Tentative Rulings for November 18, 2021
Department 502

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).)

21CECG00453 ***Rebekah Summers v. Sukhvinder Brown*** **(Dept. 502)**

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: ***Bedel v. Muradian***
Superior Court Case No. 20CECG01723

Hearing Date: November 18, 2021 (Dept. 502)

Motion: Defendant Muradian's Demurrer to First Amended Complaint

Tentative Ruling:

To overrule defendant's demurrer in its entirety. (Code Civ. Proc. § 430.10, subd. (e).) To order defendant to file and serve his answer to the first amended complaint within 10 days of the date of service of this order.

Explanation:

Third and Fourth Causes of Action for Fraudulent Misrepresentation: Defendant demurs to the fraudulent misrepresentation claims in the third and fourth causes of action, contending that plaintiff has not alleged sufficient facts to support his fraud claims.

As defendant notes, fraud must be pled with specificity. The elements of fraud are (1) a misrepresentation (false representation, concealment or nondisclosure); knowledge of falsity ("scienter"); (2) intent to defraud, i.e., to induce reliance; (3) justifiable reliance; and (4) resulting damage. (*Philipson & Simon v. Gulsvig* (2007) 154 Cal.App4th 347, 363.) Every element of a cause of action for fraud must be alleged in full, factually and specifically. (*Hills Transp. Co. v. Southwest Forest Industries, Inc.* (1968) 266 Cal.App.2d 702, 707.) Accordingly, the policy of liberal construction of the pleadings "will not ordinarily be invoked to sustain a pleading defective in any material respect[;]" instead, this "particularity requirement necessitates pleading facts which show how, when, where, to whom, and by what means the representations were tendered. (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73, internal citations and quotation marks omitted.)

Here, the court previously held that plaintiff had not alleged specific facts showing when, where, to whom, and by what means defendant Muradian made representations to plaintiff and the corporation. In his amended complaint, plaintiff has added new allegations that Muradian has been taking unauthorized and excessive shareholder distributions, a monthly salary, and "commissions" that were not linked to any sales, as well as using corporate money to pay his own personal expenses, including real estate taxes on property that Muradian owns. (FAC, ¶¶ 11-14.) Plaintiff alleges that he never agreed to any of these payments. (*Ibid*.)

Plaintiff also alleges that, starting on or before 2013 and usually at the end of each year, when he asked Muradian about why there had not been any profits paid out to the shareholders, Muradian responded, "Why are you asking me this. You are like a brother to me. Don't you trust me? We are taking the same amount but we have expenses." (FAC, ¶ 15.) He also alleges that there were similar conversations during the

year, when plaintiff had not received a monthly shareholder distribution. (*Ibid*.) One such conversation occurred in the early months of 2014, when plaintiff had not received a distribution for the months of February to May of 2014. (*Ibid*.)

Defendant's representations were false, and he knew that they were false when he made them. (*Id*. at ¶ 16.) He intended to deceive plaintiff and the corporation when he made them. (*Ibid*.) Defendant's false statements lulled plaintiff into an erroneous belief that Muradian was acting in the best interests of plaintiff and the corporation, and that he could be trusted to do so. (*Id*. at ¶ 18.) Had he known the truth, plaintiff would not have permitted Muradian to continue his actions and he would have taken steps much earlier to recover the losses to the corporation and himself. (*Ibid*.)

Thus, plaintiff has now alleged that defendant made one or more misrepresentations to him, namely that, "We are taking the same amount but we have expenses." (FAC, ¶ 15.) It appears that this statement means that defendant and plaintiff were receiving the same amounts for shareholder distributions or other payments from the corporation, but that expenses had reduced the amount of the payments. As a result, plaintiff has adequately alleged a misrepresentation of fact.

Defendant claims that plaintiff has not alleged any misrepresentation to the corporation, and thus the third cause of action fails to state a claim for derivative liability. However, plaintiff has alleged that there were only two shareholders, officers, and directors of the corporation, himself and defendant. (FAC, ¶¶ 1-5.) Thus, the only other person in the corporation to whom defendant could make any representations would be the plaintiff. As plaintiff has already alleged that defendant made the representations to him, he has effectively alleged that the representations were to the corporation as well.

Defendant also argues that the amended complaint still does not allege when the misrepresentations were made. However, plaintiff does allege that there were multiple similar statements made by defendant, starting on or before 2013, usually in or about December of each year. (FAC, ¶ 15.) He also recalls one such conversation in the early months of 2014, after he did not receive a monthly shareholder distribution for February through May of 2014. (*Ibid*.) Thus, plaintiff has adequately alleged when the statements were made, and any ambiguity can be resolved in discovery.

