Superior Court of California
County of San Benito

Tentative Decisions for October 2, 2024

Courtroom #1: Judge Thomas Breen

CU-20-00189 Rocket Restrooms and Fencing, Inc. v. Frank Leal individually and DBA RentaFence.com; Ovidiu Popescu, an individual; Rent-a-Fence.com a California Corporation, Does 2-10, inclusive

Petitioner/~~X Defendant:~~ *Frank Radoslovich, Garret M. Mandel*

Defendants/~~X Plaintiff~~ (Ovidiu Popescu) *John F. Domingue, Gregory S. Gerson*

Calendared for:

1) Plaintiff's 8-20-24 motion for protective order and sanctions

2) Defendant's 9-6-24 motion to compel response to special interrogatory #90

3) Plaintiff's 8-20-24 motion to compel attendance by Zoom and testimony of Defendant Popescu and monetary sanction.

4) Defendants 9-9-24 Motion to compel answers to Deposition questions by Plaintiff's PMK

Complaint: 12-14-20; FAC 1-11-21. Answer filed 4-2-21.

Cross Complaint 4-2-21; Answer to Cross Complaint t: 10-8-21. Cross Complaint dismissed 1-12-23, without prejudice.

Causes of Action on FAC: 1) Breach of Contract; 2) Account Stated; and 3) Open Book Account

Procedural History: The court heard X-Defendant's Demurer on 7-8-21, taking the mater under submission after oral argument. The court overruled the Demurrer on 7-21-21, holding the Third and Fourth Claims were independently supported, distinctly from the misappropriation claims. Plaintiff's motions to compel further discovery responses were heard 3-10-23, as was Defendant's motion to quash subpoena for cell phone records. The motions to compel were granted, and the motion to Quash was denied. On 1-12-23 the cross complaint filed 4-2-23 by Ovidiu Popescu individually, and as dba

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Rentafence.com, was dismissed without prejudice at Mr. Popescu's request. Doe Defendant Rent-A-Fence Inc's answer filed 2-14-23.

9-12-24 Stipulated protective order. The order addresses the use of confidential materials in discovery, and the use of confidential materials in court.

Argument: Plaintiff's motions:

1) Motion for Protective Orders, monetary sanction. Plaintiff seeks protective orders because Defendant Leal's special interrogatories, set two, and request for production of documents set two, are overbroad, oppressive, unduly burdensome and seek information that is both privileged and irrelevant. Specifically special interrogatories items 40-79 and requests for production are objectionable on these grounds. The special interrogatories ask for 1) identification of the total number of linear feet of fencing Plaintiff had in its inventory in three month increments between 1-1-19 and 11-22-22; and 2) identification of all documents demonstrating how Plaintiff acquired said fencing. The production requests, 9 and 14 seek similar information in the form of inspection demands. The defendant also seeks physical examination of all temporary fencing currently in the Plaintiff's possession, custody, and control at their principal place of business on Sept 3, 2024. This effectively requires the plaintiff to take every item of fencing it owns, whether it is in use by customers, wherever it may be and make it available for inspection. This request is not only impossible to meet within one month, but it would also result in the Plaintiff having to breach contracts with customers regarding to fencing being provided to them causing the Plaintiff to suffer real and consequential harm. (Waldi Dec ¶4). Being forced to comply would result in the type of oppression, annoyance and undue burden contemplated by the act. Moreover, the fencing at issue by admission of Leal's counsel provided to RentAFence over time between 2020 and 2022, and so what fencing is currently in Plaintiff's possession and control is without relevance to the subject matter of the case. Second the requests for identification are sought apparently because Defendant contends that Plaintiff fabricated invoices over a two-year period and seeks to discover whether Plaintiff actually had fencing in its inventory to support the amount plaintiff seeks to recover on those invoices. The request would force Plaintiff to identify all fencing that would be in its possession but was not provided to RentAFence, was in storage, or was provided to other customers during the time period requested, in three-month increments. Such a request is unduly burdensome and oppressive, requiring exceptional consumption of time, and manhours. Special interrogatories 83-85, 88, and 89 seek the addresses of each location where they contracted to provide fencing directly to customers, and the address of each location where they contracted to rent fencing from another vendor to install at a customer, and the names of all customers they provided equipment to between 10-1-10 and 12-31-22. Such request lacks relevance as to the subject matter of this litigation-the contract dispute for non-payment, moreover their customers names and address are privileged and would require the production of consumer records.
2) No opposition is in file, however there is a reply declaration indicating some form of opposition. Plaintiff argues that 1) the parties met and conferred by telephone and discussed discovery issues during both phone calls. Second, that the opposition filed by Defendant fails

to state how or why the discovery sought is not overbroad or unduly burdensome. While the requirements of relevancy are low, when relevance is nearly nonexistent and the discovery requests when balanced against both the Plaintiff's and their customers privacy rights, as well as the burdensome nature of complying with the requests, their motion should be granted. The proposed alternative- Plaintiff communicating with each and every one of their customers and arranging to have Defendant or his representatives inspect the fencing at those sites is not any less burdensome, or oppressive. Sanctions are warranted.

