $18,375.01 were distributed to the Court-approved *cy pres* beneficiaries, West County Community Services and River to Coast Children's Services. (*Id*., ¶¶ 7-9.) There are no remaining settlement funds.

"If the court approves the settlement agreement after the final approval hearing, the court must make and enter judgment. The judgment must include a provision for the retention of the court's jurisdiction over the parties to enforce the terms of the judgment. The court may not enter an order dismissing the action at the same time as, or after, entry of judgment." (Cal. Rules of Court, Rule 3.769(h).)

Here, the Court finally approved the settlement regarding class members on October 20, 2021. Plaintiffs' motion for attorney fees, costs, and the enhancement awards was heard on December 1, 2021. The court indicated its willingness to grant the motion but noted that proof of service had not been filed. Therefore, that motion was continued to February 16, 2022. On that date, as no proof of service had been filed, the motion was denied.

On January 10, 2023, Plaintiffs filed the declaration of Stephen Gomez stating payments were sent to class members. Mr. Gomez does not state how much was sent, just that $168,019.70 in checks were voided and that after the second round of checks went out, $18,375.01 was left. To date, there has not been any accounting of attorney fees, costs, or the representative's enhancement award.

On March 29, 2023, Plaintiffs filed a motion to enter final judgment. The motion was denied for failure to provide proof of service. This identical motion was filed on July 19, 2023.

As the entirety of the Plaintiffs' settlement has not been approved, as Plaintiff's motion for attorney fees, costs, and the enhancement awards was not granted, granting judgment is premature.

Alternatively, Plaintiffs request that the action be dismissed pursuant to Cal. Rules of Court, Rule 3.770(a), which provides: "A dismissal of an entire class action, or of any party or cause of action in a class action, requires court approval. The court may not grant a request to dismiss a class action if the court has entered judgment following final approval of a settlement. Requests for dismissal must be accompanied by a declaration setting forth the facts on which the party relies. The declaration must clearly state whether consideration, direct or indirect, is being given for the dismissal and must describe the consideration in detail."

Plaintiffs have not provided a supporting declaration. They state in their memorandum that the $3,535,000 has been disbursed to class members and that nothing remains. This is not a detailed description of the consideration. The declaration of Stephen Gomez filed on January 10, 2023, states that on November 19, 2021, Settlement Administrator Simpluris issued settlement checks to the 2,272 participating class members. (Gomez decl., ¶2.) On December 30, 2021, a check cashing deadline reminder postcard was set to 695 class members. (*Id.,* ¶3.) The check cashing period expired on March 19, 2022, whereupon Simpluris voided 289 checks in the total amount of $168,019.70. (*Id.,* ¶4.) On May 9, 2022, Simpluris distributed the funds from the voided checks and issued checks to 1,988 participating class members. (*Id.,* ¶6.) Following the expiration of those checks, Simpluris voided 477 checks in the total amount of $18,375.01. (*Id.,* ¶7.) This amount was divided and issued to West County Community Services and to River to Coast Children's Services. (*Id.,* ¶9.)

Of the $3,535,000 available, it is not clear what amount was actually paid to the class members and what amounts were paid to counsel for fees and costs, and to the class representatives. Presumably, the 25%, or $883,750.00, requested in Plaintiffs' attorney fee motion was paid to Plaintiffs' counsel, along with costs of $14,175.95, and representative enhancement awards of $15,000 to each class representative.

"Express or implied agreements regarding attorneys' fees must be set forth in full in the application for approval of the dismissal or settlement of a certified class action." (Cal. Rules of Court, Rule 3.769(b).) As stated above, no accounting has been filed.

In addition, Rule of Court, Rule 3.770(c) provides: "If the court has certified the class, and notice of the pendency of the action has been provided to class members, notice of the dismissal

must be given to the class in the manner specified by the court. If the court has not ruled on class certification, or if notice of the pendency of the action has not been provided to class members in a case in which such notice was required, notice of the proposed dismissal may be given in the manner and to those class members specified by the court, or the action may be dismissed without notice to the class members if the court finds that the dismissal will not prejudice them." The issue of notice of dismissal to the class members has not been addressed.

Accordingly, the matter is **CONTINUED** to December 20, 2023, at 3:00PM. The Court orders Plaintiffs' counsel to file a proof of service and a detailed declaration containing the complete details of the payment of settlement amounts within the next ten (10) calendar days.

3-4. SCV-268477, Smashmallow, LLC v. Tanis Food Tec B.V.

Appearances are required.

5. SCV-269625, Hammers v. Redwood Oil Company, Inc.

Plaintiffs Shavonne Hammers and Kilda Chiloquin's ("Plaintiffs") unopposed motion for final approval of class and PAGA action settlement is **GRANTED** in its entirety, including the following:

1. Appointing Plaintiffs as Class Representatives for settlement purposes;
2. Appointing Moon Law Group, P.C. as Class Counsel for settlement purposes;
3. Appointing ILYM Group, Inc. as Settlement Administrator;
4. Approving the Settlement as fair and reasonable;
5. Approving the Class Representative Service Payments in the amounts of $5,000.00;
6. Approving the Attorneys' Fees in the amount of $393,333.33;
7. Approving the Attorneys' Costs in the amount of $16,019.37;
8. Approving the Settlement Administration Costs in the amount of $18,350.00;
9. Certifying the Class for settlement purposes;
10. Finding that Class Members were given adequate notice of the Settlement and, in a reasonable manner, advised of their right to participate in the Settlement, object to the Settlement, or exclude themselves from the Settlement;
11. Directing the Clerk of the Court to enter the Order as a Final Judgment; and
12. Reserving continuing jurisdiction over the Parties, without affecting the finality of the Final Judgment, for purposes of implementing, enforcing, and administering the Settlement or terms of the Final Judgment.

