Tentative Rulings for September 25, 2003
Departments 22, 70, 72, 73

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 321(c).)

03CECG02765 In re Bruce Gabriel (Dept. 72)

03CECG02545 In re Marcelina Hunt (Dept. 70)

03CECG02774 In re John Whitworth (Dept. 73)

03CECG003313 Ninnis & Cribbs v. Kackson (Dept. 73)

03CECG02634 Thompson v. Magee (Dept. 73)

03CECG00414 Hoskins v. Anaya (Dept. 73)

02CECG01921 McCarron v. Wish-Ah Care Home (Dept. 72)

(Tentative Rulings begin at next page)

Tentative Ruling

Re: **Sanchez v. PRIMMS**
Superior Court Case No. 02CECG00910

Hearing Date: September 25, 2003 **(Dept. 72)**

Motion: By plaintiff to compel initial response to interrogatories and for sanctions

Tentative Ruling:

To grant motion and to award sanctions in the amount of $125.

Explanation:

Both the discovery and the moving papers appear to have been properly served on defendant's attorney of record, and no justification has been offered for the failure to respond. Defendant is therefore ordered to serve a complete response, without objection, to Special Interrogatory, Set Two (exhibit A to Costello's supporting declaration), within 10 days of service of this order. Defendant is also ordered to pay monetary sanctions to plaintiff in the amount of $125, within 20 days of service of this order.

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (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: **S J KANE** (Judge's initials) **on** **9/23/03** (Date).

Tentative Ruling

Re: **Haas v. Central Valley RV Outlet, Inc.**
Superior Court Case No. 03CECG02280

Hearing Date: Sept. 25, 2003 **(Dept. 22)**

Motion: Defendant Central Valley RV Outlet, Inc.'s Motion to Compel Arbitration.

Tentative Ruling:

To DENY.

Explanation:

Defendant Central Valley RV Outlet, Inc. contends that Mr. Haas signed an Arbitration Addendum wherein he agreed to arbitrate all disputes arising from the purchase of the motorhome. (Brewer Decl. at ¶ 6, Ex. B.) The Arbitration Addendum provides as follows:

"ARBITRATION: All disputes, claims, or controversies arising from or relating to the Contract or the relationships which result from the Contract, or the validity of this Arbitration Addendum (hereinafter the "Agreement"), shall be resolved by binding arbitration by one arbitrator selected by us with your consent."

"This Arbitration Agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1, et seq. Judgement upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right and opportunity to litigate disputes in court, but that they prefer to resolve their disputes through arbitration, except as provided herein."

"THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY US (AS PROVIDED HEREIN)."

"The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes will be subject to binding arbitration in accord with this Agreement. You agree that you shall not have the right to participate as a representative or a member of any class of claimants pursuant to any claim arising from or relating to this Agreement or the Contract."

"The parties agree and understand that the arbitrator shall have all powers provided by law, the Contract and this Agreement. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief. Notwithstanding anything hereunto the contrary, we retain an option to use judicial or non-judicial relief to enforce a security agreement relating to the property or to foreclosure on the property. Such judicial relief would take the form of a lawsuit. The institution and maintenance of any action for judicial relief in a court to foreclose upon any property, to obtain a monetary judgment or to enforce the Contract and this Agreement shall not constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this Agreement, including the filing of a counterclaim in a suit brought to us pursuant to this provision." (underlining added.)

The entire arbitration agreement is substantively unconscionable and unenforceable because it compels Plaintiffs to arbitrate all disputes, while reserving exclusively for the drafter, Central Valley, the right to bring lawsuits relating to the motorhome's purchase. (*Armendariz v. Foundation Health Psychcare* (2000) 24 Cal. 4th 83, 117-118.)

Note: Plaintiffs ask this court to take judicial notice of two prior trial court rulings in unrelated cases. This request is improper, even assuming the cases involved similar motions. (*Santa Ana Hospital Medical Center v. Belshe* (1997) 56 Cal.App.4th 819, 830.)

Pursuant to CRC rule 391 (a) and CCP 1019.5 (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: **DSB** **on** **9-17-03**.

(Judge's initials) (Date)

Tentative Ruling

Re: **Graphic Arts Mutual Ins. Co. v. Merchants Ins. Co.**
Superior Court Case No. 02CECG01584

Hearing Date: Sept. 25, 2003 **(Dept. 73)**

Motion: Application of Attorney Paul Gorfinkel to Appear as Counsel Pro Hac Vice on behalf of Defendant Merchants Ins. Co.

Tentative Ruling:

To GRANT. (CRC 983.)

Explanation:

Counsel's application appears to comply with the requirements of CRC 983 (b).

Pursuant to CRC rule 391 (a) and CCP 1019.5 (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 **MWS** **on** **9/22/03** **.**
(Judge's initials) (Date)

Tentative Ruling

Re: **Berube v. Vang**
Superior Court Case No. 03CECG00519

Hearing Date: September 25th, 2003 **(Dept. 72)**

Motion: Plaintiff's Motion to Compel Responses to Form Interrogatories, Economic Litigation

Tentative Ruling:

To deny the motion to compel responses to form interrogatories as moot. (CCP § 2030(k).) The court has already ordered defendant to respond to the form interrogatories, economic litigation, at the hearing on September 16th, 2003. To deny the request for monetary sanctions. (CCP § 2023, 2030(k).)

