SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 39
HEARING DATE: 06/30/2022

1. 9:00 AM CASE NUMBER: MSC18-00956
CASE NAME: EUBANKS VS YAPSTONE
MOTION FINAL APPROVAL OF CLASS ACTION SETTLEMENT+0001+
TENTATIVE RULING:

Continued to September 29, 2022, 9:00 a.m. by stipulation of the parties and order of the Court entered May 27, 2022.

2. 9:00 AM CASE NUMBER: MSC18-02253
CASE NAME: DAVIS VS GROCERY DELIVERY/INSPERITY PEO
SPECIAL SET HEARING COMPLIANCE HEARING
TENTATIVE RULING:

The declaration of Lindsay Kline establishes the proper disbursement of the funds, and the voided checks shall be disbursed to the State Controller within thirty days. Once that is done, the remaining attorney's fees may be disbursed to the attorneys. No further proceedings are contemplated.

3. 9:00 AM CASE NUMBER: MSC19-00973
CASE NAME: MIMRAN VS. HARR
HEARING IN RE: APPLICATION FOR RIGHT TO ATTACH
TENTATIVE RULING:

Before the Court is Plaintiffs Diane and Ronnie Mimran (collectively, "Plaintiffs")'s application for issuance of writ of attachment ("Application") against Defendant David Harr ("Harr") and Defendant DF Harr Construction ("DF Harr").

Plaintiffs seek to attach $1,124,257.93 against the real property of individual Defendant Harr.

For the following reasons, the Application is denied, without prejudice.

Background

Diane and Ronnie Mimran (collectively, "Plaintiffs") purchased the home at 1531 Avenida Street, Nuevo Diablo, CA in 2009 from DF Harr. (FAC p. 6:8.) DF Harr had renovated the home before the sale to Plaintiffs. (FAC p. 6:4.) Plaintiffs and DF Harr signed a "California Association of Realtor's California Residential Purchase Agreement and Joint Escrow Instructions" ("Agreement") in July of 2010. (FAC p. 6:8.)

Plaintiffs spotted issues with the building after they moved in: cracks formed in the drywall, the doors shifted, and the floors creaked. (FAC p. 6:21-24.) They reached out to Harr, who returned to fix the issues and assured them that the problems were "normal" and that nothing was wrong with the

house or the foundation. (FAC p. 6:26-27.) Harr returned to survey and fix the issues a few times between 2010 and 2018 because the issues reappeared again. (MPAs ISO Application, p. 3:25.)

In 2019 Plaintiffs hired experts to survey the home and the underlying foundation. The experts discovered that the renovated home was built over a culvert and that the foundation was faulty. (MPAs ISO Application, p. 4:12-22.) Plaintiffs then sold their home for $2.4 million after an appraiser estimated that it would sell for $3.2 million without the defects. (MPAs ISO Application, p. 5:12-15.).

Plaintiffs' causes of action against Defendants are: (1) negligent construction, (2) breach of oral contract, (3) breach of implied warranty, (4) fraud, (5) negligent misrepresentation, (6) constructive fraud, (7) breach of written contract and (8) declaratory relief.

Analysis

Attachment is a pre-judgment creditor's remedy. Before an attachment order is issued, the court must find all of the following:

(1) the claim upon which the attachment is based is one upon which an attachment may be issued:

(2) the applicant has established "the probable validity" of the claim upon which the attachment is based:

(3) the attachment is not sought for a purpose other than the recovery on the claim upon which the request for attachment is based: and

(4) the amount to be secured by the attachment is greater than zero.

(CCP § 484.090.)

California Code of Civil Procedure ("CCP") § 483.010(a) requires that "except as otherwise provided by statute, an attachment may be issued only in an action on a claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of the claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars ($500) exclusive of costs, interest, and attorney's fees." CCP § 482.110 allows the attachment to include "an estimated amount for costs and allowable attorney's fees" which can be secured at the discretion of the Court. (CCP § 482.110.)

A defendant who opposes a right to attach order must give notice of his objection, "accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised." (CCP § 484.060(a).) The defendant may make a claim of exemption with respect to his property in the opposition. (CCP § 484.070.)

Under Code of Civil Procedure section 483.010, "a prejudgment attachment may issue only if the claim sued upon … either unsecured or secured by personal property, not real property (including fixtures): and commercial in nature." (*Goldstein v. Barak Construction* (2008) 164 Cal.App.4th 845, 852.) Here, the sale of the home is a commercial sale.

In their Reply, Defendants objected to several pieces of evidence put forward by Plaintiffs. Defendants objected to Harr's alleged knowledge of the culvert under the house, the size of the cracks in the home, the amount of money needed to repair the defects and more. (Reply, p.3:1-7,11-15,24.) California Rules of Court ("CRC") § 3.1354, however, requires that "all written objections to

evidence must be served and filed separately from the other papers in support of or in opposition to the motion." (CRC § 3.1354.) The Court declines to rule on Defendants improper objections.

Probable Validity

A claim has "probable validity" when it is "'more likely than not' the plaintiff will obtain a judgment on that claim." (*Santa Clara Waste Water Co. v. Allied World National Assurance Co.* (2017) 18 Cal.App.5th 881, 885.)

Plaintiffs here allege that it is more likely than not that they will prevail because Harr had allegedly "tied the Property's downspouts directly in the culvert" and so was aware of the faulty foundation when the property was sold to Plaintiffs. (MPAs ISO Application, p. 4:14.) However, the only written contract made between the parties was the Agreement, which was executed by First Venture LLC. ("First Venture"), which has since dissolved. (Opp., p.4:27.) First Venture, a limited liability company, "has a legal existence separate from its members. Its form provides members with limited liability to the same extent enjoyed by corporate shareholders, but permits the members to actively participate in the management and control of the company." (*Paclink Communications Internat. v. Superior Court* (2001) 90 Cal.App.4th 958, 963.)

The alter ego doctrine has two general requirements: (1) that there must be a unity of ownership and interest such that the separate personalities of the corporation and shareholder do not in reality exists, and (2) that, if the acts are treated as those of the corporation, there will be an inequitable result. If the two requirements are met, the party may "pierce the corporate veil" and attach liability to the individual instead of the corporation. Courts have used many factors to determine if the requirements are met, but "there is no litmus test to determine when the corporate veil will be pierced; rather the result will depend on the circumstances of each particular case." (*Curci Investments, LLC v. Baldwin* (2017) 14 Cal.App.5th 214, 221.)

Here, the Agreement was made between Plaintiffs and First Venture, with Harr acting as signatory on First Venture's behalf. Plaintiffs allege that Harr "failed to adequately provide protection for the LLC's potential creditors," but have not provided any other evidence or argument in support of piercing the corporate veil. (Reply, p.2:16-20.) The Agreement at issue, then, was not with the party from whom Plaintiffs seek attachment.

"An attachment must be based on a contract claim." (*Chino Commercial Bank, N.A. v. Peters* (2010) Cal.App.4th 1163, 1170.) Here, the Agreement was made for the sale of the home and is the only written contract offered by either party. Subsequent repair work done by Harr and the damages found in the home were not included in the Agreement. Despite this, the damages Plaintiffs ask for include *Stearman* costs, expert costs, attorneys' fees, costs in preparing the home for sale and diminution in value of the home. (Decl. of Carroll in Supp. Of Attachment EX-5.) None of these values were included in the Agreement. Without an express or implied contract as per CCP § 483.010(a), the values included cannot be included in the writ of attachment. Plaintiffs have not established that they are more likely than not to obtain a judgment on their claim.

Fixed or Readily Ascertainable

"Fixed or readily ascertainable" means only that "the damages are readily ascertainable by reference to the contract and the basis of the computation of damages appears to be reasonable and definite."