BACKGROUND

Redwood Oil Company, Inc. ("Defendant") employed Plaintiffs and approximately 1,200 Class Members who claimed Defendant failed to pay minimum wages, pay overtime compensation, and timely pay final wages at termination. (Motion for Final Approval ["Motion"], 1:3-9.) Plaintiffs also claimed that Defendant failed to provide meal periods, authorize and permit rest breaks, indemnify necessary business expenses, and provide accurate itemized wage statements. (*Id*. at 1:12-27.) Plaintiffs' derivate claims were also that Defendant engaged in unfair business practices and owed civil penalties under the Private Attorneys General Act ("PAGA"). (*Id*. at 1:26-27.)

Plaintiffs' complaint alleges causes of action for: "(1) Failed to Pay Minimum Wages [Labor Code §§ 204, 1194, 1194.2, and 1197]; (2) Failed to Pay Overtime Compensation [Labor Code §§ 1194 and 1198]; (3) Failed to Provide Meal Periods [Labor Code §§ 226.7 and 512]; (4) Failed to Authorize and Permit Rest Breaks [Labor Code § 226.7]; (5) Failed to Indemnify Necessary Business Expenses [Labor Code § 2802]; (6) Failed to Timely Pay Final Wages at Termination [Labor Code §§ 201-203]; (7) Failed to Provide Accurate Itemized Wage Statements [Labor Code § 226]; (8) Engaged in Unfair Business Practices [Business and Professions Code §§ 17200, et. seq.]; and (9) Owes Civil Penalties Under PAGA [Labor Code §§ 2699, et. seq.]." (Motion, 1:19-28; Declaration of Kane Moon in support of Motion ["Decl. Moon"], ¶ 4.)

ANALYSIS

Legal Standard for Preliminary and Final Approval of Settlement of Class Actions

A settlement or compromise of an entire class action, or of a cause of action in a class action, or as to a party, requires the approval of the court after hearing. (C.R.C., Rule 3.769(a).) Any party to a settlement agreement may serve and file a written notice of motion for preliminary approval of the settlement. (C.R.C., Rule 3.769(c).) The settlement agreement and proposed notice to class members must be filed with the motion, and the proposed order must be lodged with the motion. (*Ibid*.) The court may make an order approving or denying certification of a provisional settlement class after the preliminary settlement hearing. (C.R.C., Rule 3.769(d).) If the court grants preliminary approval, its order must include the time, date, and place of the final approval hearing; the notice to be given to the class; and any other matters deemed necessary for the proper conduct of a settlement hearing. (C.R.C., Rule 3.769(e).) The court must determine the settlement is fair, adequate, and reasonable. (C.R.C., Rule 3.769(g); *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.) After the final approval hearing, the court must make and enter a judgment if it approves of the settlement agreement and the judgment must include a provision for the retention of the court's jurisdiction over the parties to enforce the terms of the settlement. (C.R.C., Rule

3.769(h).) The court cannot enter an order dismissing the action at the same time as, or after, the entry of judgment. (*Ibid*.)

A presumption of fairness exists where: 1) the settlement is reached through arm's length bargaining; 2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; 3) counsel is experienced in similar litigation; and 4) the percentage of objectors is small. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802.) The test is not the maximum amount plaintiff might have obtained at trial on the complaint but, rather, whether the settlement is reasonable under all of the circumstances. (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 250, disapproved of by *Hernandez v. Restoration Hardware, Inc*. (2018) 4 Cal.5th 260.)

In making this determination, the court considers all relevant factors including "the strength of [the] plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128, citing *Dunk* at 1801.)

<u>Motion for Final Approval</u>

1. Class Members

Plaintiffs and Defendant (collectively, "the Parties") have reached a full settlement of this action as specified in the Joint Stipulation of Class and PAGA Action Settlement ("Settlement" or "Settlement Agreement"). "Class" or "Class Members" consist of: "all current and former nonexempt, hourly-paid employees who have worked for Defendant in the State of California at any time during the Class Period." (Motion, 4:9-11; Decl. Moon, Ex. 1, Settlement ¶ 6.) "Class Period" means the period from November 3, 2017, to November 30, 2022. (Motion, 4:12-13; Decl. Moon, Ex. 1, Settlement ¶ 8.)

2. Settlement

The "maximum total payment is One Million One Hundred Eighty Thousand Dollars and Zero Cents ($1,180,000.00), payable by Defendant within fifteen (15) days of the Effective Date of the Settlement, and it covers: Attorneys' Costs; Attorneys' Fees; Settlement Payments; the PAGA Allocation; Settlement Administration Costs; and Service Payments. (Decl. Moon, Ex. 1, Settlement ¶ 18.) The settlement is non-reversionary. (*Ibid*.)