Pursuant to CRC 391(a) and CCP §1019.5(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: **S J KANE** (Judge's Initials) **on** **9/23/03** (Date).

Tentative Ruling

Re: **Kurtmen v. Shell Oil Co**.,
Superior Court Case No. 03CECG01161

Hearing Date: September 25, 2003 **(Dept. 72)**

Motion: Defendant's Motion to Strike Punitive Damage Claims

Tentative Ruling:

To deny the motion to strike punitive damage claims set forth in the Second Amended Complaint. Defendant shall file its answer within 10-days of service of the order.

Explanation:

Are the new allegations mere "conclusions" that are insufficient to support a claim for punitive damages, or adequate statements of "ultimate fact"? As one Court of Appeal explained: "While it is true that pleading conclusions of law does not fulfill this requirement [i.e., of a statement of facts constituting the cause of action], it has long been recognized that 'the distinction between conclusions of law and ultimate facts is not at all clear and involves at most a matter of degree'." (*Perkins v. Sup.Ct.* (1981) 117 Cal.App.3d 1, 6; 4 Witkin, *Calif. Proc*., 4th ed., "Pleading", Sectioin 339, p. 436-437). "The test for allegations of fact or conclusions of law is not absolute; the question is whether the pleading as a whole apprises the adversary of the factual basis of the claim." (*Jackson v. Sup.Ct*. (1994) 30 Cal.App.4th 936, 942; 4 Witkin, *supra*, p. 438).

The Plaintiff now alleges that the failure to correctly maintain and store the petroleum was "with intent to cause damage to the Plaintiff's property". (SAC, par. 20, 24). Liberally construed, it appears that the Plaintiffs are alleging that the Defendant intended to cause harm to Plaintiff's property by means of contamination, and the means used by Defendant to cause such premeditated harm was to intentionally store and/or maintain the petroleum in such a manner as to guarantee the contamination would occur. These are sufficient facts to state a claim for punitive damages, since the statute allows recovery where there is conduct "which is intended by the defendant to cause injury to the plaintiff". (*CCP* 3294(c)(1)). Defendant has been apprised of the factual basis for the claim. Therefore, the motion to strike is denied.

The Defendant argues that there are no 'other' corroborating circumstances alleged to support this charge of intentional harm. While

that may be true, the "ultimate fact" that the contamination was intentionally created is adequately presented for pleading purposes, however improbable the claim may seem.

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (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 S J KANE 9/23/03
Issued By: _____ on _____.
(Judge's initials) (Date)

Tentative Ruling

Re: **Mendiola v. Herghelian**
Superior Court Case No. 02CECG02912

Hearing Date: September 25, 2003 **(Dept. 72)**

Motion: By defendant Tessa Lang for summary judgment.

Tentative Ruling:

To grant. The prevailing party is directed to submit to this court, within 5 days of service of the minute order, a proposed judgment consistent with the court's summary judgment order.

Explanation:

Business and Professions Code section 25602, subdivision (b), provides: "No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section [to an "obviously intoxicated person"] shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage." (All further statutory references are to the Business and Professions Code unless otherwise indicated.) Subdivision (c) states the legislative intent that "the consumption of alcoholic beverages rather than the serving of alcoholic beverages [is] the proximate cause of injuries inflicted upon another by an intoxicated person."

Section 25602.1 provides an exception to the "sweeping civil immunity" of section 25602 if alcoholic beverages are sold to an obviously intoxicated minor. (*Hernandez v. Modesto Portuguese Pentecost Association* (1995) 40 Cal.App.4th 1274, 1281; *Elizarraras v. L.A. Private Security Services, Inc.* (2003) 108 Cal.App.4th 237, 245.) Section 25602.1 provides: "Notwithstanding subdivision (b) of section 25602, a cause of action may be brought by or on behalf of any person who has suffered injury or death against any person licensed, or required to be licensed, pursuant to Section 23300 . . . and any other person who sells, or causes to be sold, any alcoholic beverage, to any obviously intoxicated minor where the furnishing, sale or giving of that beverage to the minor is the proximate cause of the personal injury or death sustained by that person."

The statutory exception of section 25602.1 is a narrow one that is construed strictly. (*Hernandez*, *supra*, 40 Cal.App.4th at p. 1281.) The

phrase "causes to be sold" requires malfeasance, not acquiescence or mere inaction. (*Id.* at pp. 1276-1277.) The statute requires "an affirmative act directly related to the sale of alcohol, which necessarily brings about . . . the selling of alcohol to an obviously intoxicated minor." (*Ibid.*) Moreover, the statute sets forth no duty "to act affirmatively to prevent others, over whom one has no control, from selling alcohol to an obviously intoxicated minor." (*Id.* at p. 1282.)