(*CIT Group/Equipment Financing, Inc. v. Super DVD, Inc.* (2004) 115 Cal.App.4th 537, 540.) The damages can be uncertain and proven at trial as long as "such damages are easily ascertainable according to fixed standards supplied by the contract or the laws acting upon it." (*Greenebaum v. Smith* (1921) 51 Cal.App.692, 694: see also *CIT Group/Equipment Financing, Inc. v. Super DVD, Inc.* (2004) 115 Cal.App.4th 537, 541, where the Court held that "uncertainty as to the specific amount of ultimate damages is not a basis to deny attachment.") Although in some respects *Stearman* costs, expert costs and attorneys' fees are known quantities, those amounts are not included in the written Agreement. Consequently, they are not according to "fixed standards supplied by the contract" and so are not fixed or readily ascertainable.

Furthermore, the diminution in value is an estimate based on expert opinion of the value of the property without defects ($3.2 million) and the actual sale price ($2.4 million). Assuming that this might be recoverable (on a proper showing) after trial, it is not based on fixed standards supplied by the contract, and also would not be fixed or readily ascertainable by the written Agreement.

Finally, any oral contracts allegedly made between Harr and Plaintiffs when Harr repaired the home would also not be fixed or readily ascertainable for the same reason.

The Court finds that attachment is not proper here. The Application is denied.

4. 9:00 AM CASE NUMBER: MSC19-01377
CASE NAME: DUHE VS. HOSPITAL COURIERS
SPECIAL SET HEARING COMPLIANCE HEARING+DEPT. 39+
TENTATIVE RULING:

Based on the declaration of Madely Nava, proper disbursements are established. The Administrator is directed to disburse the cy pres funds to the recipient upon entry of an amended judgment (to be submitted by counsel). Once the amended judgment is entered and the cy pres funds are disbursed, the administrator shall disburse the remaining attorney's fees to counsel.

5. 9:00 AM CASE NUMBER: MSC20-01426
CASE NAME: ROIC PINOLE VISTA VS SANDERS
HEARING ON DEMURRER TO: AMND CRS-COMPLAINT
TENTATIVE RULING:

Before the Court is a demurrer by plaintiff and cross-defendant ROIC Pinole Vista, LLC ("ROIC") to the Amended Cross-Complaint. For the reasons set forth, the general demurrers and special demurrers to the Amended Cross-Complaint are **overruled.**

Case Background

Plaintiff ROIC owns a commercial shopping center in Pinole ("Pinole Center"). Cross-Complainants are

tenants who operated a UPS Store in the Pinole Center. On July 27, 2020, ROIC sued them for breach of their lease ("Pinole Lease") based on nonpayment of rent.

With leave of Court, Cross-Complainants filed their original cross-complaint on August 13, 2021. They alleged that ROIC violated a radius restriction in the Pinole Lease by ROIC entering into a lease to another UPS Store within five miles of their location in the Pinole Center on or about November 1, 2020, and asserted five causes of action against ROIC based on that conduct.

The Court sustained ROIC's general demurrers to all causes of action in the original cross-complaint with leave to amend. The Court found the radius restriction precluded the Cross-Complainants as the Tenant from operating another UPS Store within the five-mile radius but did not preclude ROIC as Landlord from leasing to another UPS Store within that radius. (*See* 2/4/2022 Not. of Rul. on Dem. to Cross. Comp. and attached 2/3/2022 Tent. Rul.) Cross-Complainants were granted leave to amend.

Amended Cross-Complaint

The Amended Cross-Complaint alleges (1) violation of the Unfair Competition Law, Business & Professions Code section 17200, *et seq.* ("UCL"), (2) intentional interference with prospective business advantage; and (3) civil conspiracy. They allege that they had a franchise agreement with The UPS Store ("UPS") to operate a UPS store at the Pinole Vista Shopping Center from 2014 through 2017. (Am. Cross-Compl. ¶¶ 5-8.) They notified UPS they intended to relocate, but UPS did not approve the relocation. (Am. Cross-Compl. ¶¶ 9-11.) UPS directed them to sell the business to a UPS-approved buyer immediately or to operate as an independent business, so they began operating as an independent business (Pinole Packaging and Postage) while they tried to find a buyer. (Am. Cross-Compl. ¶¶ 11-13.)

They obtained approval to sell their business from UPS in August 2019. On October 26, 2019, they "reached agreement to sell" their business to a UPS-approved buyer, they received the sales agreement from UPS, and they signed the agreement on November 2, 2019. (Am. Cross-Compl. ¶¶ 13-15.)

Cross-Complainants allege UPS had "been in contact with Cross-Defendants about the pending sale," and the buyer had also been communicating with ROIC regarding the pending sale and transferring Cross-Complainants' unused relocation credits to the buyer. (Am. Cross-Compl. ¶ 16.) On November 5, 2019, Cross-Complainants themselves informed ROIC of the pending sale and asked for paperwork to transfer the lease. (Am. Cross-Compl. ¶ 17.)

The proposed buyer notified Cross-Complainants on November 19, 2019 that she was cancelling the agreement to buy their business. In December 2019, Cross-Complainants discovered that ROIC entered into an agreement with their prospective buyer "to lease a business operating at the UPS Store in the Pinole Vista Shopping Center." (Am. Cross-Compl. ¶¶ 18, 19.)

Standards for Ruling on Demurrer

In ruling on the demurrer, the Court must accept as true all well-pleaded factual allegations of the complaint, but not " 'contentions, deductions or conclusions of fact or law.' " (*Blank v. Kirwan* (1985)

39 Cal. 3d 311, 318.) (*See also Carloss v. County of Alameda* (2015) 242 Cal. App.4th 116, 123; *Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 173 ["a demurrer does not admit the plaintiff's contentions nor conclusions of law or fact."].) The Court gives the complaint "a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan, supra,* 39 Cal. 3d at 318.) The Court also considers matters of which the Court can properly take judicial notice. (*Carloss v. County of Alameda, supra,* 242 Cal.App.4th at 123.)

The Court reviews the Amended Cross-Complaint on demurrer to determine if the factual allegations state a cause of action, regardless of the label Cross-Complainants may have assigned to the claim. "If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38 ("*Quelimane*").)

A general demurrer may be sustained when the facts alleged show the action is barred by the statute of limitations. (*Vaca v. Wachovia Mortgage Corp*. (2011) 198 Cal.App.4th 737, 746.) To sustain a demurrer based on the statute of limitations, however, it must "clearly and affirmatively" appear on the face of the complaint that the cause of action is barred, not that it might be barred. (*Committee v. Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1232 [demurrer based on statute of limitations does not lie when the action may be, but is not necessarily, barred].)

ROIC's Request for Judicial Notice

ROIC requests the Court take judicial notice of its Complaint filed in this action and of the Pinole Lease attached to the Complaint as Exhibit A. (Def. RJN Exhs. A, B.) The Court takes judicial notice of the Complaint and the Pinole Lease attached to it as Exhibit A, which Cross-Complainants referenced, incorporated and relied on in the allegations of their original Cross-Complaint, and which they incorporate by reference in their Amended Cross-Complaint, though they deny the truth of the allegations of the Complaint. (Evid. Code § 452(d); Cross-Compl. ¶¶ 5, 10 [alleging radius restriction provision of Pinole Lease]; Am. Cross-Compl. ¶ 21.) In ruling on a demurrer, the Court may consider prior versions of an amended pleading under the "sham" pleading doctrine. (*Rincon Band of Luiseño Mission Indians etc. v. Flynt* (2021) 70 Cal.App.5th 1059, 1085.)

Analysis

ROIC generally demurs to all causes of action and makes special demurrers for uncertainty to each cause of action. (Code Civ. Proc. §§ 430.10(e), 430.10(f).) Cross-Complainants have not filed any opposition to the demurrers.

A. 2nd C/A – "Intentional Interference with Prospective Business Advantage"

This cause of action alleges that ROIC intentionally interfered with the Cross-Complainants' agreement to sell their business to the buyer. ROIC asserts Cross-Complainants fail to allege an essential element of the claim, and that the claim is also barred by the statute of limitations.