The "net distribution fund" is the amount that will be used to issue settlement payments, which is the maximum settlement amount less attorneys' costs ($17,000), attorneys' fees ($393,333.33), the

PAGA allocation ($120,000), settlement administration costs ($25,000), and service payments ($10,000 total). (Decl. Moon, Ex. 1, Settlement ¶¶ 3, 4, 20, 24, 32, 35.)

3. Administrator

The Parties have agreed to ILYM Group, Inc. as the Administrator for the Settlement. Payment of the expenses of the Administrator for its services in an amount not to exceed Twenty-Five Thousand Dollars and Zero Cents. (Decl. Moon, Ex. 1, Settlement ¶¶ 34-35.)

4. Attorney fees

Class Counsel, Kane Moon, Allen Feghali, and Jacquelyne VanEmmerik of Moon & Yang, APC, will be awarded as their attorney fees in a sum not to exceed 33.33% of the Maximum Settlement Amount (i.e., up to Three Hundred Ninety-Three Thousand Three Hundred Thirty-Three Dollars and Thirty-Three Cents ($393,333.33)). (Decl. Moon, Ex. 1, Settlement ¶ 4.) Class Counsel will also be allowed to apply separately for reimbursement of reasonable litigation costs and expenses in an amount not to exceed Seventeen Thousand Dollars and Zero Cents ($17,000.00). (Decl. Moon, Ex. 1, Settlement ¶ 3.)

5. LWDA

Subject to Court approval, One Hundred Twenty Thousand Dollars and Zero Cent ($120,000.00) will be allocated to the PAGA Penalties for settlement of Plaintiffs PAGA claims during period of November 3, 2020, to November 30, 2022. (Decl. Moon, Ex. 1, Settlement ¶¶ 24, 26, 27, 52(f).)

6. Class Representative Service Payment

Subject to Court approval, the Settlement Agreement provides for a Class Representative Service Payment of no more than Ten Thousand Dollars, and Zero Cents ($10,000.00) to the Named Plaintiffs at Five Thousand Dollars and Zero Cents ($5,000) each, or such lesser amount as may be approved by the Court at final approval. (Decl. Moon, Ex. 1, Settlement ¶ 32.)

7. Net Settlement Amount

Per the Motion, the Class Members will receive an estimated total payment of $517.76, but Settlement Payments may vary based on duration of the Settlement Class Member's employment during the Class Period. (Motion, 10:17-20; Declaration of Nick Castro ["Decl. Castro"], ¶ 14.)

8. Proposed Class and Commonality of Interest

The proposed class is sufficiently numerous and ascertainable as it consists of approximately 1,200 individuals who can be identified based upon Defendant's records. (Motion,1:3-9.)

In addition, common issues of law and fact predominate. Common questions consist of whether Defendant's practices were lawful, whether Defendant failed to properly provide and/or

pay for meal and rest periods, whether Defendant failed to properly pay overtime, whether Defendant failed to pay all wages, whether Defendant failed to provide accurate wage statements, and whether the Class is entitled to compensation and related penalties. (Motion, 2:2-22.)

Plaintiffs' claims here are typical of the class claims as Plaintiffs were employed by Defendant, like all other class members.

9. Fair, adequate, and reasonable

"The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." (*Kullar*, supra at 130.) The parties mediated the action at arms-length with a professional mediator, Mark Rudy, Esq., on August 23, 2022, and for this mediation there was a meaningful exchange of data and documents including: "the total number of Class and PAGA Members; the total number of weeks and pay periods worked by all Class and PAGA Members during the Class and PAGA Periods; the time and corresponding payroll records of *all* Class Members from November 2018 to December 2021; and the employee handbooks in effect during the Class Period." (Decl. Moon, ¶ 6.) Class Counsel and its expert evaluated the claims in light of the law and to estimate the probability of class certification, Plaintiffs' success on the merits, and Defendant's maximum monetary exposure for all claims and penalties. (*Ibid*.) The mediation was successful, and a settlement was reached between the parties. (*Id*. at ¶ 7.)

10. Notice

Per California Rules of Court, rule 3.769(e), "if the court grants preliminary approval, its order must include the time, date, and place of the final approval hearing; the notice to be given to the class; and any other matters deemed necessary for the proper conduct of a settlement hearing." Additionally, rule 3.769(f) states that, "if the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court. The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement."

The ILYM Group was retained by the Parties' Counsel to provide professional settlement services, including providing notice to the Class. (Decl. Castro, ¶¶ 1-5.) The ILYM Group prepared a draft of the formatted Notice Packet, which was previously approved by this Court at the request for preliminary approval, and reviewed the class data file which contained the name, social security number, last known mailing address, and total number of applicable workweeks worked for each Settlement Class Member. (*Id*. at ¶¶ 4-5.) The information was processed against the National Change of Address database maintained by USPS to update any incorrect addresses and confirm

correct addresses. (*Id.* at ¶ 6.) After confirmation, the Notice Packet was mailed out via U.S. First Class Mail to all 1,200 individuals on August 17, 2023. (*Id*. at ¶¶ 6-7.) Out of these, 248 packets were returned as undeliverable, so the ILYM Group performed a skip trace on these individuals and they were remailed out after 180 or so updated addresses were obtained. (Decl. Castro, ¶¶ 7-9.) In the end, about 68 Notice Packets were deemed undeliverable without any updated address. (*Id*. at ¶¶ 10.) As of October 16, 2023, no request for exclusions or objections were received by the group. (*Id*. at ¶¶ 11-12.)