In finding that an "affirmative act" is required, the court in *Hernandez* followed *Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1157, and cases cited therein, construing section 25658 (making it a crime to sell, furnish or give always alcoholic beverages to a minor). In *Sagadin*, the court held that "'[t]he word "furnish" implies some type of affirmative action on the part of the furnisher . . . .' [Citation]. Among other things, it means to supply, to give, or to provide. [Citation.]" (*Sagadin*, *supra*, 175 Cal.App.3d at p. 1157.) The court went on to list examples of cases in which the defendant's actions did not constitute an affirmative act of furnishing alcohol to another under a furnishing statute:

> "… *[N]o liability arose for merely supplying the host with alcohol or providing a room where alcoholic beverages are served, even when the supplier and the proprietor had knowledge that minors would be served.* Similarly, the failure of university officials to stop a campus drinking party does not constitute the affirmative act of furnishing alcohol. [Citation.] Nor does the mere act of contributing to a common fund for the purchase of liquor constitute furnishing where the defendant never exercised any control over the alcohol consumed by his companions. [Citation.] Finally, the failure to protest or to attempt to stop another from drinking in one's presence is not such an affirmative act of furnishing. [Citation]. In short, nonfeasance does not violate the statute." (*Ibid.*, emphasis added.)

Moreover, liability under section 25602.1 may not be imposed unless the minor exhibited one or more signs of intoxication to the person providing the alcohol sufficient to cause a reasonable person to believe the minor was intoxicated. (*Schaffield v. Abboud* (1993) 15 Cal.App.4th 1133, 1140.)

In the instant case, plaintiffs allege that defendants furnished and gave plaintiffs' decedent alcoholic beverages when she was obviously intoxicated, and therefore are liable under section 25602.1. Under the authorities cited above, plaintiffs must show some "affirmative act" of furnishing or giving alcohol to decedent when she was obviously intoxicated to prove section 25602.1 was violated. Thus, defendant Tessa Lang's contention on summary judgment is that there is no

evidence of such an affirmative act on her part, and therefore an essential element of a cause of action under section 25602.1 cannot be met.

In support of this contention, Lang offers the following as undisputed material facts: during the evening of August 1, 2002, Lang did not offer, provide, serve, or furnish alcohol to Jessica, or anyone (UMF 6) and Lang did not offer, provide, serve, or furnish alcohol to Jessica, or anyone, while in an obvious state of intoxication (UMF 7). In support of these facts, Lang declares:

> "During the evening of August 1, 2002, I did not drink any alcohol in the presence of anyone, and did not serve or provide alcohol to anyone. Nobody asked me to purchase alcohol on their behalf, and I did not see anyone at the Herghelian residence that evening who appeared to be intoxicated. Indeed, I was not even aware that anyone was drinking alcohol in the Herghelian residence while I was there, as I spent nearly the entire evening in Richard's bedroom, and came down for only a moment when Clarence [Baldwin] returned home to wish him a happy birthday, after which I left and went home. Prior to leaving, I did not see anyone unconscious. Finally, and most importantly, I did not offer, provide, serve, or furnish alcohol to anyone named Jessica Mendiola that night of August 1, 2002." (Lang declr., ¶3.)

Lang has met her initial burden of presenting evidence to show that she did not engage in an affirmative act of furnishing or giving alcohol to decedent when decedent was obviously intoxicated, and therefore an essential element of a cause of action under 25602.1 cannot be met. Thus, the burden shifted to plaintiffs to raise a triable issue of material fact.

In opposing the motion, plaintiffs contend that evidence Lang purchased alcoholic beverages for and attended the party at the Herghelian residence raises a reasonable inference that Lang owned and controlled the beverages and was therefore in a position to control their consumption. Accordingly, plaintiffs claim "Lang is legally responsible because the alcohol that she purchased and that she owned and that was being consumed at the party was being furnished by her…" However, the applicable case law does not support the theory of liability advanced by plaintiffs. Rather, it suggests that simply purchasing alcohol, even with knowledge that it will later be consumed by minors, without more does not constitute an "affirmative act" of furnishing alcohol to another within the meaning of section 25602.1. (See *Sagadin*, *supra*, 175 Cal.App.3d at p. 1157.)

Plaintiffs have not presented any evidence of an affirmative act by Lang of providing decedent with alcohol. Rather, plaintiffs' evidence is

largely aimed at challenging the credibility of Lang's declaration. To that end, plaintiffs have submitted a number of depositions regarding the party from which plaintiffs assert a reasonable inference can be drawn that Lang is being untruthful and played a more active role in the party than she claims in her declaration. However, the opposing party must show that some "material fact" is in controversy. It is not enough simply to raise some issue as to the credibility of the moving party's declarations. (See CCP §437(c)(e).)

Significantly, there is no testimony by anyone who attended the party that they saw Lang dispensing or selling alcohol to anyone, or directing someone else to do so. As defendants correctly point out in their reply, each witness whose testimony has been presented to show that they recalled seeing Lang at the party that evening testified simply that they saw her when she was in the living room to wish Clarence Baldwin happy birthday, which is consistent with Lang's declaration. (See C. Mendiola depo., pp. 90, 104 [Exh. "B" of Cornwell declr.]; Baldwin depo., pp. 36-37 [Exh "L"]; Beebe depo., p. 63 [Exh. "I"].) This evidence does not support an inference that Lang engaged in an affirmative act to serve alcohol to decedent when she was obviously intoxicated. Moreover, there is no evidence refuting facts in Lang's declaration that she did not see anyone who appeared to be intoxicated or unconscious. (Lang declr., ¶3.) Plaintiffs attempt to raise a triable issue by suggesting the possibility that Lang was downstairs at the same time decedent was consuming large amounts of alcohol. However, this suggestion is conjectural and is insufficient to raise a triable issue as to whether Lang actually perceived decedent to be intoxicated.