Likewise, to the extent that defendant complains that the amended complaint does not allege where or how the representations were made, plaintiff's allegations appear to indicate that there were oral conversations between himself and defendant. The exact location where the conversations took place does not appear to be relevant or necessary for the purpose of stating a cause of action for fraudulent misrepresentation. Again, defendant can obtain more information about the specific details of the conversations in discovery. In the meantime, plaintiff has alleged sufficient facts to state a claim for fraudulent misrepresentation. Therefore, the court intends to overrule the demurrer to the third and fourth causes of action.

Fifth and Sixth Causes of Action for Fraudulent Concealment: Defendant also demurs to the fifth and sixth causes of action for fraudulent concealment. Defendant contends that plaintiff has not alleged specific facts to support the concealment claim,

including "how, when, where, to whom, and by what means" defendant made false statements or concealed facts regarding his conduct. (*Stansfield v. Starkey*, *supra*, 220 Cal.App.3d at p. 73.) Defendant also contends that there are no facts showing that the concealment caused plaintiff or the corporation any harm.

However, to the extent that defendant argues that plaintiff must allege facts showing how, when, where, to whom, and by what means defendant made misrepresentations or concealed facts, defendant appears to be confusing the requirements for pleading fraudulent misrepresentation with fraudulent concealment. Fraudulent concealment does not involve any affirmative misrepresentations to the plaintiff. Instead, plaintiff only needs to allege that (1) defendant concealed or suppressed a material fact, (2) that he had a duty to disclose that fact to plaintiff, (3) that the concealment or suppression was intentional and done with the intent to defraud plaintiff, (4) that plaintiff was unaware of the fact and would not have acted as he did if he had known of the fact, and (5) that plaintiff was damaged as a result. *(Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 878.) Thus, there is no need for plaintiff to allege how, when, where, to whom, and by what means defendant concealed the material facts.

Here, plaintiff has alleged that defendant intentionally concealed several facts from him and the corporation, including that he was receiving an excessive compensation that he was not authorized to receive, and that he was using the assets of the corporation to pay his personal expenses. (FAC, ¶¶ 11-14, 42, 49.) He has now alleged more detailed facts to support his claim that defendant was receiving excessive, unauthorized distributions, salary payments, and commissions, as well as using corporate money to pay his personal debts like his property taxes. (*Id*. at ¶¶ 11-14.) Plaintiff has also alleged that defendant intentionally concealed these facts from him and ASA, that he and ASA were ignorant of the true facts, that defendant intended to defraud them, and that they were harmed by the concealment due to lost business, business opportunities, and payments of money that did not benefit ASA. (*Id*. at ¶¶ 42-46.) Thus, plaintiff has adequately alleged facts to support his fraudulent concealment claims, and the court intends to overrule the demurrer to the fifth and sixth causes of action.

Ninth and Tenth Causes of Action for Unjust Enrichment: Unjust enrichment is generally not a standalone cause of action. (*Melchior v. New Line Productions, Inc*. (2003) 106 Cal.App.4th 779, 793; see also *McKell v. Washington Mutual, Inc*. (2006) 142 Cal.App.4th 1457, 1490.) " 'The phrase 'Unjust Enrichment' does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so.' [Citation.]" (*Melchior*, *supra*, 106 Cal.App.4th at p. 793.)

Nevertheless, despite the label, if facts sufficient to justify restitution are alleged, a cause of action premised on unjust enrichment is proper. (See *Professional Tax Appeal v. Kennedy-Wilson Holdings, Inc.* (2018) 29 Cal.App.5th 230, 238-239; *Melchior v. New Line Productions, Inc., supra,* 106 Cal.App.4th at p. 793 [insufficient basis pled for restitution, thus the plaintiff could not recover for unjust enrichment]; *Astiana v. Hain Celestial Group, Inc.* (9th Cir. 2015) 783 F.3d 753, 762 ["unjust enrichment and restitution are not irrelevant in California law."]; *Western Pac. R. Corp. v. Western Pac. R. Co*. (1953) 345 U.S. 247, 276 ["California certainly recognizes a cause of action based on unjust enrichment, whether

it be treated as a common count [citation] or as a waiver of a tort and suit in assumpsit. [Citation.]"].)