CONCLUSION

Overall, in this case, the factors identified above have all been met. The Court recognizes that the settlement was reached after the parties engaged in arm's-length mediation and that, pursuant to the Court's ruling on Plaintiffs' motion for preliminary approval of the settlement, notice was provided to all class members and there have been no objectors and no requests for exclusion. Otherwise, this motion for final approval is unopposed.

When the Court considers the strength of Plaintiffs' case, weighed against the costs and risk associated with continued litigation, the settlement agreement appears sufficiently fair, reasonable, and adequate. The attorneys' fees requested are approximately 33% of the gross settlement amount and is reasonable given the contingent nature of the case, inherent risks of class action litigation, the extent to which the litigation precluded other employment; the experience of counsel, and the overall result. Finally, the Court notes that the other requested costs and fees are less than 4% of the gross settlement amount. Accordingly, the requested fees and costs overall are reasonable and justified.

For the reasons stated above, Plaintiffs' motion for final approval of the class action settlement is **GRANTED**, in its entirety.

6-7. SCV-269997, Kerr v. Cruise America, Inc.

Defendants Cruise America, Inc. and Santa Rosa Rent a Car, LLC, doing business as Smith's Rent-A-Car ("Defendants") demurred to and moved to strike punitive damages from Plaintiff James Kerr's ("Plaintiff") Second Amended Complaint ("SAC").

Defendants' demurrer to the SAC is **SUSTAINED in its entirety with leave to amend**. Defendants' request for judicial notice for the demurrer is **GRANTED**.

Defendants' concurrently filed motion to strike punitive damages from the SAC is **MOOT** based on the Court sustaining the entirety of the demurrer.

Procedural History

This action arises from a rental agreement between Plaintiff and Defendants of a compact RV and later a separate midsize RV. (SAC, ¶ 1.) As alleged in the SAC, Plaintiff's home burned down on September 12, 2021, in the Hopkins wildfire, and he was using this RV to temporarily live in while cleanup and repairs were done on his property. (SAC, ¶ 1.) However, when it rained during the second week Plaintiff was renting the RV, water flooded the interior causing damage to the RV due to which Plaintiff had to clean up the water and was asked to take the RV back in for repairs. (*Id*. at ¶ 2.) Plaintiff alleges he was never compensated for the time and expenses it took to return the vehicle 70 miles away. (*Ibid*.) Plaintiff also rented a midsize RV after this, but alleges that he was offered an increased rate than what was advertised and later made to pay this amount as well as overtime charges for using the vehicle even though he returned the vehicle early. (*Id*. at ¶¶ 3-5.)

Plaintiff brought a complaint on January 17, 2023, to which Defendants filed a demurrer and motion to strike. (See Stipulation for Leave to File SAC and Order dated May 8, 2023 ["Stipulation"], ¶¶ 1-2.) The parties stipulated to allow Plaintiff to file the SAC, which asserts five causes of action in the SAC: (1) negligence; (2) breach of contract; (3) fraud; (4) violation of business and professions code section 17500; and (5) declaratory relief. (SAC, ¶¶ 6-16.) Defendants telephonically met and conferred with Plaintiff regarding claimed deficiencies in the SAC, but the parties were unable to reach an agreement on the issues. (Declaration of Colin R. Higgins, ¶ 3; Demurrer, 4:19-23.)

Defendants have demurred to each cause of action in the SAC and also moved to strike the punitive damages relief requested therein. Plaintiff has opposed both the demurrer and motion to strike and Defendants have filed reply briefs.

Defendants Demurrer to the SAC

Legal Standard

A demurrer can be used only to challenge defects that appear on the face of the pleading under attack or from matters outside the pleading that are judicially noticeable. (C.C.P. § 430.30(a).) At demurrer, all facts properly pleaded are treated as admitted, but contentions, deductions and conclusions of fact or law are disregarded. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) Similarly, opinions, speculation, or allegations contrary to law or facts which are judicially noticed are also disregarded. (*Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687, 702.) Generally, the pleadings "must allege the ultimate facts necessary to the statement of an actionable claim. It is both improper and insufficient for a plaintiff to simply plead the evidence by which he

hopes to prove such ultimate facts.” (*Careau & Co. v. Security Pac. Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1390; *FPI Develop., Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384.) Each evidentiary fact that might eventually form part of a party’s proof does not need to be alleged. (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872.) Conclusory pleadings are permissible and appropriate where supported by properly pleaded facts. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.) “The distinction between conclusions of law and ultimate facts is not at all clear and involves at most a matter of degree.” (*Burks v. Poppy Const. Co.* (1962) 57 Cal.2d 463, 473.) Leave to amend should generally be granted liberally where there is some reasonable possibility that a party may cure the defect through amendment. (*The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 852; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

<u>Defendants Demurrer to the Entire SAC</u>

Defendants demur to Plaintiff’s entire SAC on the following grounds:

1. Defendants demur to the first cause of action for negligence against all defendants on the basis that it fails to state facts sufficient to constitute a cause of action against Defendants per C.C.P. section 430.10(e). (Demurrer, 2:3-8.) Defendants argue that the negligence claim is barred by California’s economic loss doctrine because Plaintiff has not suffered any personal injury or property damage relating to this negligence claim. (*Id*. at 2:9-25.)
2. Defendants demur to the second cause of action for breach of contract per C.C.P. section 430.10(e) and 430.10(g) because Plaintiff failed to attach the entirety of his rental contract that forms the basis of his claim, so cannot establish any breach. (Demurrer, 3:2-11.)
3. Defendants demur to the third cause of action for fraud per C.C.P section 410.10(e) because Plaintiff failed to attach his contract which directly contradicts the fraud Plaintiff alleges, because it has not been alleged with adequate specificity, and because it is “merely a recital of the breach of contract claim.” (Demurrer, 3:13-28, 4:1.)
4. Defendants demur to the fourth cause of action for business and professions code statutory violations per C.C.P. section 430.10(e) and 430.10(f) for failure to state sufficient facts to constitute a cause of action because Plaintiff lacks standing as he suffered no injury. (Demurrer, 4:2-9.)
5. Defendants demur to the fifth cause of action for declaratory relief per C.C.P. section 430.10(e) for failure to state facts sufficient to constitute a cause of action against Defendants because “no present and actual controversy exists between the parties.” (Demurrer, 4:10-15.) Defendants also point out that the class action waiver in the parties’

rental contract is not at issue because this is not a class action, and neither is the arbitration provision because neither party is seeking to arbitrate the matter. (*Id*. at 4:16-18.)

Request for Judicial Notice

Defendants requests judicial notice of the following documents:

1. Plaintiff's Supplemental Responses to Form Interrogatories, Set One, served on October 6, 2022.
2. Plaintiff's Responses to Requests for Production of Documents, Set One, served on May 16, 2022.

The court may take judicial notice of discovery responses when considering a demurrer, but only to the extent that they contain statements of the plaintiff or his agent that are inconsistent with the allegations made in the pleading. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604–05.) The hearing on the demurrer "may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of affidavits, declarations, depositions, and other such material which was filed on behalf of the adverse party and which purports to contradict the allegations and contentions of the plaintiff." (*Ibid*.)

Per *Del E. Webb Corp.,* Defendants' request for judicial notice on the above-listed items is **GRANTED**.

Opposition

Plaintiff opposes the demurrer on the following grounds:

1. Plaintiff concedes that "other than becoming wet" his various pieces of clothing and bedding were soaked by the leaks in the RV rented. (Opposition, 4:12-15.) Plaintiff states that these personal properties were otherwise not damaged and Plaintiff is only seeking monetary relief for time and inconvenience it took to clean up the mess and dry the wet items. (*Id*. at 4:15-19.)
2. Plaintiff opposes because he states that he did not include the Exhibits to the SAC to claim they are part of the contract, but rather asserts that "he is not bound by these terms, in that he did not agree to them, they were not disclosed to Plaintiff, that no reasonable person upon renting a RV from defendants would know that said terms existed or that s/he would be bound by them, and that they are unconscionable and void as contrary to public policy." (Opposition, 5:3-22.)
3. Plaintiff claims that the fraud allegations are based on false oral representations and a breach of oral agreements. (Opposition, 6:18-25.)

4. Plaintiff argues that the SAC sufficiently alleges that he was charged more than the advertised rate for RV rental, which according to Plaintiff, is sufficient to state a breach of Business and Professions Code section 17500. (Opposition, 8:10-24.)
5. Plaintiff opposes the demurrer as to the fifth cause of action for declaratory relief arguing that "it is indisputable that defendants originally did intend to enforce the arbitration provision." (Opposition, 9:1-21.)

Reply

Defendants reaffirm their arguments made in the demurrer and emphasize that they are not enforcing the arbitration provision and this is not a class action lawsuit, sot the declaratory relief claim fails. As Plaintiff conceded he did not suffer personal injury or property damage, the negligence and business and professions code claims are barred. Furthermore, Defendants again argue Plaintiff's breach of contract claim should fail because it is contradictory to the express terms of the rental contract and the fraud claim ought to fail because it is duplicative of the breach of contract claim.

Application

Here, Plaintiff has not sufficiently demonstrated in the opposition that he has alleged facts sufficient to show that he suffered any personal injury or property damages on account of Defendants action, so the Court will sustain the demurrer as to the first and fourth causes of action. The Court notes that *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal. 4th 979, is instructive. Furthermore, Defendant has not argued Plaintiff is barred from receiving consequential damages (i.e. gas money) under the terms of the contract.

Plaintiff argues that the excerpts that were attached to the SAC are only what he believes constituted the contract between the parties and that Defendants' additional terms of the contract were not, argues Plaintiff, part of the contract. Plaintiff offers no authority for the proposition that he may only include portions of a contract he believes are valid and exclude other portions of a contract that he believes are unconscionable or against public policy. For that reason, the Court will also sustain the demurrer as to the second and third causes of action.

Finally, this action has not been commenced or categorized as a class action and the arbitration clause (which Plaintiff inconsistently claims that he did *not* agree to) is not being enforced, so the Plaintiff has not sufficiently alleged facts to constitute a cause of action for declaratory relief against Defendants. The Court sustains the demurrer entirely with leave to amend.