Defendants also attempt to raise a triable issue by suggesting that Lang had a financial stake in the collection of money by defendant Rita Herghelian from guests at the party to pay back Janet Herghelian for the alcohol purchased by Lang with Janet's money. Even assuming Lang was concerned that the money be paid back, there is no evidence that Lang actually directed the collection of money or otherwise engaged in an "affirmative act on the part of the person causing alcohol to be sold, which is directly related to the act of selling alcohol." (*Hernandez*, *supra*, 40 Cal.App.4th at p. 1281.) Also, it is undisputed that nobody ever offered to pay Lang all or a portion of whatever proceeds were collected from people who attended the party, and Lang never received money from Rita Herghelian or anyone collected from attendees of the party. (UMF 12-13, and Lang delcr., ¶4.)

Because there is no evidence that Lang sold, furnished, or gave alcohol to plaintiffs' decedent when she was obviously intoxicated, which is required to impose liability under section 25602.1, Lang is immune from liability for injuries caused by decedent's consumption of alcohol as

a matter of law under section 25602, subdivision (b). Accordingly, the court's tentative ruling is to grant Lang's motion for summary judgment.

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (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.

There have been objections to the evidence. While the court will not announce specific rulings to every objection (*Biljac* v. *First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1419), the court will only consider evidence to which there was no objection, and evidence to which there have been objections which this court has overruled.

Tentative Ruling S J KANE 9/24/03
Issued By: _____ on _____.
(Judge's initials) (Date)

Tentative Ruling

Re: **Nunez v. Obcal Foods Inc.**
Superior Court Case No. 03CECG00946

Hearing Date: September 25th, 2003 **(Dept. 70)**

Motion: Defendants' Mahal and Singh's Demurrers to First Amended Complaint

Tentative Ruling:

To overrule both demurrers to the first cause of action. (CCP § 430.10(e).) To sustain both demurrers to the second cause of action, with leave to amend. (CCP § 430.10(e).) To overrule both demurrers to the third cause of action. (CCP § 430.10(e).) The plaintiff shall file and serve her second amended complaint within 10 days of the date of service of this order. All new allegations shall be in **boldface**.

Explanation:

Mahal's Demurrer: Defendant contends that the allegations of the first cause of action fail to allege any wrongful conduct on the part of the corporations, and therefore plaintiff has not stated a claim against the corporate defendants. However, under the FEHA, a plaintiff can hold the employer vicariously liable for the harassing or discriminatory conduct of a supervisory employee without alleging any affirmative wrongful conduct on the part of the employer. (*Kohler v. Inter-Tel Technologies* (9th Cir. 2001) 244 F.3d 1167, 1177.) Here, plaintiff has alleged that her supervisor, Mahal, engaged in a course of harassment and discrimination against her. (FAC, ¶¶ 10, 12 – 55.) While plaintiff has not alleged that the corporate defendants engaged in any wrongful conduct, such allegations are not necessary in order to impose vicarious liability where the supervisor is the alleged harasser. (*Kohler, supra,* 244 F.3d at 1177.)

Defendant also argues that plaintiff has alleged a conspiracy to violate the FEHA, and that employees of a corporation cannot conspire with the corporate principal. However, plaintiff's first cause of action is for sexual harassment, not for conspiracy. Indeed, plaintiff's fist cause of action does not even mention the term "conspiracy". Clearly, plaintiff has simply alleged that her supervisor sexually harassed her, and that the employer is vicariously liable for his conduct. Therefore, the court's tentative ruling is to overrule the demurrer to the first cause of action.

Mahal next argues that plaintiff's second cause of action for retaliation fails to state a valid claim because plaintiff has not alleged any retaliatory conduct by defendant, nor has plaintiff alleged that she reported the discrimination. In order to state a claim for retaliation, plaintiff must allege (1) that she engaged in a protected activity, (2) that the employer subjected her to an adverse employment action, and (3) that there is a causal link between the protected activity and the employer's action. (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1453.) Here, plaintiff alleges that she complained of the sexual harassment to her supervisor, Mahal. (FAC, ¶¶ 15, 18, 23, 37, 39.) The fact that plaintiff complained to Mahal is sufficient to show that plaintiff engaged in protected activity, since Mahal allegedly owns and manages the store. Mahal seems to argue that plaintiff must allege that she complained to Singh in order to allege a valid report of harassment. However, Mahal cites to no authority requiring a plaintiff to make a report with someone other than her harasser if the harasser is her supervisor and the co-owner of the business that employs her. Under the circumstances, plaintiff has adequately alleged that she complained of the harassment to her employer.