In *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134 ("*Korea Supply*"), the Court held

that an essential element of a cause of action for interference with prospective business advantage is that the defendant engaged in an "independently wrongful act" other than the interference with the prospective business relationship. (*Id.* at 1158-1159.) Though Cross-Complainants have alleged ROIC interfered with their sale agreement with the buyer, the only act they allege ROIC engaged in related to the sale of their business is that ROIC leased premises in the Pinole Vista Shopping Center to another UPS Store to be operated by their buyer. (Am. Cross-Compl. ¶¶ 19, 25, 33.) They do not allege this act breached any provision of the Pinole Lease. Even if they had, the Court previously ruled on the demurrer to the original cross-complaint that they could not state a breach of contract and related claims based on ROIC leasing to another UPS Store within the five-mile radius of Cross-Complainant's store based on the terms of the Pinole Lease. They do not allege any other facts that would make ROIC leasing its property to their buyer independently wrongful.

A cause of action for intentional interference with contractual relations, however, does not require an independently wrongful act to be actionable. (*Id*. at 1158; *Quelimane, supra,* 19 Cal.4th at 55-56 ["Because interference with an existing contract receives greater solicitude than does interference with prospective economic advantage [citation], it is not necessary that the defendant's conduct be wrongful apart from the interference with the contract itself. [Citation.] [¶] . . . Intentionally inducing or causing a breach of an existing contract is . . . a wrong in and of itself."].) "'The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.' [Citation omitted.]" (*Quelimane, supra,* 19 Cal.4th at 55 [quoting *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal. 3d 1118, 1126].)

Interpreted reasonably and liberally and accepted as true on demurrer, the Amended Cross-Complaint alleges a valid, existing sale contract between Cross-Complainants and the buyer which ROIC intentionally acted to disrupt by inducing the buyer to enter into a new lease with ROIC for another location at the center, rather than buying Cross-Complainants' business and taking over their lease. (Am. Cross-Compl. ¶¶ 14-15.) Assessing whether the facts alleged state a cause of action "under any theory, regardless of the title under which the factual basis for relief is stated" (*Quelimane, supra,* 19 Cal.4th at 38), the Amended Cross-Complaint states a cause of action for intentional interference with contractual relations.

ROIC also argues this cause of action is barred by the applicable statute of limitations, which is two years for interference with contract or with prospective business advantage under Code of Civil Procedure section 339, subd. 1. (*Knoell v. Petrovich* (1999) 76 Cal.App.4th 164, 168 [affirming trial court order sustaining demurrer based on statute of limitations]; *Kenworthy v. Brown* (1967) 248 Cal.App.2d 298, 301.) Cross-Complainants allege their buyer canceled the sale agreement in November 2019, and that in December 2019, they discovered that ROIC had entered into a lease with their buyer operating a UPS store in the Pinole Vista Shopping Center. (Am. Cross-Compl. ¶¶ 18, 19.) In their original cross-complaint filed on August 13, 2021, they alleged ROIC violated its lease with Cross-Complainants by entering into a lease with another UPS store in November 2020, the same

lease ROIC allegedly agreed to in principle with the Cross-Complainants' buyer in November 2019 which disrupted their sale contract.

The two-year statute of limitations had not run as of July 2020 when ROIC filed its complaint initiating this action. Under the tolling doctrine, the filing of a complaint by the plaintiff generally tolls the statute of limitations on claims by the defendant against the plaintiff as to any claims where the statute of limitations has not already run when plaintiff files suit. (*ZF Micro Devices, Inc. v. TAT Capital Partners, Ltd.* (2016) 5 Cal.App.5th 69, 88-89; Code Civ. Proc. § 428.10(a) [a party against whom a complaint is filed 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"].) "In multiple decisions predating legislation that abolished the counterclaim and redefined the cross-complaint, the Supreme Court characterized the tolling doctrine as embracing all cross-claims by a defendant against the plaintiff, regardless of their relatedness to the claims asserted in the complaint. [Citations omitted.] . . . [T]he tolling doctrine applies to the counterclaim's modern-day equivalent, the cross-complaint. The Supreme Court's post-1971 recitation of the principle in *Liberty Mut. Ins. Co. v. Fales, supra*, 8 Cal.3d at page 715, footnote 4, offers further support for a broader application of the tolling doctrine. And the rationale for the doctrine—that by filing the complaint 'the plaintiff has thereby waived the [statute of limitations defense] and permitted the defendant to make all proper defenses to the cause of action pleaded' [citation omitted] —appears applicable to both compulsory and permissive cross-complaints." (*Id.* at 91-92 [quoting (*Western etc. Co. v. Tuolumne etc. Corp*. (1944) 63 Cal.App.2d 21, 31)].)

The relation-back doctrine is another doctrine that arguably applies to the facts alleged. "The relation-back doctrine requires that the amended complaint must (1) rest on the same general set of facts, (2) involve the same injury, and (3) refer to the same instrumentality, as the original one. [Citations omitted.]" (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 408-409.) "An amended complaint relates back to the original complaint even if the plaintiff alleges a new legal theory or cause of action, so long as the amended complaint is based on the same general set of facts. [Citation omitted.] To determine whether an amended complaint rests on the same general set of facts for purposes of the statute of limitations, the most important consideration is whether the original pleading gave the defendant adequate notice of the claim. [Citation omitted.]" (*Hutcheson v. Superior Court* (2022) 74 Cal.App.5th 932, 940.) There is no bright line for determining whether allegations of an amended complaint are so dissimilar from the original that the relation-back doctrine does not apply. (*Scholes v. Lambirth Trucking Co.* (2017) 10 Cal.App.5th 590, 599.)

The same basic facts and instrumentality of wrongdoing are alleged in the original cross-complaint and amended cross-complaint, namely, that ROIC entered into a lease with another UPS store in the vicinity of Cross-Complainants' store. The same fact and instrumentality – ROIC's agreement to lease premises to the buyer – is at issue in the original cross-complaint alleging that conduct breached the Pinole Lease and in the Amended Cross-Complaint alleging ROIC's agreement to lease to the buyer interfered with and disrupted the Cross-Complainants' sale contract with the buyer. ROIC had adequate notice of the claim from the original cross-complaint, and the relation-back doctrine

elements are met.

The general demurrers to the second cause of action on the ground this cause of action fails to state a cause of action and on the ground the claim is barred by the statute of limitations are therefore **overruled**.

B. 1st C/A - UCL

ROIC demurs to the first cause of action for violation of the UCL on the ground that Cross-Complainants have not alleged any unfair or unlawful conduct by ROIC, because ROIC entering into a lease with the Cross-Complainants' buyer does not violate the Pinole Lease.

The UCL prohibits any "unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code, § 17200.) "The UCL covers a wide range of conduct. It embraces '[] anything that can properly be called a business practice and that at the same time is forbidden by law.'[] [Citations, internal quotation marks omitted.] . . .[¶] Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices. [Citation omitted.] In addition, under section 17200, 'a practice may be deemed unfair even if not specifically proscribed by some other law.' [Citation omitted.]" (*Korea Supply, supra,* 29 Cal.4th at 1143 [quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180].)

While ROIC may have had the ability to lease to another UPS store under the terms of the Pinole Lease, the law prohibits ROIC from intentionally interfering with Cross-Complainants' sale agreement with their buyer. The facts alleged are sufficient to state a cause of action for intentional interference with contract, and those facts also are sufficient to support a cause of action for violation of the UCL based on unfair or unlawful conduct.