3) Motion to compel Popescu Deposition, sanctions: Plaintiff notes that after nearly two years of meet and confer with counsel, this motion is filed. They note that on 8-7-24 Popescu failed to appear at a properly noticed deposition, and they seek $4510.90 in sanctions. The lengthy history of the attempts to schedule and obtain the deposition testimony of Mr. Popescu are detailed. Specifically, Mr. Popescu has objected based on unspecified health issues making him unavailable to attend. While Mr. Popescu's attorney acknowledges the relevance of his testimony, they have argued that since Mr. Popescu is in Romania no deposition should be scheduled, they then noticed deposition to occur by Zoom. The objections to the 6-25-24 amended notice of deposition set for 8-7-24 were served 8-1-24. They were that deposition violates geographical limits, 2) that the time set would require Popescu to answer questions in the middle of the night, 3) that the time and date set were unilaterally selected, and 4) that Mr. Popescu suffers from medical conditions preventing deposition and he would not appear, and he did not do so. Their proposed time would have started the deposition at 8 p.m. in Romania, hardly the middle of the night. Pursuant to CCP §2025.450 Plaintiff is entitled to an order compelling Popescu's attendance and testimony. No motion to quash, nor has a motion for protective order been filed. The objections lack validity. First the deposition is set to be taken remotely thus geographic objections are inapplicable, and 8 p.m. is not the middle of the night. The claim that the time was set unilaterally at a time counsel could not attend is not a legal reason to refuse to attend the properly noticed deposition. There are three attorneys working on this case in the same office, surely one could be available. Finally, the claim that Popescu's medical conditions prohibit him form attending the deposition have never been the subject of a protective order, and in two years he has never moved for one. Monetary sanctions for abuse of the discovery process are thus appropriate as well.
4) In Opposition, defendant notes that Plaintiff's unilaterally scheduled the deposition by zoom to begin at 8 p.m. Romanian time, which if it continued for a full seven hours would conclude at 3:00 a.m. That is unreasonable. Mr. Popescu has combat related injuries from serving in the US Armed forces, and Plaintiff was advised he would not appear and failed to meet and confer, prior to and after Mr. Popescu's nonappearance. Popescu has responded to all written discovery requests made previously. No further written discovery was propounded for two years until Plaintiff asked for a supplement to his prior interrogatory answers on 8-6-24. They delayed nearly two years to notice this deposition, without clearing the date with counsel. In March 2023 after exchanging meet and confer correspondence, they waited an additional seven months to send a further meet and confer letter in October 2023. The again questioned the relevance of Popescu's testimony and had to wait another three months for further explanation. These delays indicate his testimony is not needed. HE is not a critical percipient witness as Plaintiff claims. His not moving for a protective order is not a reason to grant the

motion, as the decision to seek a protective order is permissive and is one option in addition to objecting to the deposition. Plaintiff knows that Popescu has injuries and that is sufficient to call into question his ability to set for deposition. Popescu's testimony will not be probative as plaintiff has not properly pled sufficiently to support alter ego liability. Plaintiff should be sanctioned $3780.oo

5) Reply: The time Plaintiff chose to take Popescu's deposition, after years of meet and confer effort is not relevant to the merits of the motion. Nor does Defendant explain why Popescu failed to move for a protective order over the last two years despite the claim he suffers from debilitating medical issues preventing him from giving meaningful testimony at deposition. Nor does Defendant clarify why any testimony of Popescu, a percipient witness and party to the litigation, would be irrelevant. The claim that there was no meet and confer either prior to or after the deposition is rebutted by the evidence in the record of the multiple attempts Plaintiff's counsel made to resolve this matter short of a motion. The effect of the argument is that Plaintiff's meet and confer efforts took too long and they should have moved for relief sooner, but there is no authority to support this assertion. The lack of a motion for protective order by Popescu is not a "red herring." The court must consider the failure for two years to seek protective orders because if his medical condition truly debilitates him from giving meaningful testimony, then counsel should have moved for an order. Defendants state Plaintiff should have known of his injuries for two years, yet the record reflects during this time they continued to attempt to have Popescu sit for deposition. The statutory scheme is clear that Popescu has the obligation to seek protection; it is not relevant that that the statute says "may, "as the entire reason to move for protective order is for a situation such as Popescu claims to be in. No medical notes have been produced, and while Popescu was able to respond to written discovery as late as April 2022, there is no information about how he became medically unable to testify between April 2022 and the date deposition was set. Counsel's information and belief is insufficient to deny Plaintiff's deposition of Popsecu. Popescu's testimony bay be the most important for the reasons they set out in their motion. The dispute as to who truly owns RentAFence during the relevant time periods and who is ultimately responsible for failing to pay the invoices at issue relies on his testimony. Whether alter-ego allegations are pled in the FAC is not relevant because the pleading places Defendant and Popescu on notice of the claims to be asserted, including that Popescu served as Leal's strawman to avoid debt and obligation. Additionally, during the time RentAFence did business with Plaintiffs, they appear to have been unincorporated, as such, the individual who owns the assets of the unincorporated entity is personally liable for the debts the business incurs, thus they need not prove alter-ego, it would be sufficient to show Leal was operating as the owner of RentAFence.

Legal Standards:

The Civil Discovery Act only authorizes for each type of discovery propounded, the ability to file a motion to seek further responses. (CCP §2030.300; 2031.310) In each code section, the statute lays out what is required to put forward a motion to compel further discovery. For each type of discovery allowed under the code, a propounding party must put forward a notice of motion, declaration, and when seeking further responses, a separate statement compliant with California Rule of Court 3.1345.

The code also states at each relevant provision that sanctions will be awarded to each party who successfully makes or defends a motion to compel discovery.

CCP §2031.060(b) lists six illustrative types of orders the court can issue in response to a motion for protective orders from an inspection demand. Each should provide protection from unwarranted annoyance, embarrassment, oppression, or undue burden or expense. (Id.) The court may order that all or some of the categories of items demanded need not be produced or made available at all. If many items are sought, the court may order production of only a statistically significant sampling. The court may extend the time specified to respond to the demand or to a particular category in the set. The court may alter the place of production specified in the demand, or that the inspection, copying, testing, or sampling be made only on specific terms and conditions. Trade secret or other confidential research, development, or commercial information not be disclosed, or disclosed only to specified persons or only in a specific way, or that the items to be produced be sealed and thereafter only opened in response to court orders. (Id. at (b)(1)-(6).) The motion must be brought by the party to whom the demand has been directed, promptly, and accompanied by a meet and confer declaration. (CCP§§2016.040; 2031.060(a).) The moving party must make a showing of good cause. Good cause includes, but is not limited to, the ground that production will result in excessive burden, expense or intrusion pursuant to CCP§2017.020(a). THE court must measure that burden as part of weighing it against the general policies favoring discovery. (*Williams v. Sup. Ct.* (2017) 2 Cal. 5th 531,549-550.) It requires proof an analysis of specific details, showing the amount of work needed to furnish the requested discovery (*Id. at 550; see also West Pico Furniture Co. v. Sup. Ct.* (1961) 56 Cal. 3rd 407, 417.) The court should also consider alternatives such as shifting of cost before denial of the discovery. The court may also limit discovery in view of the context in which it is being requested.