The more difficult question is whether plaintiff has alleged any retaliatory conduct by the employer. The plaintiff must allege that the employer engaged in some retaliatory conduct that resulted in a substantial adverse change in the terms and conditions of employment. (*Akers, supra*, 95 Cal.App.4th at 1455.) Here, plaintiff claims that her constructive termination is the adverse employment action. (FAC, ¶ 94.) Constructively terminating an employee can constitute "adverse employment action" in support of a claim for retaliation. (*Colores v. Board of Trustees of the California State University* (2003) 105 Cal.App.4th 1293, 1312.) Here, however, plaintiff has not alleged that any of the actions taken against her were in retaliation for her reporting Mahal's alleged harassment. It is true that plaintiff has alleged that the harassment against her continued, and perhaps even intensified, after she asked Mahal to stop harassing her. Yet there is no indication that Mahal took any adverse employment action against her in retribution for plaintiff's complaints. Rather, plaintiff simply alleges that Mahal continued his campaign of harassment despite her requests that he stop. Since plaintiff has not alleged any facts showing that her employer punished her for her complaints, plaintiff has not alleged an essential element of her retaliation claim. Therefore, the court's tentative ruling is to sustain the demurrer to the second cause of action, with leave to amend.

On the other hand, Mahal's demurrer to the third cause of action for failure to take steps to prevent harassment is not well taken. Mahal argues again that plaintiff has failed to allege any facts showing that she

reported the harassment to anyone in the company with the power to do something about the harassment. However, while it is true that a defendant may assert a plaintiff's failure to use complaint procedures as an affirmative defense to a harassment claim (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 806), such defenses are properly raised in the answer, not on demurrer. Defendant has pointed to no allegations in the complaint that even show that the company had a procedure in place for complaining about sexual harassment, so there is no basis for finding that plaintiff failed to utilize such a procedure.

In any event, plaintiff has alleged that she complained about the harassment to her supervisor, Mahal. (FAC, ¶¶ 15, 18, 23, 37, 39.) There is no reason to conclude from the allegations of the complaint that Mahal had no power to take action to prevent the harassment. As the co-owner of the store, he had as much authority as anyone to take action. Thus, plaintiff's allegations that she complained to Mahal are sufficient to show that she reported the harassment to the employer.

Again, defendant implies that plaintiff should have reported to the harassment to Singh instead of Mahal. However, there is nothing in the complaint that shows that only Singh had the power to take action against an employee who was harassing another employer. Indeed, according to the FAC, Singh and Mahal were co-owners of the store, and therefore apparently had equal power to discipline employees. Consequently, the fact that plaintiff reported the harassment to Mahal instead of Singh does not mean that plaintiff has not stated a claim for failure to prevent harassment. Thus, the court's tentative ruling is to overrule the demurrer to the third cause of action.

Singh's Demurrer: Plaintiff has alleged that Singh is a manager and co-owner of the Subway restaurant. As discussed above, plaintiff does not have to allege any affirmative conduct on the part of the employer in order to hold the employer vicariously liable for the harassment of a supervisory employee. (*Kohler v. Inter-Tel Technologies* (9th Cir. 2001) 244 F.3d 1167, 1177.) Therefore, the fact that plaintiff has not alleged that Singh herself performed any wrongful act or omission does not mean that plaintiff cannot state a claim against Singh in her capacity as plaintiff's employer. Consequently, the court's tentative ruling is to overrule the demurrer to the first cause of action as it relates to Singh.

However, the court intends to sustain the demurrer to the second cause of action with leave to amend as it relates to Singh, for the same reasons discussed above regarding Mahal's demurrer. Plaintiff has adequately alleged that she reported the harassment to her employer,

but she has not alleged any retaliation against her for making her complaint.

Finally, the court intends to overrule the demurrer to the third cause of action as it relates to Singh. Plaintiff has alleged that she made several complaints to her employer, through Mahal. (FAC, ¶¶ 15, 18, 23, 37, 39.) Since Singh and Mahal were co-owners of the store, Singh was on constructive notice of plaintiff's complaints. Plaintiff has also alleged that the employer did not take reasonable steps to prevent the harassment or discrimination. (FAC, ¶ 108.) Therefore, plaintiff has alleged sufficient facts to state a claim against Singh for failure to take reasonable steps to prevent the harassment.

Pursuant to CRC 391(a) and CCP §1019.5(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: **HAC** (Judge's Initials) **on** **9/24/03** (Date)**.**

Tentative Ruling

Re: **Graylift, Inc. v. Landeros**, **et al.**
Superior Court Case No: 03CECG00297

Hearing date: September 25, 2003 **(Dept. 22)**

Motion: Gerry Hudson and Wholesale Equipment Company's demurrer to and motion to strike second amended complaint

Tentative Ruling:

To overrule the demurrer to the first and fourth causes of action, and to the entire second amended complaint. To sustain without leave to amend the demurrer to the fifth cause of action. To grant the motion to strike paragraph 7 of the prayer, as to the moving defendants only. To deny the motion to strike paragraph 11 and allegations of the fifth cause of action.

Explanation:

The first and fourth causes of action now allege the amount of damages demanded. (Code Civ. Proc. § 425.10; *Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 494 (where complaint alleged damages "in excess of $20,000," "the specific amount of damages alleged in the complaint was $20,000.")

To allege a cause of action under the RICO statute (18 U.S.C. § 1962), plaintiff must allege seven elements: (1) that the defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an "enterprise" (7) the activities of which affect interstate or foreign commerce. (*Moss v. Morgan Stanley, Inc.* (2d Cir. 1983) 719 F.2d 5, 17.)