ROIC argues that it is only alleged that ROIC interfered with the sale, without "facts to support this." (Memo. ISO Dem. p. 7, ll. 9-10.) A complaint is generally sufficient if it alleges ultimate facts. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 549-550 ["[T]he complaint ordinarily is sufficient if it alleges ultimate rather than evidentiary facts."]; *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal. 4th 861, 872; *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1390 ["A complaint 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."].) They allege ROIC knew about their sale contract with the buyer, that within two weeks after ROIC was made aware of the agreement for the sale of their business, the buyer cancelled the sale and by December 2019 Cross-Complainants discovered ROIC had leased another location in the shopping center to the buyer to operate a UPS store.

Since ROIC was not a party to the sale agreement, the fact the buyer was the party who canceled does not support the conclusion ROIC did not interfere. (Memo. ISO Dem. p. 7, ll. 10-11.) The sequence of events and allegations ROIC had entered into a lease with the buyer near the time the sale was pending is reasonably interpreted to support that Cross-Complainants' allegation that ROIC interfered with the sale, at least for purposes of demurrer.

The demurrer to the first cause of action is **overruled.**

C. 3rd C/A – Civil Conspiracy

ROIC asserts a general demurrer to this cause of action on two grounds. ROIC contends Cross-Complainants have not alleged a viable underlying tort claim or wrongful conduct since it was entitled to enter into a lease with another UPS Store. It also argues they have not alleged that ROIC entered into a conspiracy with another party, since it is the sole cross-defendant. ROIC does not demur to this cause of action based on the statute of limitations.

To state a cause of action for civil conspiracy requires "the commission of an actual tort" and allegations of " 'the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design' [Citation omitted.]" (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 511 [quoting Doctors' Co. v. Superior Court (1989) 49 Cal.3d 39, 44].) " 'Conspiracy' " itself is not a cause of action; conspiracy allegations are typically made in order to assert liability against an actor who did not participate in the underlying wrongful conduct alleged to have been committed by another defendant. [Citations omitted.]" (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1473.)

As to the first point, for the reasons set forth regarding the second cause of action, Cross-Complainants have alleged facts sufficient to state a cause of action for intentional interference with contract. As to the second point, Cross-Complainants name other cross-defendants, albeit fictitiously (Roes 1-10), with whom ROIC conspired to interfere with the sale agreement. (Am. Cross-Compl. ¶¶ 3, 4, 39.) ROIC, the party accused of committing the actual tort, is alleged to be a co-conspirator with others who "entered into an agreement and/or understanding, and otherwise conspired with, Defendants Roe 1-10 to tortuously interfere with cross-complainants business." (Am. Cross-Compl. ¶ 39.) The two grounds ROIC asserts for its general demurrer to this cause of action are therefore not well-founded.

The demurrer to the third cause of action is therefore **overruled.**

D. Special Demurrers

ROIC does not argue any basis on which any of the causes of action are uncertain or ambiguous. Demurrers for uncertainty are disfavored, since ambiguities in the pleading can be clarified through discovery. (*A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 695.) The special demurrers for uncertainty are **overruled.**

6. 9:00 AM CASE NUMBER: MSC20-02078
CASE NAME: CASTELLANOS VS DEVIL MOUNTAIN WHOLESALE
***HEARING ON MOTION IN RE: PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT**
****TENTATIVE RULING:****

Plaintiffs Juan Castellanos and Joel Montes move for preliminary approval of their class action and PAGA settlement with defendants Devil Mountain Wholesale Nursery, Inc. and Devil Mountain Wholesale Nursery, LLC.

A. Background and Settlement Terms

Castellanos filed the original complaint on October 13, 2020, raising a class action on behalf of non-exempt employees alleging that defendant violated the Labor Code in various ways, including unpaid overtime, unpaid minimum wage, con-compliant meal and rest periods, unreimbursed business expenses, failure to maintain payroll records, waiting time, and wage statement claims. On November 13, 2020, the complaint was amended to add PAGA claims. On December 29, 2020, Montes filed a similar complaint, also in this county. The two cases were consolidated by stipulation and order on August 2, 2021.

The settlement would create a gross settlement fund of $970,000. The class representative payment to each of the two plaintiffs would be $7,500. Counsel's attorney's fees would be $339,500 (35% of the settlement). Litigation costs would not exceed $25,000. The settlement administrator would receive an estimated $10,500. PAGA penalties would be $20,000, resulting in a payment of $15,000 to the LWDA. The fund is non-reversionary. The approximate net payment amount is $560,000, and the estimated class size is 284 members.

The proposed settlement would certify a class of all hourly, non-exempt employees of defendants in the State of California who worked at any time from October 13, 2016, through the date of preliminary approval, excluding employees who have signed arbitration and/or separation agreements (estimated at 708 employees).

The class members will not be required to file a claim. Class members may object or opt out of the settlement. (Class members cannot opt out of the PAGA portion of the settlement.) Funds would be apportioned to class members based on the number of individual workweeks worked by the individual employee during the relevant time period. As to the PAGA Members, the employee portion of the PAGA penalties will be allocated in the same manner. (Par. 44(b).) Since PAGA members cannot opt out, they will receive their portion of the PAGA penalties regardless of whether they opt out.

Various prescribed follow-up steps will be taken with respect to mail that is returned as undeliverable. Checks uncashed checks after 180 days will be tendered to the State Controller's unclaimed property fund.

The settlement contains release language, releasing all claims "arising from, or related to, the same set of operative facts as those set forth in the operative complaints in the Actions and in the

Plaintiffs' PAGA letters." (Par. 26, 63.) It then identifies specific types of claims falling within that general provision. The limitation to claims arising from facts alleged in the complaint is important. (*Amaro v. Anaheim Arena Mgmt., LLC* (2021) 69 Cal.App.5th 521, 537 ["A court cannot release claims that are outside the scope of the allegations of the complaint." "Put another way, a release of claims that' go beyond the scope of the allegations in the operative complaint' is impermissible." (*Id*., quoting *Marshall v. Northrop Grumman Corp*. (C.D. Cal.2020) 469 F.Supp.3d 942, 949.)

Informal discovery was undertaken prior to mediation, including analysis of a 20% sample of time and payroll data. The matter settled after extensive arms-length negotiations, with included a mediation session with an experienced mediator.

Counsel also has provided a summary of a quantitative analysis of the case, and how the settlement compares to the potential value of the case, after allowing for various risks and contingencies. Counsel estimates the maximum potential liability at $11,799,803.76. This is broken down by separate categories for meal and rest period violations, unpaid off-the-clock work and overtime, unreimbursed business expenses, waiting time penalties, and wage statement penalties. Plaintiffs also estimate PAGA penalties at a maximum of $8,953,500. The potential liability needs to be adjusted for various evidence and risk-based contingencies, including problems of proof, as well as the derivative nature of wage statement and waiting time penalties. Claims for PAGA penalties are difficult to evaluate for a number of reasons: they derive from other violations, they include "stacking" of violations, the law may only allow application of the "initial violation" penalty amount, and the total amount may be reduced in the discretion of the court. (See Labor Code, § 2699(e)(2) [PAGA penalties may be reduced where "based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust arbitrary and oppressive, or confiscatory."])

The LWDA was notified of the settlement.

B. Legal Standards

The primary determination to be made is whether the proposed settlement is "fair, reasonable, and adequate," under *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, 1801, including "the strength of 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 state of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction … to the proposed settlement." (See also *Amaro v. Anaheim Arena Mgmt., LLC, supra,* 69 Cal.App.5th 521.)

Because this matter also proposes to settle PAGA claims, the Court also must consider the criteria that apply under that statute. Recently, the Court of Appeal's decision in *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, provided guidance on this issue. In *Moniz*, the court found that the "fair, reasonable, and adequate" standard applicable to class actions applies to PAGA settlements. (*Id.*, at 64.) The Court also held that the trial court must assess "the fairness of the settlement's allocation of civil penalties between the affected aggrieved employees[.]" (*Id*., at 64-65.)