In addition, "while restitution ordinarily connotes the return of something which one party has 'received' from another, the term may also refer to a broader obligation to pay." (*Earhart v. William Low Co.* (1979) 25 Cal.3d 503, 511, fn. 5.) In essence, "[t]he elements of a cause of action for unjust enrichment are simply stated as 'receipt of a benefit and unjust retention of the benefit at the expense of another.'" (*Professional Tax Appeal v. Kennedy-Wilson Holdings, Inc*., supra, 29 Cal.App.5th at p. 238.)

Here, plaintiff alleges that defendant received benefits that belong to ASA and plaintiff, and that he has unjustly retained those benefits at the expense of ASA and plaintiff. (FAC, ¶¶ 62, 64.) He also incorporates the prior allegations of the complaint, including that defendant received unauthorized and excessive shareholder distributions, salary payments, and commissions that he did not earn through sales. (*Id*. at ¶¶ 11-13.) In addition, he alleges that defendant used corporate money to pay his own real property taxes. (*Id*. at ¶ 14.) Thus, plaintiff has adequately alleged facts to support his unjust enrichment claim, and the court intends to overrule the demurrer to the ninth and tenth causes of action.

Eleventh and Twelfth Causes of Action for Negligence: Defendant also demurs to the eleventh and twelfth causes of action for negligence, contending that the amended complaint only alleges intentional rather than negligent conduct, so it fails to state a claim for negligence. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 890-891.) However, the amended complaint alleges that defendant negligently breached his duty of care to the corporation and plaintiff by allowing the corporation to pay him excessive and unauthorized compensation, allowing the corporation to pay his personal expenses, failing to protect the corporation's proprietary products from being sold directly by others, and failing to protect the corporation's customers and business opportunities. (FAC, ¶¶ 66-67, 70-71.) Defendant's negligence caused damage to the corporation and to plaintiff. (*Id*. at ¶¶ 68, 72.) Thus, plaintiff has adequately alleged a claim for negligence.

To the extent that defendant argues that the facts only show intentional rather than negligent conduct, plaintiff is allowed to allege his theories in the alternative, even if the theories are inconsistent with each other. (*Savage v. Van Marie* (1974) 39 Cal.App.3d 241, 245.) Negligence may also be pled in general terms, without stating the particular omission that rendered it negligent. (*McMillan v. Western Pacific Railroad Co*. (1960) 54 Cal.2d 841, 845.) Here, plaintiff has generally alleged that defendant was negligent in allowing the corporation to pay him excessive and unauthorized compensation, pay his personal expenses, failing to protect the corporation's proprietary products from direct sales, and failing to protect the corporation's customers and business opportunities. Therefore, he has adequately alleged his negligence causes of action, and the court intends to overrule the demurrer to the eleventh and twelfth causes of action.

Fifteenth Cause of Action for Breach of Manager's Duty: Defendant demurs to the fifteenth cause of action for breach of manager's duty, contending that ASA is a corporation, and therefore has no "manager." (*People v. Pacific Landmark, LLC* (2005)

129 Cal.App.4th 1203, 1213.) He argues that, since the corporation has no manager, plaintiff cannot state a claim for breach of a manager's duties.

However, defendant's reading of the amended complaint appears to be overly narrow. The amended complaint alleges that defendant had a duty as a director and officer of the corporation to act in good faith with regard to the company. (FAC, ¶ 80.) Plaintiff alleges that defendant breached that duty when he committed the acts previously alleged. (*Id*. at ¶ 81.) The breach caused actual damage to the corporation. (*Id*. at ¶ 82.)

Thus, plaintiff is not necessarily alleging that defendant held the official position of "manager" within the corporation, but rather that he had a duty to act in good faith toward the corporation as a director and officer of the corporation, and that he breached that duty and harmed the corporation's interests. Such allegations appear to be sufficient to state a cause of action for breach of duty, whether it is characterized as a "manager's duty" or a "director's and officer's duty." It is the substance of the allegations, not the label placed on the cause of action, that determines whether a cause of action has been sufficiently alleged. "Erroneous or confusing labels attached by the inept pleader are to be ignored if the complaint pleads facts which would entitle the plaintiff to relief. 'It is not what a paper is named, but what it is that fixes its character.'" (*Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908, internal citations omitted.) Therefore, the court intends to overrule the demurrer to the fifteenth cause of action.