The racketeering activity alleged in the fifth cause of action is mail and wire fraud. Where the predicate acts alleged are mail fraud, the alleged fraudulent mailings must be linked to particular defendants, and may not be attributed vaguely to "defendants." (*Tribune Co. v. Purcigliotti* (S.D.N.Y. 1994) 869 F.Supp. 1076, 1088.) The circumstances constituting the fraud must be pleaded with particularity; some specificity as to the nature of the mailings or wire communications, or their role in the fraudulent scheme must be alleged. (*Qantel Corp. v.*

Niemuller (S.D.N.Y. 1991) 771 F.Supp. 1361, 1368; *Moy v. Adelphi Institute, Inc.* (E.D.N.Y. 1994) 866 F.Supp. 696, 703.)

The fifth cause of action alleges the defendants communicated via interstate wire on nine dates. Plaintiff does not allege any mailings; it does not allege what type of interstate wire communications were used, who originated and who received the interstate wire communications, the nature of the mailings or wire communications, or their role in the fraudulent scheme.

To allege a pattern of racketeering activity, plaintiff must allege facts showing that the racketeering predicates are related and that they amount to or pose a threat of continued criminal activity. (*H.J. Inc. v. Northwestern Bell Telephone Co.* (1989) 492 U.S. 229, 239.) This "continuity" refers either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. (*Id.* at 241.) A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement. (*Id.* at 242.)

The fifth cause of action alleges wire communications on nine dates between June 14, 2002, and October 16, 2002. It does not allege any facts showing a threat of continuation in the future. Under *H.J. Inc.*, the element of a pattern of racketeering activity is not adequately alleged.

The "enterprise" must be an entity separate and apart from the pattern of activity in which it engages. (*Elliott v. Foufas* (5th Cir. 1989) 867 F.2d 877, 881.) If the enterprise alleged is an "association in fact" enterprise, the plaintiff must allege an ongoing organization, formal or informal, that functions as a continuing unit over time through a hierarchical or consensual decision-making structure. (*Id.*) Additionally, plaintiff must plead specific facts that establish that the association exists for purposes other than simply to commit the predicate acts. (*Id.*)

The fifth cause of action alleges the association of Landeros and Wholesale Equipment is the enterprise; it does not allege facts showing an ongoing organization that functioned as a continuing unit over time through a hierarchical or consensual decision-making structure. It alleges defendants agreed and conspired to commit the acts of racketeering activity; it does not allege the association existed for purposes other than to commit the predicate acts. Thus, an enterprise is not properly alleged.

It must be alleged that the activities of the enterprise itself affect interstate commerce; it is not sufficient to allege that each predicate act affects interstate commerce. (*United States v. Bagnariol* (9th Cir. 1981) 665 F.2d 877, 892.)

Plaintiff here alleges only that the predicate acts of mail and wire fraud affected interstate commerce, not that the activities of the enterprise itself affected interstate commerce. This element is not adequately alleged.

Plaintiff has not adequately alleged at least elements (3), (4), (6) and (7) of the RICO cause of action. Since this is plaintiff's third attempt to allege a RICO cause of action, and plaintiff has suggested no other facts that may be added to cure the deficiencies in the pleading, leave to amend will not be granted.

The second amended complaint alleges Landeros took plaintiff's property and gave or sold it to Hudson and Wholesale without the permission of plaintiff. It may be reasonably inferred that these are the "actions" to which paragraph 11 refers; paragraph 11 is thus not improper matter and will not be stricken.

The request to strike allegations from the fifth cause of action is moot in light of the ruling on the demurrer to that cause of action.

There are no allegations of malice, fraud or oppression against the moving defendants to support the prayer for punitive damages. However, paragraph 7 of the prayer should be stricken only as to the moving defendants, since the complaint also contains a cause of action for fraud by concealment against defendant Landeros.

Pursuant to California Rules of Court, rule 391(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 **DSB** **9-24-03**
Issued By:_____ **on** _____.
(Judge's initials) (Date)

Tentative Ruling

Re: **In re Breanna Nicole Griggs**
Superior Court Case No. 02CECG01148

Hearing Date: September 25, 2003 **(Dept. 22)**

Motion: Petition to compromise minor's claim

Tentative Ruling:

To grant. Completed order with all appropriate blanks filled in to be submitted for signature. Hearing off calendar.

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (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: **DSB** **on** **9-24-03**.
(Judge's initials) (Date)

Tentative Ruling

Re: **Jones v. Gottschalks, et.al.,**
Superior Court Case No. 03CECG00882

Hearing Date: September 25, 2003 **(Dept. 72)**

Motion: Defendant's Demurrer and Motion to Strike re: First Amended Complaint

Tentative Ruling:

To sustain Defendant Gottschalks Inc.'s demurrers to each of the causes of action in the Plaintiff's First Amended Complaint, with 10-days leave to amend as to the 1st and 2nd Causes of Action, but without leave to amend as to the 3rd, 4th and 5th (labeled 6th) Causes of Action. To grant the motion to strike punitive damage allegations, with 10-days leave to amend. To the extent that leave to amend is granted herein, the time in which the First Amended Complaint can be amended will run from service by the clerk of the minute order. All new allegations in the Second Amended Complaint are to be set in **boldface** type.