California law provides some general guidance concerning judicial approval of any settlement. First, public policy generally favors settlement. (*Neary v. Regents of University of California* (1992) 3

Cal.4th 273.) Nonetheless, the court should not approve an agreement contrary to law or public policy. (*Bechtel Corp. v. Superior Court* (1973) 33 Cal.App.3d 405, 412; *Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1127.) Moreover, "[t]he court cannot surrender its duty to see that the judgment to be entered is a just one, nor is the court to act as a mere puppet in the matter." (*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664.) As a result, courts have specifically noted that *Neary* does not always apply, because "[w]here the rights of the public are implicated, the additional safeguard of judicial review, though more cumbersome to the settlement process, serves a salutatory purpose." (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 48, 63.)

C. Attorney fees

Plaintiffs seek 35% of the total settlement amount as fees, relying on the "common fund" theory. Even a proper common fund-based fee award, however, should be reviewed through a lodestar cross-check. In *Lafitte v. Robert Half International* (2016) 1 Cal.5th 480, 503, the Supreme Court endorsed the use of a lodestar cross-check as a way to determine whether the percentage allocated is reasonable. It stated: "If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment." (*Id*., at 505.) Following typical practice, however, the fee award will not be considered at this time, but only as part of final approval.

Similarly, litigation costs and the requested representative payment of $7,500 for each plaintiff will be reviewed at time of final approval. Criteria for evaluation of such requests are discussed in *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-807.

D. Discussion

The moving papers sufficiently establish that the proposed settlement is fair, reasonable, and adequate to justify preliminary approval.

E. Conclusion

The motion is granted. Counsel are directed to prepare an order reflecting this tentative ruling, the other findings in the previously submitted proposed order, and to obtain a hearing date for the motion for final approval from the Department clerk. Other dates in the scheduled notice process should track as appropriate to the hearing date.

The ultimate judgment must provide for a compliance hearing after the settlement has been completely implemented. Plaintiffs' counsel are to submit a compliance statement one week before the compliance hearing date. 5% of the attorney's fees are to be withheld by the claims administrator pending satisfactory compliance as found by the Court.

The further case management conference set for July 27, 2022 at 8:30 a.m. is vacated.

7. 9:00 AM CASE NUMBER: MSC21-01952
CASE NAME: TARA STARR VS THOMAS STARR
***HEARING ON MOTION IN RE: TO BE RELIEVED AS COUNSEL**
****TENTATIVE RULING:****

Granted. Counsel is directed to serve a copy of the order granting the motion on the client and to file proof of service with the court. In accordance with Rule of Court 3.1362(e), the order relieving counsel is not effective until that proof of service is filed.

8. 9:00 AM CASE NUMBER: MSC21-02242
CASE NAME: RODRIGUEZ VS. GONSALVES & SANTUCCI
***HEARING ON MOTION IN RE: JUDGMENT ON THE PLEADINGS**
****TENTATIVE RULING:****

Before the Court is Defendant Gonsalves & Santucci, Inc. ("Defendant")'s motion for judgment on the pleadings ("MJOP"). The MJOP relates to Plaintiff Elmer N. Rodriguez ("Plaintiff")'s Complaint under the Labor Code Private Attorneys' General Act of 2004 ("PAGA") for civil penalties under Labor Code §§ 210, 226.3, 558, 1174.5, 1197.1, and 2699.

Defendant moves for judgment on the pleadings pursuant to Code of Civil Procedure ("CCP") § 438 on the grounds that Labor Code § 2699.6(a) applies to exempt Defendant (a construction industry employer) from PAGA liability where there is a valid collective bargaining agreement ("CBA") that explicitly waives PAGA.

For the following reasons, the MJOP is denied.

Evidentiary Objections

As a threshold issue, the Court notes that a motion for judgment on the pleadings turns on "the facts as alleged in the pleading or subject to judicial notice," not declarations. (See *County of Orange v. Association of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 32; accord *Harris v. Grimes* (2002) 104 Cal.App.4th 180, 185.)

Del E. Webb Corporation v. Structural Materials Company (1981) 123 Cal.App.3d 593, 604-605, explains, "[t]he court will take judicial notice of records such as admissions, answers to interrogatories, affidavits, and the like, when considering a demurrer, only where they contain statements of the plaintiff or his agent which are inconsistent with the allegations of the pleading before the court. The hearing on 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. [Citation.]" (Fn. 7 omitted.) *Pang v. Beverly Hospital,*

Inc. (2000) 79 Cal.App.4th 986, 989-990, provides, "[a]n MJOP is equivalent to a demurrer and is governed by the same standard of review. All material facts that were properly pleaded are deemed true, but not contentions, deductions, or conclusions of fact or law. If leave to amend was not granted, we determine whether the complaint states a cause of action and whether the defect can reasonably be cured by amendment. If the pleading defect can be cured, the trial court committed reversible error. If not, we affirm. The plaintiff bears the burden of proof on this issue. Finally, the judgment will be affirmed if it is proper on any grounds raised in the motion even if the court did not rely on those grounds. [Citation.] [¶] In addition to the facts pleaded, we may consider matters that may be judicially noticed, including a party's admissions or concessions which cannot reasonably be controverted. [Citation.]"

As such, the Court only considers those documents attached to the Declarations of Jessica Fraser and William J. Kim that are subject to judicial notice, as described further below. The Court does not otherwise consider the testimony of Ms. Fraser or Mr. Kim (unrelated to Defendants' efforts to meet and confer).

Request for Judicial Notice

Defendant's Request for Judicial Notice

A. Defendant requests Judicial Notice of several court records from *Rodriguez v. Gonsalves & Santucci, Inc. et al*., Case No. 3:21-cv-07874 in the federal court for the Northern District of California pursuant to Evidence Code §§ 452, 453, and CRC 3.1306(c).

Plaintiff's primary objection to this Request is relevance. The Court declines to deny the Request on the grounds of relevance. *Rodriguez v. Gonsalves & Santucci, Inc. et al*., Case No. 20 3:21-cv-07874 in the Northern District of California is between the same parties and involves similar Labor Code allegations. The Court also notes that Plaintiff requests judicial notice of an order from the same action.

Evidence Code § 452(d) authorizes judicial notice of court records. The Court takes judicial notice of the existence of these documents, including the truth of results reached, but not the truth of hearsay statements in decisions and court files. (See *in re Vicks* (2013) 56 Cal.4th 274, 314 [court may take judicial notice of a judgment in another case, but not of the truth of facts asserted during testimony in that case]; see also *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1568.) Thus, "[a] court cannot take judicial notice of hearsay allegations as being true, just because they are part of a court record or file." (*Sosinsky*, *supra*, 6 Cal.App.4th at p. 1566, citing *People v. Surety Insurance Co.* (1982) 136 Cal.App.3d 556, 564.) The court may not properly take judicial notice of the truth of statements made in a declaration. (*Sosinsky*, *supra*, 6 Cal.App.4th at p. 1567 citing *Bach v. McNelis* (1989) 207 Cal.App.3d 852, 864-865.)

Subject to the above limitations, the Court takes judicial notice of the court records from *Rodriguez v. Gonsalves & Santucci, Inc. et al*., Case No. 3:21-cv-07874 in the federal court for the Northern District of California. (Evid. Code § 452(d).)

B. Defendant also requests Judicial Notice of the Collective Bargaining Agreement entitled, "Agreement Iron Worker Employers State of California and a Portion of Nevada And District Council of Iron Workers of the State of California and Vicinity" dated July 1, 2020 –

December 31, 2024 between Gonsalves & Santucci, Inc. and District of Iron Workers of the State of California and Vicinity, Local Union 377 pursuant to Evidence Code § 452(d) as well as § 452(h).

Defendant requests judicial notice of the CBA on the grounds that it is a Court record within the meaning of Evidence Code § 452(d). The Court has reviewed the Court records at issue. Critically, both the order dismissing case and denying motion to remand (RJN Ex. 16) and the order granting the motion to dismiss the amended complaint (RJN Ex. 21) took judicial notice of the CBA. The request in that case was unopposed. (See RJN Ex. 16 at p.2, fn. 4.)