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: RTM on 11/17/2021.
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Quiring v. Rodriguez***
Superior Court Case No. 18CECG02713

Hearing Date: November 18, 2021 (Dept. 502)

Motion: Petition for Approval of Compromise of Claim of Minor in Pending Action

Tentative Ruling:

To deny without prejudice. In the event that oral argument is requested, Mr. Viruegas is excused from appearing.

Explanation:

The court requires more explanation as to the agreement regarding Liberty Mutual's medical lien. The handwritten language of the agreement states:

> Viruegas will pay $139,000 to resolve lien claims as to defendant Westech and defendant State of California, except that this cash payout does not resolve or satisfy Liberty Mutual's claims for future credit, which will be resolved after resolution of plaintiffs' claims against the State by trial or settlement.

(Petn., Att. 12b(5)(a)9ii), .pdf pp. 71-73.)[1]

It is not clear from this language who else Liberty Mutual may have "claims for future credit" against, and if that will result in Mr. Viruegas owing more to Liberty Mutual. Typically, a petition for compromise is a final statement of what will be paid on a lien claim, so more explanation is needed.

The court is also very concerned as to whether petitioner's proposed disposition of the net settlement monies is in the best interest of Mr. Viruegas. Petitioner proposes to deposit $76,500 in a "savings account or money-market fund to help cover short-term and accrued expenses," and for the remaining $2,165,229 to fund an annuity with an expected lifetime benefit of $5,203,237.93, consisting of guaranteed payments for 30 years, beginning with monthly payments of $4,950 and increasing every year thereafter, ending at age 50 with a monthly payment of $13,323. (Petn., Ferrante Dec., p. 93.)

Probate Code section 3610 states that when money is to be paid under a compromise to a disabled adult with no conservator of the estate, it is to be "paid delivered, deposited, or invested as provided in this article," and section 3611 specifically sets out the various options the court has for disposition of the funds. As pertinent here,

[1] All references herein to page numbers in the petition are to the .pdf page number, rather than any page number reflected on any page itself.

the court can: 1) require that a conservator be appointed and that the remaining balance be paid/delivered to that conservator once appointed; 2) order that the funds be used to purchase a single-premium deferred annuity; 3) order the funds paid into a blocked account; 4) order the funds paid into a special needs trust; or 5) (as requested here as to $76,500 of the net settlement)) order that the money "be paid or delivered to the person with a disability." (Prob. Code § 3611, subd. (a), (b), (c), and (i), respectively.)[2]

Ostensibly, the petition requests that the $76,500 "be paid or delivered" to Mr. Viruegas. (Petn., Item 18b(11), mirroring the language of Prob. Code 3611, subd. (i).) However, it is clear from reading the accompanying medical information that Mr. Viruegas is not capable of managing this money for himself. Evidently petitioner (his mother) intends to manage this money. But as it stands now, this would be without any continuing court oversight or any other system of accountability. While the court has no doubt that Ms. Ferrante is an upstanding and trustworthy person, who has selflessly cared for her son over the course of several years since the accident, the court nonetheless must find that this is not what is contemplated under subdivision (i) of section 3611. Instead, that option appears to be designed for times when the disabled person has sufficient mental capacity to actively participate in the management of their own financial affairs. In such a situation, this statute gives the court the flexibility to make the appropriate order distributing the settlement proceeds *to the disabled person, for them to manage*.

Therefore, the court cannot grant this request, especially in the face of the attached medical reports which expressly state that Mr. Viruegas will need a conservator of the estate to manage his finances. (Petn., Delis Rept. at .pdf p. 49 and Magnusson Rept. at p. 68, acknowledging Delis recommendation.) The court is willing to order that a conservator of the estate be appointed pursuant to Probate Code section 3611, subdivision (a), subject, however, to further considerations noted below regarding the potential need for Mr. Viruegas to qualify for needs-based social programs that might provide him with the life care management he will need.

The medical reports from Drs. Delis and Magnusson give in-depth guidance as to the kind of ongoing care Mr. Viruegas will need. Dr. Magnusson states, "Ensuring he has comprehensive medical care, life-long therapies, durable medical equipment, and personal assistance is imperative in achieving the best outcomes, as well as prevention of complications and comorbidities." (Petn., pp. 60-61) Both doctors indicate that in addition to a conservator for his estate, Mr. Viruegas will need a case manager: Dr. Delis mentions needing a "case manager to oversee and coordinate his future medical and psychiatric treatments" and Dr. Magnusson indicates case management would "preferably [be] provided by a Catastrophic Nurse Case Manager." (*Id.*, pp. 49, 67-68.) Dr. Magnusson indicates he will need a Life Skills Coach. (p. 96-97.)