Explanation:

A. 1st Cause of Action—Constructive Discharge/ Breach of Contract

Defendant generally demurs on the ground that the allegations are still insufficient to show a "constructive discharge" occurred. The court agrees. "In order to establish a constructive discharge, an employee must plead and prove…that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251). "In order to amount to a constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, single, trivial, or isolated acts of misconduct are insufficient to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." (*Turner*, *supra*, p. 1247). "The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The

proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Id.*, p. 1246).

In sustaining the prior demurrer, the court held that although the Plaintiff had alleged a number of incidents in which Plaintiff was insulted or suffered unfair criticism or other indignities, it did not appear that the allegations were sufficient to show "working conditions that were so intolerable or aggravated…that a reasonable employer would realize that a reasonable person in employee's position would be compelled to resign." The new allegations in the First Amended Complaint fail to cure this defect, for the reasons noted below.

First, although Plaintiff alleges the conclusion that a "continuous pattern" existed or that he "suffered continuous unfair criticism and indignities" (FAC, par. 32), it appears that only occasional or sporadic incidents are actually alleged. Since very few dates are alleged, it is difficult to assess the frequency of the allegedly false, demeaning or insulting criticisms. Plaintiff apparently was transferred to the Manchester store in 1997 and worked until March of 2001. Thus, the incidents alleged in the FAC may have been spread out over a long time period, such that they were merely sporadic or isolated. It also remains unclear whether the allegations are merely examples of the sort of conduct that allegedly occurred continuously, or whether the incidents alleged were the *only* ones that occurred.

Second, as to Plaintiff's alleged emotional vulnerabilities and sensitivities (i.e., a war veteran with post-traumatic stress syndrome, etc), Plaintiff has failed to present any case indicating that a defendant's knowledge of emotional vulnerability will somehow lower the standard of constructive termination. The Supreme Court has made clear that "the standard by which a constructive discharge is determined is an *objective* one." (*Turner v. Anheuser-Busch, Inc*. (1994) 7 Cal.4th 1238, 1248—emphasis added). "Under *Turner*, the proper focus is on the working conditions themselves, not on the plaintiff's *subjective* reaction to those conditions." (*Gibson v. Aro Corp*. (1995) 32 Cal.App.4th 1628, 1636).

Third, the new allegations, together with the prior allegations, still fail to show "working conditions that were so intolerable or aggravated…that a reasonable employer would realize that a reasonable person in employee's position would be compelled to resign." Although Plaintiff has had a number of disappointments and suffered several insults or indignities on the job, the allegations fall short of meeting the objective standard set forth in *Turner*. The complaint fails because (1) if the specific conduct alleged was isolated or sporadic, it is insufficient by itself to constitute such aggravated or intolerable working conditions; and (2) as noted above, it has not been adequately or clearly alleged whether there was a *continuous* or *ongoing pattern* of the same sort of allegedly unfair (false), demeaning, and harsh criticisms. That is, it is not clear whether the specific occurrences alleged were the *only* incidents

of Defendant's wrongful conduct, or whether they are merely examples of ongoing and continuous conduct of the same sort that was repeatedly directed at the Plaintiff.

The demurrer to the 1st Cause of Action based on failure to allege facts constituting a "constructive discharge" is sustained. The court will allow one further opportunity to amend.

Next, Defendant demurs to the 1st Cause of Action on the additional ground that it inadequately describes the factual basis for the alleged contract—i.e., it fails to sufficiently state the specific oral promises and/or conduct that allegedly created the parties' final agreement (that plaintiff could only be fired for good cause, etc). The new allegations are that Plaintiff was offered a "permanent" position at the "flagship" store; that he was offered "the highest salary the position allowed"; that Gottschalks paid for his move; that Plaintiff was at the height of his career; and he "understood" he could only be fired for "good cause", and "was led to believe that he would finish out his career at the 'flagship' store. (FAC, par. 32). This ground for the demurrer will be overruled. If the Plaintiff was expressly offered a "permanent" position, it could be reasonably inferred from such offer that he would get to remain on the job unless or until there was good cause for dismissal.

B. 2nd Cause of Action—Defamation.

Defendant generally demurs to the 2nd Cause of Action on the ground that the one-year statute of limitations set forth at *CCP* 340 has expired. The FAC now alleges that the Defendants who were responsible for Plaintiff's constructive termination "continued to repeat false stories about him." There is still no indication, even on information and belief, that the Defendants defamed the Plaintiff within the one-year statutory period. Previously, the court sustained the demurrer to this cause of action because the nature of the defamatory statements were such that it reasonably appeared that they occurred at the time of, or shortly after termination. The ruling stated: "It appears from the context of the allegations that the defamation occurred before and/or shortly after Plaintiff's termination, since the remarks were "to cause him to be terminated" and "to justify his termination." (Complaint, par. 43). Plaintiff's termination occurred on March 12, 2001. The Plaintiff's Complaint was filed on March 10, 2003. Under the current allegations, it appears the one-year statute of limitations expired." (7-2-03 Minute Order). Plaintiff has still failed to cure this defect, by failure to allege (even on information and belief) that a defamatory statement was made within the limitations period. The vague statement that Defendants, at some unspecified time, continued to repeat indefinite 'false stories' is insufficient.