As to Depositions, when a party is served with a deposition notice but fails to either appear for examination or to proceed with it, or to serve a written objection to the notice at least three calendar days before the deposition is scheduled (CCP §2025.410(a), (b).) the party giving notice may move to compel the deponents attendance, the deponent's testimony, and for the production for inspection of any document, electronically stored information, or tangible things described in the notice. (CCP§2025.450(a).) The motion must include a meet and confer declaration pursuant to CCP§§2016.040, 2025.450(b)(2). Rule of Court 3.1010 sub (a) states, in relevant part, "[a]ny party may take an oral deposition by telephone, videoconference, or other remote electronic means, provided: 1) Notice is served with the notice of deposition or the subpoena; 2) That the party makes all arrangements for any other party to participate in the deposition in an equivalent manner. However, each party so appearing must pay all expenses incurred by it or properly allocated to it.; . . .." As such the travel distance prohibitions can be overcome, and similarly a non-resident of California at the time of service of the deposition subpoena, while they cannot be compelled to attend as a witness at a deposition in California, can be compelled, pursuant to the statute and the associated rule of court, to attend deposition and be deposed, barring a protective order. IF a deponent fails to obey a deposition notice, whether they served a timely written objection to the notice, the court must consider whether the excuse for disobeying the notice on grounds such as illness is adequately documented, whether the deponent gave reasonable notice of the illness, and made a reasonable effort to be available at another time; whether the moving party made reasonable efforts to accommodate the deponents

special needs; and the special arrangements that can be made to accommodate those needs when the deposition is rescheduled.

Analysis: 1) Motion for protective order: The plaintiff has founded their request for a protective order on the basis that the production request and related interrogatories are overbroad and unduly burdensome, noting the relevant dates for this litigation, and that the inquiries made, and items sought relate to times outside the relevant time period of the litigation. Of more note to the court is the massive and unwieldy scope of what is requested, and the limited relevance of that information. While the Defendant does have the right to pursue discovery relevant to their own claims or defenses, in this case the claim that Plaintiff retained fencing owned by RentAFence as a possible offset to the invoices claimed due by the Plaintiff, the request to inspect at Plaintiff's primary place of business every linear foot of fencing in their possession and control would create the kind of undue burden envisioned in *Williams.* Here what is sought is not just every single invoice for fencing, whether related to RentAFence or not, for a period starting in 2019 and ending in 2022, but also the inspection of every linear foot of fencing in possession and control of the Plaintiffs, whether in use , contracted for use currently, in storage, in transit to other locations, without regard to the fact that moving all of the fencing to that location would result in violation of current contracts magnifying the Plaintiff's expenses. Nor does allowing Defendant to go to each and every site where Plaintiff's fencing is in use presently to inspect the fencing, or to every storage yard, transit depot, or other location alleviate the problem, as this would require Plaintiff to contact each and every client using their fencing and arrange the time and place for Defendant's inspection. What is unclear is how a tally of every linear foot of fencing made every three months over a period of four years would clarify whether Plaintiff had any of RentAFence's fencing in their possession, without relating it to specific invoices charged by Plaintiff. Similarly, the same analysis applies from the inspection demands to the Specially prepared interrogatories and warrants pursuant to CCP§2030.090(b), the issuance of a protective order. Defendant will revise his requests for production and his specially prepared interrogatories to state, in connection with specific invoices, which dates and how many linear feet of fencing he is asserting Plaintiff obtained from RentAFence and failed to return.

Deposition: The court notes that after nearly two years of meet and confer, which the record of both parties makes clear occurred, the Plaintiff scheduled the deposition of Mr. Popescu, who currently is in Romania. Despite Defendant's assertions to the contrary, the declarations filed in support of the motion to compel the deposition, is replete with evidence of extensive meet and confer efforts by the Plaintiff to schedule the deposition of this party. Despite Mr. Popescu's counsel's claim on information and belief that Mr. Popescu is suffering from unspecified medical conditions which prohibit him from sitting for deposition, the Defendant has failed to produce an iota of documentation supporting the assertion. Despite this, the documentation provided by Plaintiff shows efforts made to accommodate both counsel's schedule and the alleged health concerns of the deponent. What is also apparent is that Defendant failed to provide alternative dates or provide any objective proof of a medical condition which would prevent Mr. Popescu from testifying. Through more than two years of wrangling, Defendant's counsel has asserted Mr. Popescu's ill health but failed to pursue protective orders. Despite the claim to the contrary, this too is relevant. While it is true that Mr. Popescu could not be hauled into a deposition in California, the rules of court do permit remote attendance and testimony at deposition and include provision that the court reporter need not be in the same room as the

deponent. (CRC 3.1010.) CRC 2026.010 is also clear that Mr. Popsecu may be deposed in his current state of residency, which Plaintiff arranged by noticing the deposition to be taken by remote means.

As to the relevancy of the deponent's testimony, the court looks to the operative complaint, which alleged that Defendant Leal, either himself or doing business as RentAFence failed to pay Plaintiff for services provided according to invoice. Plaintiff avers in their declaration that during the deposition of Molina, it was learned that Popescu purportedly owned RentAFence during the time many of the invoices at issue were created. Therefore, Plaintiff seeks to discover if Popescu has information relating to RentAFence or Mr. Leal's failure to pay said invoices, which is directly relevant to the non-payment claims and the affirmative defenses raised by Mr. Leal and RentAFence in their answer. The testimony is relevant. The only remaining issue appears therefore to be scheduling and time. The court notes that a party may be deposed once, for a total of 7 hours. THE parties may be able to meet and confer to spread the deposition over two days, starting at an earlier hour than 10 a.m. California time to ensure that the deposition begins and pauses at a reasonable time in Romania.