The Court may take judicial notice of a content of a court record where the existence of the record itself precludes contravention of that which is recited in it, such as where findings of fact, conclusions of law or a judgment bind a party for purposes of res judicata or collateral estoppel. (*Columbia Casualty Co. v. Northwestern Nat. Ins. Co*. (1991) 231 Cal.App.3d 457, 473.) However, "[w]hether a factual finding is true is a different question than whether the truth of that factual finding may or may not be subsequently litigated a second time. The doctrines of res judicata and collateral estoppel will, when they apply, serve to bar relitigation of a factual dispute even in those instances where the factual dispute was erroneously decided in favor of a party who did not testify truthfully." (See *Sosinsky*, *supra*, 6 Cal.App.4th at p. 1569 citing *Nakash v. Superior Court* (1987) 196 Cal.App.3d 59, 67 [res judicata] and *McClain v. Rush* (1989) 216 Cal.App.3d 18, 28-29 [collateral estoppel].)

The Court grants the request pursuant to § 452(d) (but declines to grant this request pursuant to § 452(h); see further discussion, below).

C. Defendant also requests Judicial Notice of the fact that Plaintiff is a member of District Council of Iron Workers of the State of California and Vicinity, Local Union 377 pursuant to Evidence Code § 452(h).

This fact is not undisputed, as evidenced by Plaintiff's vigorous opposition to Defendant's request for judicial notice. If there is any possibility of dispute, the fact cannot be judicially noticed. (*Communist Party of United States v. Peek* (1942) 20 Cal.2d 536, 546.) Such is not the case here.

Evidence Code § 452(h) only allows the Court to take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Judicial notice under this section is "intended to cover facts which are not reasonably subject to dispute and are easily verified. These include, for example, facts which are widely accepted by experts and specialists in the natural, physical, and social sciences which can be verified by reference to treatises, encyclopedias, almanacs and the like or by persons learned in the subject matter....The statute has also been used on demurrer to take judicial notice of facts commonly known in the community, such as ownership, easements and control over land....and the history and operation of a local museum." (*Gould v. Maryland Sound Industries, Inc*. (1995) 31 Cal.App.4th 1137, 1145 [citations omitted].)

The Court declines to take judicial notice of this "fact."

D. Defendant also requests Judicial Notice of an unpublished minute order dated January 22, 2020 in Alvarez v. Gonsalves & Santucci, Inc., Case No. 19STCV24444.

E. Defendant also requests Judicial Notice of an unpublished minute order dated February 26,

2019 in Deloache v. Sukut Construction, Case No. 56-2018-00516761-CU-OE-VTA.

With certain exceptions, not applicable here, the Rules of Court generally prohibit the Court from noticing unpublished opinions. (Cal. Rules of Court, rule 8.1115(a).) The Court declines to take judicial notice of these minute orders.

Plaintiff's Request for Judicial Notice

Plaintiff requests judicial notice of a June 2, 2022 court order from *Rodriguez v. Gonsalves & Santucci, Inc. et al*., Case No.: 3:21-cv-07874. Defendant's sole objection is to relevance. The Court overrules the objection and grants Plaintiff's request. (Evid. Code § 452(d).)

Analysis

Labor Code § 2699.6(a)

Section 2699.6 provides that PAGA:

shall not apply to an employee in the construction industry with respect to work performed under a valid collective bargaining agreement in effect any time before January 1, 2025, that expressly provides for the wages, hours of work, and working conditions of employees, premium wage rates for all overtime hours worked, and for the employee to receive a regular hourly pay rate of not less than 30 percent more than the state minimum wage rate, and the agreement does all of the following:

(1) Prohibits all of the violations of this code that would be redressable pursuant to this part, and provides for a grievance and binding arbitration procedure to redress those violations.

(2) Expressly waives the requirements of this part in clear and unambiguous terms.

(3) Authorizes the arbitrator to award any and all remedies otherwise available under this code, provided that nothing in this section authorizes the award of penalties under this part that would be payable to the Labor and Workforce Development Agency.

(Labor Code § 2699.6.)

Although the Court has taken judicial notice of the CBA, it cannot conclude that Plaintiff is a member of Local Union 377 and subject to the terms of the CBA. Without an allegation or concession by Plaintiff that he is so bound, the Court cannot conclude that Defendant is entitled to the statutory exemption set forth in Labor Code § 2699.6.

The MJOP is denied. The Court declines to award sanctions to either party.

9. 9:00 AM CASE NUMBER: MSC21-02280
CASE NAME: ASAAD VS CITY OF SAN RAMON
***HEARING ON MOTION IN RE: MTN TO SET ASIDE DEFAULT & DEFAULT JUDGMENT**
****TENTATIVE RULING:****

The motion by defendants Contra Costa Regional Medical Center and Samantha Parr, R.N. ("moving defendants") to set aside their defaults, is **granted** and the proposed answer, submitted as

an attachment to defendants' proposed order, shall be filed and served by July 11, 2022.

Plaintiff Maissa Assad filed this case on October 29, 2021. The proofs of service indicate the complaint was personally served on moving defendants on November 17, 2021. (Declaration of Maissa Assad in Support of Opposition, hereinafter "Assad Decl.," Ex. A.) Counsel for the moving defendants and plaintiff exchanged emails beginning on December 8, 2021 when plaintiff agreed to extend moving defendants' time to answer by 30 days since she intended to amend the complaint. (Declaration of Jason W. Mauck in Support of Motion, hereinafter "Mauck Decl.," Ex. A.)

On December 24, 2021, plaintiff requested her own extension of time (from moving defendants) in order to file an anticipated amended complaint. (Mauck Decl., Ex. B.) On January 31st, moving defendants confirmed with plaintiff that they would have "35 days from the date of service to respond." (Mauck Decl., Ex. C.) Plaintiff's response was, "Please do have over 35 days to respond." (Mauck Decl., Ex. D.) Plaintiff attempted to file an amended complaint, but does not appear to have served it. The amended complaint was rejected for formatting reasons. (Correspondence Memo mailed to plaintiff February 2, 2022.) On March 2, 2022, an Order to Show Cause was issued because plaintiff had not taken the defaults of moving defendants.

Plaintiff's response was to attempt to take the defaults of moving defendants on March 15, 2022, an attempt that was initially rejected.

At no point did plaintiff tell moving defendants she had changed her mind regarding her intention to file an amended complaint, or serve them with any amended complaint, even though she continued communicating with counsel for the moving defendants. Plaintiff then demanded a response to the original complaint on March 16th, the same day she successfully requested the defaults of moving defendants be entered.

On March 18, 2022, the Court held a status conference. Moving defendants told the Court they would be bringing this motion. They told plaintiff they had not received any amended complaint. (See Assad Decl., Ex. D.) Plaintiff still refused to vacate the default.

A few days later, on March 24, 2022, moving defendants brought this motion to set aside their defaults. They argue circumstances showing mistake, inadvertence, surprise, or excusable neglect pursuant to Code of Civil Procedure § 473(b). Plaintiff opposes the motion, arguing that Code of Civil Procedure § 473.5 requires a declaration showing lack of actual notice. She also argues moving defendants do not provide explanation for the delay in filing their motion.

Discussion

Code of Civil Procedure § 473 (b) states, in relevant part:

> The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other

> pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.

Code of Civil Procedure section 473 is a remedial statute to be "applied liberally" in favor of relief if the opposing party will not suffer prejudice. The law strongly favors trial and disposition on the merits. "Unless inexcusable neglect is clear, the policy favoring trial on the merits prevails." (*Minick v. City of Petaluma* (2016) 3 Cal.App.5th 15, 24, quoting *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 235). Where the party in default moves promptly to seek relief, and the party opposing the motion will not suffer prejudice if relief is granted, "very slight evidence will be required to justify a court in setting aside the default." (*Murray & Murray v. Raissi Real Estate Development, LLC* (2015) 233 Cal.App.4th 379, 385.)