The Plaintiff's new allegation to the effect that Plaintiff's emotional condition and his need to seek help caused him to personally repeat the

alleged defamatory statements made about him is insufficient. (FAC, par. 38). Plaintiff has failed to present any authority for the proposition that Plaintiff's own action of repeating the statements would somehow extend the statute of limitations. Further, to the extent that the Plaintiff is arguing that statements made in the context of the unemployment benefits proceedings constitute a defamatory statement, such theory has not been adequately alleged, and in any event, it is clear that such statements would be privileged under *Civil Code* 47.

The demurrer to the 2nd Cause of Action is sustained once again. One further opportunity to amend will be given.

C. 3rd and 4th Causes of Action—Intentional and Negligent Infliction of Emotional Distress.

Defendant demurs to these claims under the former one-year statute of limitations for such personal injury, i.e., *CCP* Section 340. Taking the date of termination as the apparent accrual date, the one-year statute of limitations expired on March 12, 2002. The instant Complaint was not filed until March 10, 2003. For this reason, the prior demurrer to the 3rd and 4th Causes of Action based on statute of limitations was sustained. No new allegations are set forth showing accrual of the causes of action occurred within one-year of filing the complaint. Plaintiff mentions in passing that Defendant opposed Plaintiff's request for unemployment benefits, but no argument is made or authority presented why such conduct would not be privileged under *Civil Code* 47. The demurrer to the 3rd and 4th Causes of Action based on statute of limitations is once again be sustained, this time *without* leave to amend.

A second ground for general demurrer to the 3rd and 4th Causes of Action is that the emotional distress claims are barred by the exclusive remedy provisions of worker's compensation law. Where emotional distress is caused by an employer's work-related conduct, the exclusive remedy provisions apply. As the Supreme Court summarized in *Livitsanos v. Sup.Ct.* (1992) 2 Cal.4th 744, 754: "So long as the basic conditions of compensation are otherwise satisfied (*Labor Code* 3600), and the employer's conduct neither contravenes fundamental public policy nor exceeds the risks inherent in the employment relationship (*Cole*, *supra*), an employee's emotional distress injuries are subsumed under the exclusive remedy provisions of worker's compensation." (See also, *Gibbs v. American Airlines* (1999) 74 Cal.App.4th 1, 10 ["the exclusivity of worker's compensation extends to intentional infliction of emotional distress by an employer's work-related conduct so long as the conduct does not contravene public policy."]). Because of these principles, the prior demurrer to the 3rd and 4th Causes of Action based on the exclusive remedy provisions of worker's compensation was sustained.

In an effort to cure this defect, Plaintiff now alleges that Defendant's conduct did, in fact, contravene public policy and exceed the risks inherent in employment. Allegedly, "Defendants insisted he assist in illegal termination" (FAC, par. 50). This is too conclusory to state a cause of action for violation of public policy or for conduct outside the risks inherent in the employment relationship. Therefore, the demurrer is sustained based on worker's compensation exclusivity. Because of the statute of limitations bar (see above), leave to amend is denied.

D. New 5th (Labeled as 6th) Cause of Action for "Wrongful Termination in Violation of Public Policy."

The "Sixth" Cause of Action incorporates all the prior allegations of the FAC, and further alleges that Plaintiff suffers from a medical disability, that Defendants were aware of said disability, and that Defendants unlawfully discriminated against him because of his medical disability, including the creation of a hostile work environment that led to his constructive discharge. (See, FAC, par. 57-63). Further Defendants allegedly violated FEHA policy by failure to make any accommodation to his disability, demoting him after he refused to assist in the wrongful firing of two staff members, etc. (Par. 58-67). However, as asserted in the Defendant's demurrer, this cause of action is clearly barred by the one-year statute of limitations applicable to claims for wrongful termination in violation of public policy. (See, *Barton v. New United Motor Mfg.* (1996) 43 Cal.App.4th 1200, 1209). Plaintiff resigned his position (allegedly constructively discharged) on March 12, 2001. The Complaint was not filed until March 10, 2003. This cause of action is time-barred, and demurrer to the 5th (labeled 6th) Cause of Action is sustained *without* leave to amend.

E. Motion to Strike.

In light of the defects in the allegations of the FAC, it is clear that the allegations are insufficient to support a claim for punitive damages and thus the motion to strike should be granted, with one final opportunity for leave to amend.

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (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 S J KANE **9/24/03**
Issued By: _____ **on** _____.
(Judge's initials) (Date)

Tentative Ruling

Re: **Vang v. Xiong**
Superior Court Case No. 00CECG11640

Hearing Date: September 25, 2003 **(Dept. 73)**

Motion: Demurrer by cross-defendant John Vang to cross-complaint and motion to strike.

Tentative Ruling:

To sustain the demurrer with ten days' leave to amend. The time in which the cross-complaint can be amended will run from service by the clerk of the minute order. All new allegations in the first amended cross-complaint are to be set in **boldface** type. In light of the court's ruling on the demurrer, the motion to strike is moot.

Explanation:

The cross-complaint is uncertain. (CCP §430.10(f).) Cross-complainant's failure to label the parties and claims renders the complaint so confusing moving party cannot reasonably respond. (See *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139.) Due to the uncertainty of the claims being alleged against the demurring party, the court cannot meaningfully assess the merit of the other grounds for demurrer. Leave to amend is granted to give cross-complainant an opportunity to clarify the nature of the claims and the parties affected thereby.

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (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: **MWS** **on** **9/23/03** **.**
(Judge's initials) (Date)