Proposed Rulings

1) The court grants Plaintiff's motion for protective order in part; The parties to meet and confer to determine which specific invoices and how many linear feet of fencing Defendant is asserting the Plaintiff may have retained for each invoice, and how to determine if Plaintiff's inventory controls for the amount of fencing in their possession and control during each of these specific invoice periods is tracked, documentation supporting purchases of additional linear feet of fencing during said invoice periods, among other documents specifying the number of linear feet of fencing owned , purchased, and possessed by Plaintiff for each invoice Defendant asserts Plaintiff failed to return Defendant's fencing.
2) The court Grants Plaintiff's motion to compel the deposition of Ovidiu Popescu at the earliest possible time and date. The Parties will meet and confer to select times to start the Deposition, to be taken by remote technology, such that it will conclude by no later than 9:00 p.m. in Romania. The parties to discuss multiple dates to ensure that these time restrictions may be accommodated by continuing the deposition over a minimum of two calendar days.

Defendant's Motions:

1) Defendant's 9-6-24 motion to Compel Response to Special Interrogatory #90. Defendant seeks to compel Plaintiff to provide further response to this interrogatory, asking Plaintiff to identify all payments made to Danny Molina. After initially objecting on the basis of relevance, Plaintiff provided an unverified amended response on 8-30-24. This response provided a chart reflecting dates from 2019 through 2020, which is reproduced in the Defendant's memorandum of points and authorities. (Defendant's MPA page 2 :23 to 3:4.) Defendant asserts that the Plaintiff advised that the response was a typographical error and served a new amended response, omitting item #90. Pursuant to *Deyo v. Kilbourne* (1978) 84 Cal. App. 3rd 771, 783-784, that Plaintiff must provide complete and straightforward answers to interrogatories. The information sought is relevant, and discoverable as it goes to the issue of whether Defendant and Molina had an agency relationship, which, if Molina was taking kickbacks and redirecting business that a finding of agency would not be supported. (Civ §2306).

2) Plaintiff in opposition notes that the objection on the basis of vagueness as to the word "payments", and on the basis of relevance as it sought information not reasonably related to discovery of admissible evidence, and over breadth, as it asks for information between 1-1-18 and 12-31-22. Plaintiff argues Molina was Defendant's agent and employee and the question of whether Plaintiff paid Molina kickbacks for redirecting customer leads or subcontracts disproves agency is tenuous. Whether kickbacks were paid has nothing to do with whether he was authorized to enter into contracts on RentAFence's behalf during the time periods relevant to litigation, or whether Molina was Leal's agent during that time. Whether Plaintiff paid Molina kickbacks for redirecting leads or subcontracts and related data does not bear on whether Leal created the impression that Molina was his agent, nor on whether Plaintiff reasonably believed Molina was Leal's agent, nor on whether Plaintiff reasonably relied on that belief. The issue is whether Molina had authority to enter into transactions at issue in the FAC, and nothing more. Nor is it explained how this information would be relevant to an actual agency argument. Defendants fail to identify any specific allegations or affirmative defenses and how the information at issue in this motion would be relevant to the unidentified allegations or affirmative defenses. Defendants further argue that "[a]t a minimum, information as to the dates and amounts paid to Danny Molina may put other evidence already in Defendants' possession in a different light" but fails to explain how the information sought by Special Interrogatory No. 90 would actually do so.
3) Defendant's reply: Plaintiff's view of the discovery sought is too narrow. The information is relevant if it may reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement. (*Gonzalez v. Sup. Ct.* (1995) 33 Cal. App. 5th 1539, 1546.) Any doubt as to whether the payment of kickbacks to Molina is relevant should be resolved in favor of permitting discovery. (*Colonial Life & Acc. Ins. Co. v. Sup. Ct.* (1982) 31 Cal. 4th 785, 790.) Moreover, the view of agency espoused by Plaintiff is too limited. The information about the dates and amounts of kickbacks to Molina could lead to the discovery of admissible evidence bearing on Molina's alleged authority. IF it is proved that Molina, instead of contracting for the lowest cost of goods for RentAFence instead went with the higher priced product available from Plaintiff, it could be found that Molina defrauded RentAFence, thus, this would determine if Civ Code §2306 applies to Molina's authority.
4) Defendant's motion to compel Answers to Deposition Questions by Plaintiff's PMK. Specifically, the Defendant seeks further responses to topics 3, 4, and 15. The concern is that Plaintiff's PMK failed to undertake proper preparation. Pursuant to CCP§2025.230, for a corporate defendant, the deposition notice must describe the matters on which examination is to proceed with reasonable particularity and the entity must designate persons most qualified to testify on its behalf as to those matters "to the extent of any information known or reasonably available to the deponent." Ergo, deponents must make efforts to familiarize themselves with the topics they are designated to testify about. (*LOASD Asbestos Cases* (2023) 87 Cal. App. 5th 939, 948.) Unlike the deposition of a party testifying in their individual capacity, wherein they need only testify as to their personal knowledge, more is required of a person most knowledgeable. Topic 4 addresses commissions paid to Molina, including several subtopics related to this issue. Plaintiff's PMK noted that he did not discuss the matter with the other PMK, nor look at related records. Topic 15 addressed communications with Molina

related to any invoices alleged owed to Plaintiff. Repeatedly, Plaintiff's PMK stated that he did not prepare to testify as to that topic, nor communicate with the other PMK in preparation. Topic 3 addressed the date of specific calls with Molina and records as to any written assent to the alleged contracts. Again, no additional documentation was reviewed or discussed with the other PMK, and the PMK testified from his own knowledge. Finally, Plaintiff's counsel instructed the witness not to answer on topic 18, without pursuing protective order or halting the deposition to do so, when asked about written policies regarding the steps taken to maintain secrecy of customer identities, potential customer identities, pricing, and methods to attract new customers. The objections raised were relevancy, and a claim of trade secret, however it is improper to instruct a deponent not to answer based on relevancy and the proper response if there is a claim of privilege is to halt the deposition and seek a protective order, which was not done. Defendant seeks $10, 337.25 in sanctions.