To the extent the evidence is in conflict, it must be construed in light of the policy favoring trial on the merits. "Because the law favors disposing of cases on their merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980, citations omitted.)

Despite knowing moving defendants were relying on her filing an amended complaint, plaintiff never informed moving defendants that the amended complaint had been rejected or warned them that their defaults were going to be taken. Any communication provided was sporadic and confusing. Once moving defendants learned their defaults had been taken, it was only a matter of days before they brought this motion, not an unreasonable amount of time. As a result, the requisite showing has been made.

Plaintiff argues she was *required* to seek the defaults because the Court had issued and Order to Show Cause related to her delay. The argument conflates plaintiff's duties to the Court with her duties to the opposing parties. (See *Lasalle v. Vogel* (2019) 36 Cal.App.5th 127 [email warning and one day mail notice was insufficient to satisfy ethical obligation to warn opposing counsel regarding intention to request default].) Plaintiff additionally could have responded to the OSC by informing the Court of the reasons (cause) for not taking the defaults (i.e. that she had been in communication with moving defendants and told them she was going to amend, and had not yet amended, etc.).

No award of fees is appropriate here. The default is set aside on the discretionary grounds of "mistake, inadvertence, surprise, or excusable neglect," not attorney fault (for which fees are mandatory). Plaintiff is also acting in pro per. (See *Trope v. Katz* (1995) 11 Cal.4th 274, 280 [addressing unavailability of attorney's fees where party is self-represented].) Finally, any attorney-related costs claimed do not relate to the motion at hand, but to efforts to obtain medical records—a separate question from the defaults at issue here.

10. 9:00 AM CASE NUMBER: MSN21-1755
CASE NAME: MARK S. VS STATE OF CALIFORNIA
HEARING ON DEMURRER TO: FIRST AMENDED COMPLAINT
TENTATIVE RULING:

The California Department of Education, State Board of Education and Tony Thurmond's demurrer to the first amended petition is **overruled as to cause of action four and sustained without leave to amend as to cause of action five**. The State Defendants shall file and serve their answers by August 5, 2022. The Court has extended the time to file answers until after the Court decides the motion for judgment on the pleadings set for hearing on July 21.

The State of California's joinder in the demurrer is granted. The Court's ruling on the demurrer applies to the State of California. The State of California, California Department of Education, State Board of Education and Tony Thurmond are collectively referred to as the State Defendants.

In this demurrer, the State Defendants challenge the Taxpayer Claim (cause of action 4) and the writ claim (cause of action 5). The States Defendants previously demurred to these claims and their demurrer was sustained with leave to amend.

Taxpayer Claim (cause of action four)

The State Defendants argue that Plaintiffs have not alleged a taxpayer claim because their claim is based on the State Defendants' monitoring of the Pittsburg Unified School District. A claim for waste, however, must be based on the expenditure of funds.

"A ' "taxpayer action must involve an actual or threatened expenditure of public funds. [Citation.] [¶] General allegations, innuendo, and legal conclusions are not sufficient [citation]; rather, the plaintiff must cite specific facts and reasons for a belief that some illegal expenditure or injury to the public fisc is occurring or will occur." ' [Citation.] Similarly, the 'term "waste" as used in [Code of Civil Procedure] section 526a means something more than an alleged mistake by public officials in matters involving the exercise of judgment or discretion.' [Citation.] Rather, it is more readily understood as 'a "useless expenditure of funds." ' [Citation.]" (*Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 910.)

Collins explained that a "claim the state-level defendants are wasting state funds by failing to fully implement a monitoring system for discriminatory practices" is not a viable waste claim. *Collins* explained that "[t]he extent to which those funds are appropriately spent is, absent additional allegations that the assignment of funds to that program is illegal, a political issue involving legislative discretion on how to comply with their legal obligations." (*Id.* at 911, fn. 12 (citing to *Humane Society of the United States v. State Bd. of Equalization* (2007) 152 Cal.App.4th 349, 356].)

Collins found that the taxpayer plaintiffs had stated a claim for waste explaining that

"although appellants' contentions are vague as to the nature of the state-level defendants' actions, appellants do minimally allege that the state-level defendants are authorizing funds that they know are being illegally used by their recipients, that illegality arising, at a minimum, from a violation of the equal protection clause." (*Collins, supra,* 41 Cal.App.5th at 911.)

Here, Plaintiffs allege that the "State Defendants continue to permit or authorize the allocation or reimbursement of public funds to Pittsburg Unified despite knowing that the funds are being illegally used. Because State Defendants have permitted the use of these funds or authorized these funds without fulfilling their statutory and constitutional obligation to ensure these funds are not used to deprive students of equal educational access in a discrimination-free environment, they have also committed waste." (FAP ¶132.) These allegations are similar to the ones found sufficient in *Collins*.

The State Defendants argue that *Collins* can be distinguished because there it was alleged the State was "*authorizing* funds that they know are being illegally used by their recipients". (Reply p. 2.) Yet the allegations here are nearly identical to those in *Collins*. Plaintiffs have alleged that the State Defendants "continue to permit or authorize" funds "knowing that the funds are being illegally used." (FAP ¶132.)

The State Defendants also argue that the claim fails because the taxpayer allegations do not arise from the ministerial duty to approve budgets, but from the discretionary ability to withhold apportionments. This argument does not defeat the taxpayer claim. In *Collins*, the state argued that their duties and obligations are limited to verifying that the budget requests submitted by the local-level defendants meet statutory requirements. (*Id*. at 910-911.) Appellants did not contest this position, but argued that they could state a claim because the state was aware of the discrimination actions and approved the school district's budget and thus failed in an alleged duty to correct those actions. (*Id*. at 911.)

The Court finds that Plaintiffs have alleged a taxpayer claim and the demurrer to cause of action four is overruled.

Writ of Mandate (cause of action five)

The State Defendants argue that Plaintiffs have not alleged any ministerial duties and instead focus on discretionary obligations. The State Defendants' argument focuses on alleged ministerial duties (or lack thereof) and they do not focus on the allegations that State Defendants abused their discretion until the reply.

"To state a cause of action for a writ of mandate, one must plead facts showing (1) a clear duty to act by the defendant; (2) a beneficial interest in the defendant's performance of that duty; (3) the defendant's ability to perform the duty; (4) the defendant's failure to perform that duty or abuse of discretion if acting; and (5) no other plain, speedy, or adequate remedy exists. [Citation.]" (*Collins, supra,* 41 Cal.App.5th at 915.)

"The two requirements for mandamus thus are (1) a clear, present and usually ministerial duty on the part of the respondent, and (2) a clear, present and beneficial right in the petitioner to performance of that duty. [Citation.] And, while mandamus is not available to control the discretion exercised by a public official or board, it is available to correct an abuse of discretion by such party. [Citation.]" (*Barnes v. Wong* (1995) 33 Cal.App.4th 390, 394-395.)

"Mandatory duties are often invoked in the context of ministerial acts. 'A ministerial act is one that a public functionary " ' "is required to perform in a prescribed manner in obedience to the mandate of legal authority," ' " without regard to his or her own judgment or opinion concerning the propriety of such act.' [Citation.] … However, '[w]hile a party may not invoke mandamus to force a public entity to exercise discretionary powers in any particular manner, if the entity refuses to act, mandate is available to compel the exercise of those discretionary powers in some way.' [Citation.]" (*Collins, supra,* 41 Cal.App.5th 879, 914.) " 'Where the duty in question is not ministerial, mandate relief is unavailable unless the petitioner can demonstrate an abuse of discretion.' " (*Alejo v. Torlakson* (2013) 212 Cal.App.4th 768, 780.)