The court is not clear how the provision proposed for the settlement funds is designed to implement this life care plan. This must be addressed. No mention is made of ongoing health insurance coverage, or how the recommended services and life care management are to otherwise be paid for. The settlement funds are a source of payment for this care which will obviously be critical to Mr. Viruegas' quality of life, especially should

[2] There are other options listed in this statute which are not applicable here.

he outlive his parents, as appears to be expected. The court's standard in ruling on compromise petitions is finding that it is in the best interest of the minor or disabled person. (*Scruton v. Korean Air Lines Co.* (1995) 39 Cal.App.4th 1596, 1606-1608.) At this juncture, the court cannot find that the proposed disposition is in Mr. Viruegas' best interest.

Furthermore, it is not clear whether Mr. Viruegas will need to qualify for any needs-based social programs in order to receive some training or services he would not otherwise qualify for. If so, then it is possible that the best solution is for a special needs trust to be created in order to administer the totality of the funds in such a way that the beneficiary (Mr. Viruegas) is not disqualified from receiving public assistance benefits available to him (*e.g.,* Medi-Cal and other means-tested public benefits for which he would not qualify if the money/assets in the trust were counted against him). As now proposed, both the $76,500 bank account and the monthly income from the annuity would disqualify him for such benefits.

If it is decided that a Special Needs Trust will be established, it must be done with the approval of the Probate Court; this ensures that necessary language is in the trust and that the Probate Court will have continuing oversight over the trust (i.e., with periodic accountings required). An estate planning attorney may need to be consulted and hired for this purpose, and the court will approve funds expended for this purpose. Furthermore, the trust must be set up and be ready to be funded prior to approval of the settlement. That way the approved Trust can be attached to the amended Petition.

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: RTM on 11/17/2021.
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***Sandhu v. Sidhu***
Superior Court Case No. 18CECG01303

Hearing Date: November 18, 2021 (Dept. 502)

Motion: by plaintiff Daulat Sandhu to enforce settlement against defendants Pritpal S. Sidhu and Rashpal S. Virk.

Tentative Ruling:

To grant. However, the court will not sign the proposed judgment submitted by plaintiff, as it does not sufficiently describe the terms of the settlement. Plaintiff is directed to submit to this court, within ten (10) days of service of the minute order by the clerk, a proposed judgment consistent with the written settlement agreement.

Explanation:

Code of Civil Procedure Section 664.6 provides as follows: "If parties to pending litigation stipulate, in a writing signed by the parties outside of the presence of the court . . . for settlement of the case . . . the court, upon motion, may enter judgment pursuant to the terms of the settlement." It also provides that the parties may request that the court "retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." (Code Civ. Proc. § 664.6.) Due to the summary nature of the statute authorizing judgment to enforce a settlement agreement, strict compliance with its requirements is prerequisite to invoking the power of the court to impose a settlement agreement. (*J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974, 984.)

Here, plaintiff submits a writing, signed by the parties, made outside the presence of the court, and litigation is still pending (i.e., no dismissal has yet been filed). Also, the writing reflects that this court would retain jurisdiction under section 664.6 to enforce the writing. (Declaration of Justin T. Campagne, ¶ 4, and Ex. 1 thereto.) The agreement contemplated the sale of defendants' interest in a subject property to plaintiff for a certain sum, less the cost to extinguish certain existing encumbrances. (*Ibid.*) The encumbrances contemplated by the parties were as such:

1. Defendants would be responsible for all "PG&E" fees, and County of Fresno fines and citations at the subject property.
2. Each party would bear the cost of back-taxes in 1/3rd proportions. Each party would further bear the costs of escrow and title insurance.
3. Title insurance shall only cover utility easements, future taxes not due, and "other items acceptable to [plaintiff]."
4. Defendants would be responsible to remove any security interest, judgment, or other claims they may have caused to be recorded against the subject property to clean title. (*Ibid.*)

Plaintiff now seeks a judgment of the settlement terms.

Defendants submit an untimely opposition. The court exercises its discretion and considers the late filing. (Cal. Rules of Court, Rule 3.1300.) Defendants state that the parties believed the settlement agreement would have been completed on October 26, 2020, when the parties signed escrow documents and delivered the same to the title company. (Declaration of Justin D. Harris, ¶ 3.) On October 27, 2020, the title company ran a final lien check, which revealed newly discovered liens. (*Id.*, ¶ 4.) Defendants have resolved these newly discovered liens, except one. (*Id.*, ¶ 5.) Defendants seek a continuance of the present motion of 60 days to resolve the final lien and close escrow. (*Id.*, ¶ 6.) While defendants' efforts to comply are noted, defendants' request is denied.