5) Plaintiff's opposition: Their witness did testify as to all topics in the PMK notice. The argument is essentially that the witness did not sufficiently prepare. As per *Maldonado v. Sup. Ct.* (2002) 94 Cal. App. 4th 1390, 1396, no single person can be expected to be familiar with the total contents of a corporation's files. In *Maldondo,* the court found there was a failure to comply with the obligation to produce a PMK because the witness had no real knowledge of the categories listed in the deposition notice. That is not the case here. The witness gave testimony all of these topics among others, for over five hours. The claim that the witness did not prepare is without merit, the fact that he did not have answers to every single question posed, including those that are the subject of this motion , does not mean that he was unprepared to provide testimony, noting he provided testimony on most if not all of the seven subparts to Topic 4, noting that topic consumed 15 pages of transcript, of which Defendant highlights two questions as to the exact amount of commissions paid to Molina, which was the sole item the PMK was unable to answer specifically on this topic. Similarly, topic 15, the questioning went beyond the existence of communications relating to invoices in this matter, but to any communications with Molina and any individual at RocketRestrooms, and the witness nonetheless testified at length, the issue is not knowledge, but the level of preparation Defendant deems fit. Topic 3 was the dates and content of telephone calls between RocketRestrooms and Molina, meaning all telephone calls that had ever taken place. The PMQ testified that only he and Mr. Burt spoke with Molina, but it is not possible, per Maldonado, for one individual to identify all dates and all content of conversations between an entity and an individual. Because the one objection given as to trade secrets is proper, noting the privilege is well recognized at law, (EV §§1060-1063) when asserted at deposition, disclosure may only be compelled if the court finds the interest of justice in obtaining the information outweighs the protection of the privilege. Defendant cannot show that disclosure of the information sought is essential to the resolution of this case. Monetary sanction is not warranted here.

6) Defendant's reply; Simply put the Plaintiff's designee was unable to provide testimony on noticed topics. Section 2025,230 dictates that a person so designated should be able to testify "to the extent of any information known or reasonably available to the deponent." Here, Plaintiff posits that the unrefreshed personal recall of events from 4 years ago is sufficient, and the deponent has satisfied the dictates of statute. This cannot be the case. While Maldonado

recognizes that no person is expected to be familiar with the entirety of a corporation's files, there is more to the discussion. This is the reason for the specificity of the notice, and the scope of the topics was deliberate. The contend that when a matter on which testimony is clear and precise, the designee must make an effort to be able to testify on that precise clear topic. Moreover, the objection posed on trade secret was levied when the deponent was asked merely as to the existence of a document when the question was whether Plaintiff had written policies on any of the matters of customer identities, product pricing. The remainder of the objection was to relevancy

Legal Authority: When the party is not a natural person, the code of civil procedure provides for the taking of a deposition of that party's person most qualified/ person most knowledgeable. (CCP§2025.230). The statute is clear that the deposing party must provide a list of topics in advance to the deponent, and that the deponent must prepare and provide answers on those topics to "to the extent of any information known or reasonably available to the deponent." Unlike a natural person, the deponent is not expected to just testify from his or her independent individual recall, but as a prepared repository of the entity's information on the topics so designated. Generally speaking, the protection of information from discovery on the ground that it is privileged, or that it is a protected work product is waived unless a specific objection to its disclosure is made during the deposition in a timely manner. (CCP§2025.460 (a). Any matter that is relevant to the subject matter and not privileged is discoverable if it is by itself admissible or "appears reasonably calculated to lead to the discovery of admissible evidence" (CCP§2017.010) An objection as to relevancy to the subject matter is a proper objection to a deposition question pursuant to (CCP§2017.010). The court may grant a motion to compel deposition answers "if a deponent fails to answer any question." (CCP§2025.480(a).) The deposing party may make this motion with respect to any question only if this party made an objection and stated a valid ground for that objection before the completion of the deposition so that the deponent had an opportunity to give an answer that was not objectionable (CCP§2025.460(b), Ev. §353.)

As to responses to specially prepared interrogatories, a motion to compel further response is warranted where a response to an interrogatory is evasive or incomplete (CCP§2030.300(a)(1).) or that the objection to the interrogatory is without merit or too general. (CCP§2030.300 (a)(3).) While an objection is a valid interrogatory response (CCP§2030.210(a)(3).), the objection must clearly state a specific ground. An objection for ambiguity or vagueness is valid only if the question is wholly unintelligible. An interrogatory must be answered if "the nature of the information sought is apparent." (*Deyo v. Kilbourne* (1978) 84 Cal. App. 3rd 771n 783.) The Discovery Act gives litigants the broad right to discovery pursuant to CCP §2017.010. In this context, relevance is broader than admissible evidence at trial. For the purpose of discovery information is relevant if it might assist a party in evaluating the case preparing for trial or reaching settlement. (*Haniff v. Sup. Ct.* (2017) 9 Cal. App. 5th 191, 205.) Because of the breadth of this standard, some of the information brought to light in pretrial discovery may be unrelated or only tangentially related to the underlying causes of action or defenses. (*Mercury Interactive Corp. v. Klien* (2007) 158 Cal. App. 4th 60, 70.) But there are limits, the Act also vests broad discretion with the judges to allow or prohibit discovery, and the scope of discovery is not without limit. (*Haniff, supra,* at 205-206.) It is on the proponent of discovery to identify a disputed fact that is of consequence in the case and explain how this

discovery will tend to prove or disprove that fact or lead to other evidence tending to prove or disprove that fact. (*Digital Music News, LLC v. Sup. Ct.* (2014) 226 Cal. App. 4th 216, 224.)