Defendants' Motion to Strike Punitive Damages Request in SAC

Defendant's motion to strike the claim for punitive damages from the SAC is MOOT given the sustaining of the demurrer.

Conclusion

Defendants' demurrer to the SAC is **SUSTAINED in its entirety with leave to amend**. Defendants' request for judicial notice for the demurrer is **GRANTED**.

Defendants' concurrently filed motion to strike punitive damages from the SAC is **MOOT.**

Defendants shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

8. SCV-272048, County of Sonoma v. Freitas

Motion for Judgment on the Pleadings is **GRANTED** in full, against solely Defendants William J. Freitas and Janet M. Freitas, as explained herein. As further explained herein, the motion, this order, and the resulting judgment do not include any other defendant.

Facts and History

Plaintiff complains that Defendants have been maintaining illegal and hazardous conditions, related to illegal and hazardous uses, on real property at 34790 Highway 128, Cloverdale (the "Property") in violation of applicable zoning codes, and filed this action to abate the conditions and uses as well as to recover civil penalties, abatement costs, attorneys' fees, and legal costs. It alleges that Defendants "William J. and Janet M. Freitas" (collectively, "Freitas Defendants") own, operate, possess, and control the Property while Defendant Jason Pierce, referring to himself in his pleadings as Jason Pearce ("Pearce") is the tenant of the Freitas Defendants on the Property and is responsible for creating and maintaining the illegal conditions. The illegal conditions and uses, it alleges, consists of two illegal, unpermitted greenhouses, an illegal commercial cannabis operation, generators, occupied travel trailers, non-operative vehicle storage yard, and junkyard conditions. The allegations further specify that they instituted and completed administrative enforcement proceedings against Defendants and made determinations regarding the Property, the alleged violations, and Defendants' liability, setting these forth in detail. It adds that Defendants, having failed to exhaust administrative remedies to challenge Plaintiff's proceedings and determinations against them, have no defense.

Pearce filed an answer and cross-complaint on March 2, 2023, followed by a "Verified Amended Answer" (the "Pearce Answer") on March 21, 2023. His cross-complaint is against the Freitas Defendants for indemnity, contribution, conversion, and declaratory relief. He claims that

the Freitas Defendants are responsible for any alleged violations and any damages or liability he may incur. The Pearce Answer denies numerous allegations of the complaint but admits others. He also denies refusal to allow inspectors to enter the Property, that he was still living on the Property, denies being responsible for any of the alleged illegal uses or conditions, and denies that he has made no effort to abate the conditions. He also sets forth several affirmative defenses, alleging that any conduct of which he is accused is in fact the conduct of others, and that he has "substantially complied with the rules and requirements…."

The Freitas Defendants filed an answer and cross-complaint on March 6, 2023, followed by a "First Amended Verified Answer" (the "Freitas Answer") on March 17, 2023. The cross-complaint, against Pearce, seeks declaratory relief and indemnification, claiming that Pearce, who was to manage the Property, is responsible for the conditions and damages. The Freitas Answer states that they lack sufficient information to deny any of Plaintiff's allegations and that they expressly admit all of Plaintiff's allegations except for those in paragraphs 76-77, 85, 94, 104, and 111 of the complaint. It therefore admits all allegations except the paragraphs incorporating the prior allegations and one statement regarding the Property being in violation of applicable codes, but it admits all of the other allegations, including those setting forth the allegedly illegal conditions and uses, the fault, the underlying administrative proceedings, and Defendants' failure to exhaust administrative remedies. It states no affirmative defenses.

Motion

Plaintiff moves for judgment on the pleadings against the "Defendants' First Amended Verified Answer" (the "Answer"), and to enter judgment in its favor against all three Defendants, along with civil penalties, abatement costs, attorneys' fees, and legal costs, as well as the requested injunction. It contends that the Answer admits all material allegations and states no affirmative defenses. It also contends that Defendants failed to exhaust their administrative remedies, as alleged in the complaint and as admitted in the Answer.

The Freitas Defendants have filed an opposition brief in which they state that although they disagree with some of the facts which Plaintiff has alleged, "they recognize that it would be futile to oppose the Motion… because plaintiffs did not exhaust their administrative remedies." They instead indicate that they will rely on their cross-complaint against Pearce, claiming that he was responsible.

Judicial Notice

Plaintiffs request judicial notice of the complaint and the Freitas Answer as well as recorded grant deed for the Property. The Court may judicially notice these documents, the contents, and the

purported legal effect but may not judicially notice the truth of factual assertions made therein. With this limitation, the Court grants the request.

Defendants and Answers at Issue in This Motion

There is some ambiguity about the scope of this motion and the Defendants and answer at issue. As noted above, the motion states that Plaintiff seeks judgment on the pleadings against the "Defendants'" answer, without specifying that it is limiting the motion to only some Defendants. It also states that Plaintiff asks the court to enter judgment in its favor against all three Defendants, specifically naming all three.