Defendants do not contest signing the written settlement agreement. Neither do defendants contest the terms of the written settlement agreement. The court finds a valid written signed settlement agreement outside of the presence of the court, and judgment will be entered in accordance with the terms of the written settlement agreement. (Code Civ. Proc. § 664.6, subd. (a).)

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: RTM (Judge's initials) on 11/17/2021 (Date).

(34)

Tentative Ruling

Re: ***Switzer v. Flournoy Management, LLC***
Superior Court Case No. 11CECG04395

Hearing Date: November 18, 2021 (Dept. 502)

Motion: by Cross-Defendants for Summary Judgment/Adjudication

Tentative Ruling:

To deny Cross-Defendants' McCormick, Barstow, Sheppard, Wayte & Carruth LLP, Gordon M. Park, Dana B. Denno and Irene V. Fitzgerald's motion for summary judgment. To deny the motion for summary adjudication as to the First, Twelfth, Twenty Sixth and Thirtieth Causes of Action. To grant the motion for summary adjudication as to the claim for punitive damages. (Code Civ. Proc. § 437c.) Cross-defendants' objections to Michael Carrigan's Declaration nos. 5, 6, 7, 8, 9, and 10 are overruled. All other objections were not material to the determination of the motions. (Code Civ. Proc., § 437c, subd. (q).)

Explanation:

Burden on Summary Judgment

Summary judgment law turns on issue finding rather than issue determination. (*Diep v California Fair Plan Ass'n* (1993) 15 Cal.App.4th 1205, 1207.) The court does not decide the merits of the issues, but merely discovers, through the medium of affidavits or declarations, whether there are issues to be tried and whether the parties possess evidence that demands the analysis of a trial. (*Melamed v City of Long Beach* (1993) 15 Cal.App.4th 70, 76; *Molko v Holy Spirit Ass'n* (1988) 46 Cal.3d 1092, 1107; *Schwoerer v Union Oil Co.* (1993) 14 Cal.App.4th 103, 110.) In short, the motion is not a substitute for a bench trial.

Summary adjudication is the proper mechanism for challenging a particular, "cause of action, an affirmative defense, a claim for punitive damages, or an issue of duty." (*Paramount Petroleum Corp. v. Superior Court* (2014) 227 Cal.App.4th 226, 242.) However, "[a] motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (CCP § 437c(f)(1); see also *Catalano v. Superior Court* (2000) 82 Cal.App.4th 91, 97 [piecemeal adjudication prohibited].)

A summary judgment motion must show that the "material facts" are undisputed. (Code Civ. Proc., § 437c, (b)(1).) The pleadings serve as the "outer measure of materiality" in a summary judgment motion, and the motion may not be granted or denied on issues not raised by the pleadings. (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74 [pleadings determine the scope of relevant issues on a summary judgment motion].)

Cross-Defendants McCormick, Barstow, Sheppard, Wayte & Carruth LLP, Gordon M. Park, Dana B. Denno and Irene V. Fitzgerald ("McCormick Barstow") assert that summary judgment, or alternatively, summary adjudication is proper here where cross-complainant cannot establish one or more elements of her causes of action brought on behalf of Flournoy Management LLC ("Flournoy"). Specifically, the assertion is that cross-complainant cannot establish that there was a conflict of interest in McCormick Barstow's representation of both Flournoy and Robert "Sonny" Wood and even if there was a conflict there was no harm to Flournoy caused by the conflict alleged in its causes of action for (1) Breach of Fiduciary Duty, (12) Accounting, (26) Violation of Business and Professions Code section 17200 and (30) Treble Damages and Attorneys Fees (Penal Code section 496).