Analysis: As to Interrogatory #90, the objection as to vagueness posed by the Plaintiff is without merit. The word payment, in context of the question, and in light of the ordinary dictionary definition of the word leaves no doubts as to the information sought by the Defendant. The larger question is whether the question of what payments were made by Plaintiff to Molina and when is relevant to the subject matter of the litigation, or if it tends to prove or disprove a fact relevant to a claim or defense or will lead to admissible evidence. Here, the Defendant states that these payments are relevant to prove that Molina may have defrauded his employer by taking kickbacks for directing business to the Plaintiff, thus calling into question whether it was reasonable for Plaintiff to have believed he was acting within the scope of ostensible agency. While Plaintiff is correct, this is ultimately a case about unpaid invoices for products and services provided to the Defendant, the defense is that as a result of the alleged kickbacks, the contract made between the ostensible agent (Molina) and the Plaintiff may have been the result of fraud, calling into question whether it was reasonable to believe Molina was Defendant's agent when taking an unusual commission from Plaintiff. The material is relevant to that course of inquiry and may lead to admissible evidence. The Plaintiff will answer.

As to the PMK deposition, the allegation herein is that the Plaintiff's witness was unprepared to answer all questions posed within the scope of the designated topics. The late provided transcripts indicate that there were some gaps in the information provided, and that the witness did review documents or have conversations with another possible PMK prior to the deposition. The issue is ultimately one of degree. The late- provided official transcript reveals that the Plaintiff's witness answered most questions at length but was unable to respond to the very limited selections of questions posited in the motion to compel. For example, Defendant highlights on 7:13 to 7:16 that the witness states he did not prepare to respond to topic 2, however, in the next question at 7:18 to 7:24, the witness goes on to clarify that he spoke with another member of the company and confirmed that no one was aware of any communications with Mr. Popescu. Such a series of question is repeated in similar context in regard to topics, 3, 4, and 15. What the court notes is that the Defendant excises most of the pages following their highlighted portions, which indicate that there were additional questions and answers pursued in response to each of these topics. And while the witness repeatedly states he did not prepare he nonetheless repeatedly answers the Defendant's questions. *Maldonado* is indeed instructive. The case involved the deposition of a PMK who repeatedly answered that he did not know the answers to the topics at issue, and did not prepare at all. This was deemed wholly deficient, though the court noted that the entirety of the corporations' business files would not be something subject to the recall of any individual person. Noting that the information sought is essentially the content and date of every single telephone conversation, or other communication with Molina occurring over the span of more than a year, and requiring review of every telephone bill generated for every employee in the entity, and then interviewing each person who may have spoken with Molina with regard to each conversation occurring up to four years in the past also does not seem to fit within the ambit of information that is reasonably available for review. it appears that the witness engaged in some

middle ground by responding to the questions, and was able, if not perfectly, to respond to the questions posed.

As to the objections posed as to relevancy and trade secret privilege, the court notes that while the existence of a policy is not something protected by trade secret privilege, the content of that policy, is protected, even if it is relevant. This raises whether the Defendant can clearly state how the need to obtain the information in that policy (client identification, client retention, client sourcing practices) is relevant to the subject matter of a claim or a defense such that in the balance the trade secret privilege is overcome.

Tentative rulings:

1) The Plaintiff will provide further response to Specially Prepared Interrogatory #90.
2) The Plaintiff's objection based on trade secret privilege is sustained as to the content of any written policies regarding client identification, client generation, or client retention. However, the existence of such a policy is, in and of itself, not protected by the privilege asserted. Plaintiff will provide response as to whether Plaintiff has such policies.
3) The Defendant's motion for further responses to deposition topics 3, 4, and 15 is Denied.

Sanctions:

1) Plaintiff's motions included request for sanctions, which the court grants in the amount of $5000.00 total for both motions.
2) Defendant's motions included requests for sanctions. The court grants $2500 in sanctions for the motion to compel further response to specially prepared interrogatory #90, and given the partial denial of the Defendant's motion to compel further responses to deposition questions by Plaintiff's PMK, the court awards a further $2500.00

Noting that there will need to be further meet and confer with regard to providing further responses and clarifying discovery requests pursuant to this order, it appears that trial will need to be continued.

CU-23-00156 ODK Capital, LLC., A Utah Limited Liability Company v. Trent Jones

On Calendar for Plaintiff's 9-18-24 Motion to Deem Admitted, on shortened time.

Plaintiff: Christina Melhouse

Defendant: Joseph Robert Kafka

7-28-23 Plaintiff's complaint seeks damages for 1) breach of written contract. Plaintiff asserts that on or about 5-9-22 the Defendants executed a business loan and security agreement with a supplement (BLSA) in favor of Celtic Bank, wherein Celtic Bank entered into a business loan with Defendant in exchange for agreement to pay, and as part of the BLSA Defendant Jones executed a personal guaranty agreement wherein Jones guaranteed unconditionally all obligations as defined in the BLSA of the defendant. Thereafter, in accord with an agreement between Celtic Bank and Plaintiff, the BLSA and all right title and interest was assigned to Plaintiff, naming them as the loan servicer for the BLSA. Defendant ceased paying on the loan as agreed and this case follows.

9-18-24 Plaintiff's motion to deem matters admitted and requesting order shortening time, sanctions. 7-24-24 Plaintiff served their Request for Admissions, set one. (Plaintiff's counsel's dec, ex A.) The responses were to be served on Plaintiff no later than 8-24-24. No discovery responses have been received, nor has Defendant provided any responses by the date of this motion. A meet and confer letter was sent to Defendant's attorney 8-28-24, making clear that they expected responses on or before 9-12-24, otherwise they would seek an order deeming the matters specified in the Request for Admissions as admitted and to request monetary sanction. No responses to discovery, including the Request for Admissions have been served. Defendant's counsel has advised that they are not in contact with their client, but this does not excuse the failure to comply. Per CCP§§ 2033.240, 2033.250, a party has 30 days to respond to requests for admission. The failure to serve a timely response waives all objections including those for work product protection under CCP §2018.010. Additionally, the requesting party may move for an order that the genuineness of any document and the truth of any matter specified in the request be deemed admitted, as well as for monetary sanction. Monetary sanctions are mandatory against the party, attorney, or both whose failure to timely serve a response necessitated the motion. (CCP§2033.280 sub (a)-(c).) Monetary sanction is requested pursuant to CCP §§2030.290(b), 2031.300(b), and 2033.280(b). They are seeking $60 for the filing fees for the motion.