However, the motion in fact is evidently directed only to the Freitas Defendants and the Freitas Answer, and is not directed toward Pearce or his answer. The Court notes that it consistently states that it is attacking only the sufficiency of *one* answer, using the singular at all times. It also identifies that answer by the specific title of the Freitas Answer, the "First Amended Verified Answer," whereas the Pearce Answer is called "Verified Amended Answer." Substantively, the motion is based on the assertion that the answer admits all material allegations and sets forth no affirmative defenses. This is true of the Freitas Answer, which essentially admits all of the allegations in the complaint and includes no effort to assert any affirmative defenses. On the other hand, as noted above, the Pearce Answer denies many of the material allegations by paragraph, denies specific allegations by content, and asserts affirmative defenses. The Court also notes that the Plaintiff's moving and reply papers discuss only the Freitas Defendants and their answer. Finally, the proposed judgment which Plaintiff submits with its reply papers would enter judgment solely against the Freitas Defendants and does not mention Pearce.

The Court therefore interprets this motion, and all relief requested, including judgment on the pleadings against the answer, and entry of judgment, to apply solely to the Freitas Defendants, not Pearce.

The Court further notes that, even if Plaintiff were attempting to obtain judgment on the pleadings against Pearce, the motion would substantively be denied in that regard because, as stated above, his answer clearly states valid defenses in both the denials and affirmative defenses.

Analysis

A motion for judgment on the pleadings is essentially the same as a general demurrer but is brought after the time to bring a demurrer has expired. Code of Civil Procedure ("CCP") §438; *Lance Camper Mfg. Corp. v. Republic Indem. Co. of America* (1996) 44 Cal.App.4th 194, 198.

When brought by a plaintiff against an answer, a motion for judgment on the pleadings must be based on the assertion "that the complaint states facts sufficient to constitute a cause or causes of

action against the defendant and the answer does not state facts sufficient to constitute a defense to the complaint." CCP §438(c)(1)(A).

If the Court grants leave to amend, it must allow 30 days to do so, under CCP section 438(h)(2). Otherwise, the rules governing demurrers basically apply. *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999. As with a demurrer, the motion must rest on the face of the pleading and on matters judicially noticeable. *Consolidated Fire Protection Dist. v. Howard Jarvis Taxpayers' Assn.* (1998) 63 Cal.App.4th 211, 219; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.

The complaint sets forth valid causes of action for abatement of nuisance, along with allegations demonstrating that the Freitas Defendants, having failed to exhaust administrative remedies to challenge Plaintiff's proceedings and determinations against them, have no defense. The Freitas Answer on its face admits all of the allegations and includes no attempt to state any affirmative defense. The Freitas Defendants recognize these points and state that they do not oppose the motion because it would be "futile" to do so.

The Court finds it appropriate to deny leave to amend the answer. The Freitas Defendants have already amended the answer once, they have expressly admitted the allegations which make it clear that they have no defense and are liable, and they have admitted in response to this motion that opposing it would be futile.

The court **GRANTS** the motion in full, in favor of Plaintiff and against the Freitas Defendants. Upon entry of the final order, the Court will enter judgment using the proposed judgment submitted to the court. The prevailing party shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing counsel shall inform the preparing counsel of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.

9. SCV-272237, Stuhlmuller Vineyard Properties v. Foppiano Haun

Appearances are required. The Court wants to discuss the appointment of a discovery referee.

10. SCV-272506, Clark v. Seiffert

Cross-Defendant Cindy Clark's ("Clark") motion for leave to file a cross-complaint against Defendant/Cross-Complainant Linda Seiffert ("Seiffert") is **GRANTED.** Clark shall prepare and serve a proposed order consistent with this tentative ruling and in accordance with California Rules

of Court, Rule 3.1312. Clark shall also file and serve the proposed Cross-Complaint within ten (10) days of service of the notice of entry of order on the Court's final ruling on this motion.

PROCEDURAL HISTORY

This action arises from a property ownership dispute. Clark alleges that she lived with her sister, Seiffert, at 208 Indian Creek Drive, Santa Rosa, California 95409 (the "Property") for a period of roughly nine years, during which time Clark has recently discovered that Seiffert allegedly stole substantial sums of money from Clark while caring for her. (Motion for Leave Memorandum of Points and Authorities ["Motion MPA"], 2:22-26, 3:1-6.) Clark's son, Ryan ("Trustee"), serves as the Trustee of her irrevocable trust created July 20, 2021. (*Id*. at 3:1-3.) Seiffert alleges that she served as Clark's caretaker from 2012 to the end of 2020 and that Clark promised she would transfer her 50% interest in the Property to her. (Opposition, 2:8-12.) The other two individuals with interest in the property are Seiffert and her husband. (*Id*. at 2:1-3.)

Trustee commenced this action on January 24, 2023, seeking to partition the Property, which is the only significant asset owned by Clark and is thought to be worth around $400,000.00. (Motion MPA, 3:14-19.)

Seiffert filed a cross-complaint against Trustee and Clark on April 19, 2023, seeking declaratory relief with respect to the Property, requesting damages for Clark's alleged fraudulent inducement of Seiffert's care by promising to transfer Clark's interest in the Property, and seeking compensation for services performed for Clark's care. (Motion MPA, 3:20-24.)

Clark then filed this motion for leave to file cross-complaint on September 1, 2023, to which Seiffert filed an opposition on November 1, 2023. Clark filed a reply brief on November 7, 2023.