Ministerial Duty

In *Collins* the court found there was no ministerial duty as to how the State defendants monitored a local school. *Collins* explained that the State defendants had a duty to monitor compliance with federal law, but it was a discretionary in nature. The court also noted that it found "no clear mandate in the law for the state to act at any particular moment upon learning of potential violations of the equal protection clause." (*Id*. at 916, fn.13.) Instead, the court explained that "any claim arising from the way in which the state implements such a duty must demonstrate an abuse of discretion." (*Id*. at 918.)

In the First Amended Petition, Plaintiffs allege that the "State Defendants each have a clear and present ministerial duty to provide for equal access to educational opportunity for all children enrolled in the school districts they administer and/or oversee; to take appropriate action to identify and eliminate policies that interfere with the equal participation by their students in their instructional programs; and to monitor and ensure that the schools and/or school districts are in compliance with state and federal statutory and regulatory requirements and the underlying purposes and specific provisions of the California Constitution and state laws applicable to the provision of equal education to students of color and disabled students of color." (FAP ¶140.)

Plaintiffs alleged that the State Defendants violated section 5 C.C.R. section 4900(c) and section 4902. Later, Plaintiffs alleged that the State Defendants violated Education Code section 56000, et seq. (FAP ¶144.) In their opposition brief, Plaintiffs cited to section 56836.04. Section 4900 and 4902 were not included in the original petition. Section 56000 was included, but in the writ section it was included as part of the claims against the District. These regulations and the statutory scheme are new issues. Yet neither side actually discusses the language to argue their position regarding whether the State has a mandatory duty here.

Section 4900(c) states that "It is the intent of the State Board of Education that the

Superintendent of Public Instruction assist school districts and county offices of education to recognize and eliminate unlawful discrimination that may exist within their programs or activities and to meet the requirements of this Chapter. The Superintendent shall meet this responsibility through technical assistance and ensuring compliance pursuant to Chapter 5.1 (commencing with section 4600) of this Title relating to standard complaint procedures."

Section 4902 states that "the Superintendent of Public Instruction is responsible for providing leadership to local agencies to ensure that the requirements of the following nondiscrimination laws and their related regulations are met in educational programs that receive or benefit from state or federal financial assistance and are under the jurisdiction of the State Board of Education…" Section 4902 cites to various statutory schemes, including the Individuals with Disabilities Education Act. (5 CCR 4902(h).)

Section 56836.04(a) states that "The Superintendent continuously shall monitor and review all special education programs approved under this part to ensure that all funds appropriated to special education local plan areas under this part are expended for the purposes intended."

These sections create some potential mandatory duties. The State Defendants waited until reply to address whether these sections created mandatory duties, which did not provide sufficient notice to Plaintiffs. Therefore, the Court's analysis here gives Plaintiffs the benefit of the doubt and assumes that these regulations and statutes create some, albeit limited, mandatory duties.

First, Section 4900(c) states that "The Superintendent shall meet this responsibility [to ensure no unlawful discrimination] through technical assistance and ensuring compliance pursuant to Chapter 5.1 (commencing with section 4600) of this Title relating to standard complaint procedures." This section can be read as required the Superintendent to provide technical assistance, but how the assistance is provided appears to be a matter of discretion. Similarly, how the Superintendent is to ensure compliance section 4600, et seq is a matter of discretion.

Arguably section 4900(c) creates a mandatory duty that the Superintendent must provide technical assistance. The First Amended Petition alleges that the State is providing "technical assistances". (FAP ¶140.) Thus, Plaintiffs have not alleged a violation of a mandatory duty in section 4900(c). Plaintiffs contend that the technical assistances is insufficient, but that argument can only relate to the abuse of discretion claim as it is alleged that the State is doing something and thus, the State has not violated a mandatory duty.

Section 4902 makes the Superintendent "responsible for providing leadership to local agencies to ensure that the requirements of the following nondiscrimination laws and their related regulations are met in educational programs…" This section does not state exactly how the Superintendent is to behavior in providing this leadership and thus, this section does not create a mandatory duty.

Finally, section 56836.04(a) states that "The Superintendent continuously shall monitor and review all special education programs…to ensure that all funds appropriated to special education

local plan areas under this part are expended for the purposes intended." Here there is a mandatory duty that requires the Superintendent to monitor and review the special education programs. But how the Superintendent performs that obligation is not specified in this statute. Thus, as long as the Superintendent is engaging in some more of monitoring and review of the special education programs, the State will have met its mandatory duty.

The First Amended Petition alleges that the State has a "defective system for monitoring" school districts and that this system "fails to identify the scope of systemic issues at school districts, like Pittsburg Unified, that disproportionately segregate disabled students of color into classrooms". (FAP ¶140.) These allegations show that the State is fulfilling its mandatory duty to monitor the school districts and that Plaintiffs objection is with how the monitoring is being conduct. Again, whether the State's actions are so deficient as to abuse its discretion is a different issue than whether the State is preforming any mandatory duty under this section.

The Court finds that Plaintiffs have not alleged the failure to fulfill a mandatory duty by the State Defendants and thus, Plaintiffs have not stated a writ claim based on a mandatory duty.

Abuse of Discretion

Plaintiffs also allege that the State Defendants "have failed and are failing to comply with those duties and obligations and their actions, or inactions, constitute an abuse of discretion." (FAP ¶141.) Thus, the Court must consider whether Plaintiffs have alleged that the State Defendants abused their discretion.

In order to state a claim for abuse of discretion based on the State's duty to monitor local districts, "a plaintiff must allege that the monitoring program in whole is sufficiently flawed such that its continued use constitutes an abuse of discretion." (*Collins, supra,* 41 Cal.App.5th at 918 [citing to *Alejo, supra,* 212 Cal.App.4th at 781].)

In *Collins,* it was alleged that the local-level defendants failed to submit data required of them for the 2011–2012 school year, yet the state-level defendants took no action to procure the date and failed to implement any process for ensuring the data is accurately submitted. (*Id*. at 918.) The court found that a writ claim had been alleged because the plaintiff was "alleging that the state-level defendants, having a mandatory duty to monitor for compliance with federal law, have abused their discretion to do so by failing to implement any review of the program they implemented to ensure they are receiving the data necessary to meet their duty. (*Ibid*.)

Plaintiffs here allege that the State Defendant's monitoring systems are not good enough. Such allegations are insufficient to state a claim based on abuse of discretion. Plaintiffs needed to allege (with facts supporting the allegations) that the State Defendant's monitoring system is so bad that it amounts no essentially no monitoring system. That was not done here. Therefore, the demurrer is sustained.

This is the second demurrer on the same issue and Plaintiffs have not provided additional

facts that they can allege to state a writ claim. Therefore, leave to amend is denied. If Plaintiffs have additional facts that they can add to the petition they may timely contest the tentative ruling and explain those facts and their legal effect at the hearing.

If Plaintiff decides to seek leave to amend they will need to consider how their claim does not run afoul of *AIDS Healthcare Foundation*, which is discussed in the State Defendants' reply papers. In *AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health* (2011) 197 Cal.App.4th 693 the plaintiff sought to compel the health department to protect individuals working on the pornography industry from sexually transmitted diseases by ordering that the department to require performers to be vaccinated and require condom use. (*Id*. at 699.) The court found that plaintiff had not state a writ claim because the claim based on the department's "failure to act" was really a claim that the department's actions were ineffective or failed and the plaintiff sought to compel the department to act in a different manner. The court explained that it "cannot compel another branch of the government to exercise its discretion in a particular manner". (*Id*. at 704-705.)

11. 9:00 AM CASE NUMBER: N22-0690
CASE NAME: CLAIM OF: VANESSA LAKTHANASUK
***HEARING ON MINOR'S COMPROMISE RE: MINOR'S COMPROMISEE**
****TENTATIVE RULING:****

The Guardian ad Litem is ordered to appear in person. Appearance of the minor is waived for good cause.