The order shortening time was granted 9-24-24; as of the date of this writing, no opposition has been filed.

Legal Authority: A party served with requests for admissions has 30 days to serve their response after being served with the requests. (CCP§2033.250.) If no response is received, the propounding party must bring a formal "deemed admitted motion" to have requests for admission which has received no timely response deemed admitted. (*Stover v. Bruntz* (2017) 12 Cal. App. 5th 19, 30; *St. Mary v. Sup. Ct.* (2014) 2223 Cal. App. 4th 76, 775-776.) The motion may also request monetary sanction (CCP§2033.280 (b).) Service of responses before the hearing defeats the motion, but imposing monetary sanctions remains mandatory. There is no meet and confer requirement for a motion t deem admitted under CCP§2033.280 as there is for a motion to compel further response. (*St. Mary v. Sup Ct., supra,* at 777-778.) Unless the judge determines that a responding party has served, before the hearing on the motion, a proposed response to the requests for admission in substantial compliance with CCP§2033.220 the judge must order the requests for admission deemed admitted. Such an order establishes, by judicial fiat, that a non-responding party has responded to the requests by admitting the truth of the matters contained in the requests. (*St. Mary v. Sup. Ct, supra,* at 776.)

Analysis: As of the time of this writing no responses to the request for admissions have been served on the propounding party. Pursuant to the declaration of counsel, the request was served, and the time to respond passed without a response from the Defendant. Therefore, the court will deem the matters admitted as requested, and issue monetary sanction against counsel for Defendant in the sum of $60.00.

Proposed Order: Plaintiff's motion is granted as prayed.

Petitioner: Hugo Gerstl

Defendant: Dennis J. Lewis (REFCO Farms, LLC)

Cross Complaint:

Cross Complainant: Dennis J. Lewis (Ray Franscioni (*dismissed 5-7-24*), REFCO Farms, LLC)

Cross Defendant: Hugo Gerstl (Linda J. Naegle)

On calendar for REFCO's motion to set aside/vacate dismissal. Plaintiff's motion to amend complaint.

6-5-24 The court grans the Plaintiff's unopposed motion to dismiss REFCO's complaint; based on the insufficiency of the allegations made, and on the basis that after the dismissal of Franscioni's complaint, REFCO lacks standing to sue.

This case involves a dispute over the terms of a lease for agricultural land owned by Ms. Naegle and rented by Franscioni and REFCO Farms, LLC.

5-16-22 Complaint filed by Naegle, which was amended 7-5-22 to state the following causes of action: 1) Breach of Oral Contract; 2) Open Book Account. 8-2-22 Defendants filed their answer issuing a general denial and 20 affirmative defenses.

6-3-22 Cross Complaint: Franscioni and REFCO sought relief, specifically either the value of the pumping equipment owned by Cross Complainant with estimated value of $60,000.00, interest, consequential damages and attorney's fees and/or an order permitting them access to retrieve said pumps and equipment. Cross Complaint has the following causes of action: 1) Breach of Written Contract; 2) Conversion; and 3) Specific Performance/ Injunctive relief.

Cross Complainant Franscioni dismissed his portion of the cross-complaint 5-7-24.

9-18-24 REFCO files its opposition to the motion to dismiss.

9-20-24 Plaintiff's motion to amend the complaint:

Argument:

9-18-24 REFCO files its opposition to the motion to dismiss is filed, noting that there is no such thing as a motion to dismiss an action Pretrial in California. The proper form of the action would be demurrer, motion for judgment on the pleadings, or for summary judgment. REFCO's complaint presents two causes of action – breach of written contract, and conversion. The motion should be denied because if the allegations of the cross complaint are taken as true, as must be done for demurrer or motion for judgment on the pleadings, sufficient facts have been alleged. Franscioni's dismissal is without relevance to that issue. As to conversion, their complaint sufficiently alleges that the *plaintiffs*, including REFCO, owned or had the right to possess the equipment in question (Cross complaint, paragraph 23.) Even if this is treated as either a motion

for judgment on the pleadings or as a demurrer, and the court is inclined to grant the Plaintiff's motion, it should do so with leave to amend. The request the court overrule Naegle's motion.

Noting that this opposition is filed several months after the court issued its order on 6-5-24, the opposition appears to have been construed as a motion to set aside at filing. However, no motion to set aside or vacate, nor any points and authorities with regard to the same has been presented.

9-20-24: Plaintiff's counsel notes that trial is six months away and that a single deposition has been taken, indicating a lack of prejudice should the motion be granted. The amended complaint would not materially change the tenor of the dispute, but rather simplifies it. Essentially Franscioni or his wholly owned entity, REFCO, leased properly owned by Naegle. Defendant(s) farmed said property for several years. The question is whether the parties operated under the terms of a written agreement executed in 2013, or after they were unable to come to terms for a new written lease, whether they operated under an oral lease. They now included a catch all cause of action for implied in fact contract. Defendants argue that inserting an alter ego provision to pierce the LLC veil alters the complaint, but both Franscioni and REFCO were parties to the original complaint and remain so, the only change is that they are now alleged to be alter egos of one another. The doctrine of relation back, noting the original complaint is filed in 2022, resolves any issues of the statute of limitations, as the underlying tenor of the suit has not changed. Under CCP §473(a)(1) the court must construe the right to amend liberally and unless prejudice to the other party is shown, grant the motion. (*Atkinson v. Elk Corp* (2003) 109 Cal. App. 4th 739, 761; *Tung v. Chicago Title Co.* (2021) 63 Cal. App. 5th 734, 747.)