LEGAL ANALYSIS

Standard for Filing or Seeking Leave to File Cross-Complaint

The California Code of Civil Procedure ("C.C.P.") states in relevant part that "[a] party against whom a cause of action has been asserted in a complaint or cross-complaint may file a cross-complaint setting forth…[a]ny cause of action he has against any of the parties who filed the complaint or cross-complaint against him." (C.C.P. § 428.10(a).) Additionally, the Code provides that "[a] party shall obtain leave of court to file any cross-complaint" unless filed at the same time as the answer to the complaint." (C.C.P. §428.50(a)-(c).) Leave may be granted for a permissive cross-complaint in the interest of justice at any time during the course of the action. (C.C.P. §428.50(c).) If a defendant's cause of action against the plaintiff is related to the subject matter of the complaint, it must be raised by cross-complaint as the failure to plead it will bar the defendant from asserting that cause of action in any later lawsuit. (C.C.P. §§ 426.30, 426.50.) Thus, a

defendant's cause of action that is related to the subject matter of the complaint makes defendant's cross-complaint compulsory, if the cause of action "arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action…in [the] complaint." (C.C.P. § 426.10(c).) California courts have generally approved a broad and liberal interpretation of sections 426.50 and 428.10 to permit a cross-complaint to allow the resolution of related disputes in a single action. (C.C.P. § 426.50; *Santa Barbara Channelkeeper v. City of San Buenaventura* (2018) 19 Cal.App.5th 1176, 1187, citing, *Valley Circle Estates v. VTN Consolidated, Inc.* (1983) 33 Cal.3d 604, 612, fn. 4; see also, *Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 986.)

Moving Papers

Clark moves per C.C.P. sections 426.50 and 428.5 for leave to file a cross-complaint to assert causes of action for financial dependent elder abuse, conversion, constructive fraud, and violation of Penal Code section 496(a) against Seiffert. (Declaration of Ryan F. Thomas ["Decl. Thomas"], Exhibit D, ¶¶ 12-31.). Defendants contend that this motion is brought in good faith and is compulsory because though the case was commenced as a partition matter and through documents produced via a subpoena to Wells Fargo Bank, Clark learned of Seiffert's alleged theft of substantial sums from Clark. (Motion MPA, 4:16-22; Decl. Thomas, Ex. A, at pp. 18-24.) Though Clark sought a stipulation from Seiffert to file the cross-complaint, Seiffert declined. (*Id*. at 4:20-22; Decl. Thomas, ¶¶ 4, 6, 8, Ex. A-Ex. C.) Trial is not set yet in this matter and there has not been much discovery done by the parties, so Clark argues that there will be no prejudice to the parties if the Motion is granted and that it will otherwise be in the interest of justice and judicial economy for the Court to do so. (*Id*. at 4:23-28; 5:2-8.)

Seiffert opposes the motion on several grounds. First, Seiffert argues that Clark has not shown her cross-claims are compulsory to this action. She argues that the claims did not exist at the time of the answer to the complaint. (Opposition, 3:12-28, 4:1-8.) Second, Seiffert does not agree that the cross-claims arise out of this same matter. (*Id*. at 4:10-19.) Third, Seiffert's position is that Clark should have instead sought to file a permissive cross-claim and failed to do so. (*Id*. at 4:12-28, 5:1-5.) Fourth, Seiffert finds the motion to be procedurally defective because Clark has never alleged that relief is necessary due to some other cause or due to her own mistake, oversight, inadvertence, or neglect. (*Id*. at 5:7-23.) Finally, Seiffert claims there would be prejudice because "the enlargement of the issues would require a delay in the trial date." (*Id*. at 5:25-27, 6:1-2.)

In Clark's reply, she reaffirms that the cross-complaint is compulsory because these claims were already in existence when she filed her response to Seiffert's cross-complaint since the alleged

abuses happened prior to May 26, 2023. For that reason, Clark states that the opposition's arguments regarding procedure for filing a permissive cross-complaint do not apply and the motion is not procedurally defective. Clark also argues C.R.C., Rule 3.1324(b) does not apply because it governs the amendment of pleadings rather than leave to file a new pleading.

Application

In this case and under a broad and liberal interpretation of C.C.P. sections 426.50 and 428.5, Clark has sufficiently demonstrated that leave to file the proposed cross-complaint is both warranted and compulsory. The issues raised in the proposed cross-complaint are directly related to the causes of action brought in Seiffert's own cross-complaint for declaratory relief, fraud, and quantum meruit, because she claims Clark fraudulently induced her to care for her by promising her the interest she had in the Property and also requests compensation for all the care she claims to have provided Clark. The proposed cross-complaint brings into issue alleged misconduct Seiffert did while caring for Clark and having access to her financial accounts. Trial has not yet been set and the parties are still going through the discovery process, so the Court is not convinced by Seiffert's argument that she would be prejudiced if the Court gave Clark leave to file the cross-complaint.

CONCLUSION

Clark's Motion for Leave to File a Cross-Complaint is **GRANTED**. Clark shall prepare and serve a proposed order consistent with this tentative ruling and in accordance with California Rules of Court, Rule 3.1312. Clark shall also file and serve the proposed Cross-Complaint within ten (10) days of service of the notice of entry of order on the Court's final ruling on this motion.