Conflict of Interest

McCormick Barstow argues where, as here, a single law firm takes on representation of a limited liability company and its managing member in defense of a direct cause of action from another LLC member, that the two concurrently represented parties' interests were wholly aligned and there was no conflict. (*Coldren v. Hart, King, & Coldren, Inc.* (2015) 239 Cal.App.4th 237). In support, McCormick Barstow directs the court to correspondence between Switzer and Kravitz law firm indicating the purpose of the inspection request was to end his relationship with Flournoy Management and that the cause of action brought against Flournoy and Wood was a direct cause of action. (SSUMF Nos. 3, 4, 5, 6, 23, 24, 25, 26, 43, 44, 45, 46, 63, 64, 65, 66.) There is no dispute that McCormick Barstow appeared as co-counsel with the Kravitz law firm on behalf of both Flournoy and Wood concurrently. (SSUMF Nos. 7, 27, 47, 67.) Switzer argues that there was evidence of the conflict between Flournoy and Wood prior to McCormick Barstow undertaking the concurrent representation and, even though Switzer ultimately brought a direct cause of action against Flournoy and Wood, it is evident in the pre-litigation correspondence and complaint that Wood's mismanagement of Flournoy was at issue. (SSRMF Nos. 3, 4, 5, 6, 23, 24, 25, 26, 43, 44, 45, 46, 63, 64, 65, 66.) As such, in a situation where there is a direct cause of action but mismanagement on the part of the corporate officer is alleged, there is at least a potential conflict in concurrent representation of the two defendants. (*Gong v. RFG Oil, Inc.* (2008) 166 Cal.App.4th 209.)

Specifically, paragraph 8 of the Complaint indicates mismanagement of the LLC and Defendant Wood is identified as the managing member of Flournoy at paragraph 3 of the Complaint. (McCormick Barstow RJN Exh. 1.) As the managing member Wood was required to respond to the request for inspection of records per paragraphs 9 through 12 of the Complaint. (Id.) Additionally, the correspondence between Mr. Switzer and Kravitz law firm indicates concerns of mismanagement. (Carrigan Decl. Exh. 4, 9/30/11 letter.) This raises the question of what McCormick Barstow knew of the alleged mismanagement of Flournoy before undertaking concurrent representation of both Flournoy and Wood. Further there is reason to question whether the correspondence and allegations in the Complaint present a potential conflict of interest between Flournoy and Wood. This is sufficient to overcome summary adjudication based upon this issue.

Harm to Flournoy Management LLC

In bringing their motion for summary adjudication based upon the inability of plaintiff to establish "harm" caused by the concurrent representation, cross-defendants characterize the harm to Flournoy as only "delay" and assert that the other harm alleged was not proximately caused by the concurrent representation. (SSUMF Nos. 19, 20, 39, 40, 59, 60.) This characterization of the alleged damages is disputed by cross-complainant who directs the court to read the entirety of the discovery response cited by cross-defendants in support of the material fact. (Buchanan Decl., Exh. L Response to Form Interrogatory No. 17.1, regarding Request for Admission No. 33; Exhs. M, N and O, Response to Form Interrogatory No. 17.1, regarding Request for Admission No. 1.) Based on the evidence cited, there is a triable issue of material fact as to the nature of the harm caused to Flournoy, if any, by McCormick Barstow's concurrent representation of Flournoy and Wood.

Violation of Penal Code section 496

The elements of a claim for civil liability under Penal Code section 496 are: (1) Defendant concealed or withheld or aided in concealing or withholding property from the owner which had been stolen or obtained by theft or extortion; (2) Defendant knew the property was stolen or obtained by theft or extortion at the time it aided in concealing or withholding from the owner of the property; (3) the defendant's violation of Penal Code section 496, subdivision (a) caused plaintiff to suffer injury, damage, loss or hard; and (4) The elements and amounts of plaintiff's damage. (BAJI No. 11.48.6.)

Cross-defendants argue that the interpretation of the statute relied upon by cross-complainant that fraud and conversion of property are sufficient for a claim for treble damages under Penal Code section 496 is no longer legally supported. (*Siry Investment, L.P. v. Farkhondehpour* (2020) 45 Cal.App.5th 1098 [holding that treble damages are only available under the statute when the conduct involves trafficking in stolen goods.].) Switzer alleges that McCormick aided Mr. Wood in concealing and withholding the property stolen by Mr. Wood from Flournoy and that this action involved Wood's alleged fraud and conversion of property not the theft of stolen property. The broader interpretation of the statute, replied upon by cross-complainant in bringing this claim, is supported by a Fifth District Court of Appeal decision arising from the litigation between Mr. Switzer and Mr. Wood. (*Switzer v. Wood* (2019) 35 Cal.App.5th 116.). The California Supreme Court granted review of the *Siry Investment* decision.

Although *Siry Investment* is pending review by the California Supreme Court, it may still be considered for persuasive value. (Cal. Rules of Court, rule 8.1115(e)(1).) The court in *Siry Investment* specifically states that it "chart[s] yet a different path in ruling." (*Siry Investments, L.P. v. Farkhondehpour, supra*, 45 Cal.App.5th at 1134.) In contrast, the court in Switzer was ruling based on precedent that also adopted the plain meaning of the words of Penal Code section 496. (*Switzer v. Wood, supra*, 35 Cal.App.5th at 130.) Given the additional case law supporting an interpretation of Penal Code section 496 using its plain meaning, this court is not inclined to break from that precedent.

In support of summary adjudication of this cause of action in their favor, cross-defendants argue there is no evidence to support that they had knowledge the property

at issue in the dispute between Mr. Switzer and Mr. Wood was stolen until the 2017 jury verdict finding Wood had stolen property from Switzer. (McCormick Barstow MPA 22:6-12.) The Separate Statement of Undisputed Material Facts relating to "Issue 4: This Court Should Grant Summary Judgment as to Switzer's Cause of Action Against the McCormick Barstow Parties For a Violation of California Penal Code Section 496" does not contain a statement of material fact as to whether or not McCormick Barstow had knowledge that the property at issue in the action was stolen or not. (SSUMF Nos. 61 – 83.) There are material facts relating to when the alleged conversion took place (Nos. 78 and 83.) and what the damages are related to this cause of action (No. 82) but nothing directly refuting cross-defendant's knowledge that property at issue was obtain by fraud or conversion.

The burden is on the moving party to prepare a separate statement that sets forth plainly and concisely all material facts that the moving party contends are undisputed, and each of these material facts must be followed by a reference to the supporting evidence. (Code Civ. Proc., § 437c, subd. (b)(1), (f)(2).) "This is the Golden Rule of Summary Adjudication: If it is not set forth in the separate statement, *it does not exist*." (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337 [superseded by statute on other grounds]; *Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1282; *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 173 [failure of defendant's separate statement to address material allegation in complaint was "fatal flaw"].) In the case at bench, cross-defendants have not addressed this element of knowledge in their separate statement, only in argument. This is not sufficient for purposes of this motion.

In addition to there being a triable issue of material fact as to whether there was a conflict of interest in the concurrent representation of Flournoy and Wood giving rise to a breach of McCormick Barstow's fiduciary duty to Flournoy as pled in the cross-complaint (McCormick Barstow RJN, Exh. 3, ¶ 194.), cross-defendants have not addressed the issue of their knowledge in the separate statement and given the opposition the opportunity to dispute the material fact.

Punitive Damages

The court may grant summary adjudication of a claim for punitive damages even though it does not dispose of an entire cause of action. (Civ. Proc. Code § 437c(f)(1).) Punitive damages may be recovered only "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." (Civ. Code § 3294(a).)

Cross-defendants contend that Switzer has not identified specific evidence supporting a claim for punitive damages and, at best, relies only on argument and inference that McCormick Barstow acted with malice, oppression or fraud in what McCormick Barstow characterizes as zealous representation of Flournoy. (SSUMF Nos. 89, 93.) Switzer's discovery responses cited as supporting these material facts are also cited in response to the separate statement as citing to both facts and evidence in support of the prayer for punitive damages. (Buchanan Decl. Exh. P at Response to Special Interrogatory No. 244; Exhs. Q, R and S at Response to Special Interrogatory No. 32.)

Reviewing the Response to Material Fact Nos. 89 and 93, the majority of the facts describe McCormick Barstow's representation of Flournoy and are relevant to the breach of fiduciary duty. There are no facts specifically describing what actions of McCormick Barstow were fraudulent, malicious or oppressive and there is no evidence cited in the Response to support a finding that the actions of McCormick Barstow during its representation of Flournoy were undertaken with malicious or oppressive intent or that McCormick committed fraud in its representation of Flournoy. Switzer has not succeeded in identifying a triable issue of material fact regarding the prayer for punitive damages. Therefore the motion for summary adjudication as to the claims for punitive damages is granted.

Cross-Defendants' Objections to Switzer's Evidence in Support of the Opposition

Objections to the Carrigan Declaration Nos. 5, 6, 7, 8, 9, 10 are overruled. The objections are to the content of the declaration to which the documents are attached. The court is not considering the description of the document as evidence, only the attached documents themselves for purposes of this motion.

As to cross-defendants' remaining evidentiary objections, the court declines to rule on them, as the evidence was not material to the disposition of the motion. (Code Civ. Proc., § 437c, subd. (q).)

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: RTM on 11/17/2021.
(Judge's initials) (Date)