9-25-24 REFCO's opposition: This motion to amend comes more than two and a half years after the filing of the original complaint, five months after the discovery cut off, and after the trial date has been twice continued, which alleges now, for the first time, that Francioni is the alter ego of REFCO, which he manages, and seeks to add him as a defendant. In so doing, the tenor of the case is altered from a simple contract dispute to a more complex corporate alter ego case. No explanation of the delay has been proffered, noting this is the first time that alter ego is claimed and that the 2013 written lease agreement controls the parties' relationship. Second adding the alter ego claim now and asserting the 2013 lease controls would require reopening discovery. The court's ruling on a motion to amend pleadings is reviewed on an abuse of discretion standard. (*Eng v. Brown* (2018) 21 Cal. App. 5th 675, 707.) While the court has wide discretion to permit amendment, it must exercise discretion and consider a variety of factors, including the conduct of the moving party, and late presentation of the amendment. (Id. at 706-707.) Granting the motion without showing good cause for delay can be an abuse of discretion. (*Duchrow v. Forrest* (2013) 215 Cal. App. 4th 1359, 1377.) While great liberality is granted, it should be applied only where no prejudice is shown to the adverse party. Here, no explanation of the delay has been offered, and worse the request is made after discovery cut off and two trial continuances. This is the first time that the 2013 lease agreement is claimed to be the controlling document, contradicting the original complaint and FAC. This alone is sufficient for denial. Moreover, substantially new and different issues are injected into the case at this late date, after the discovery cut off. Prejudice exists where amendment would result in delay of trial, loss of critical evidence, added costs of preparation, and increased burden of discovery, among other reasons.

(*Magpali v. Farmers Group* (1996) 48 Cal. App. 4th 471,476-488.) The addition of an alter ego claim ads substantial complexity and new issues expanding the cost to the Defendant and requiring re opening of discovery and further delay. (*Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal. App. 2nd 825, 838-840.) Moreover, it fails to state a valid claim in the amended complaint, and it contradicts and omits facts alleged in prior pleadings which the Plaintiff now finds harmful.

Legal Authority:

A motion to set aside or vacate a court order pursuant to CCP §473(b) may be made within 180 days of the date of the order. The court may set aside the order if the defendant seeking the set aside presents sufficient evidence to the court demonstrating that the order was taken by inadvertence, mistake, surprise, or excusable neglect. Inadvertence and excusable neglect are essentially synonymous. (Barnes *v. Witt* (1962) 207 Cal. App. 2nd 441.) These are the most common reasons for a set aside. Moreover, the Defendant seeking set aside must present sufficient evidence for the court to find that the inadvertence or neglect was excusable. To be excusable, the neglect must have been the act or omission of a reasonably prudent person under the given circumstances. Being overly busy is not necessarily excusable. Other reasons include a mistake of fact (i.e. understanding facts to be other than what they are), or a mistake of law (when the person knows the facts as they are but has a mistaken belief about the consequences of those facts.) Surprise occurs when a party is put in an injurious situation through no fault or negligence of their own which ordinary prudence would not have guarded against. However, pursuant to CCP §473 (d), the court on its own motion, or the motion of either party, set aside any void judgment or order. A judgment or order may be void if the issuing court lacked subject matter jurisdiction, or if the court lacked personal jurisdiction over the defendant, or if the order granted relief that the court did not have power to grant. There are numerous ways that an order can be void. An order that is void on its face is subject to set aside at any time. (*Nagel v. P&M Distributors, Inc.* (1069) 273 Cal. App. 2n 176.) But courts typically require a motion to set aside a void order to be filed within a reasonable period of time. Typically court apply the six-month time period under CCP §473(b); others apply the two-year or 180-day period applicable to motions under CCP§473.5, especially when the judgment or order is void due to extrinsic defects in service. (*Rogers v. Silverman* (1989) 216 Cal. App. 3rd 1114.) Here, however, no such application has been made. What the Defendant does present is argument on the legal standards governing demurrer or motion for judgment on the pleadings.

The rules governing demurrer applies to a motion for judgment on the pleadings. (Cloud *v. Northrop Grumman Corp.* (1998) 67 Cal. App. 4th 995, 999.) A demurrer tests the legal sufficiency of a complaint, raising only questions of law. (*Berg & Berg Enterprises, LLC. v. Boyle* (2009) 178 Cal. App. 4th 1020, 1034.) A court must accept as true all properly pled material facts. However, it does not accept as true contentions, deductions, or conclusions of law. (*Id.*) A demurrer does not weigh evidence or test the provability of facts so alleged, the only issue is whether the facts, if pled properly, sufficiently state a cause of action. It looks to whether there is a defect on the face of the complaint or on matters subject to judicial notice. The court does not engage in the weighing of evidence at demurrer, nor does it determine issues of fact. (*Berry man v. Merit property Management, Inc.* 82007) 152 Cal. App. 4th 1522, 1556.) In so doing, the court must construe the

complaint in the plaintiff's favor. Moreover, the court in its analysis must determine whether the complaint frames any valid cause of action entitling plaintiff to relief, even if it is not the cause of action intended by the plaintiff. (*Quelimane Co., Inc. v. Stewart Title Guar. Co.* (1998) 19 Cal. 4th 26, 38-39.)

Motion for Leave to File Amended Complaint: A motion for leave to amend must be made promptly on discovery of the need to amend. (*Record v. Reason* (1999) 73 Cal. App. 4th 472, 486-487; *North 7th St. Assocs. V. Constante* (2001) 92 Cal. App. 4th, Supp 7.) A motion to amend is properly denied on the ground that it is untimely when, among other reasons, the trial date is set, the only way to avoid prejudice to the defendant is to continue the trial date for further discovery, and the plaintiff opens an entirely new field of inquiry with the proposed amendment without any satisfactory explanation as to why leave to amend was not requested sooner. (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal. App. 4th 471, 786-487; *Miles v. City of Los Angeles* (2020) 56 Cal. App. 5th 728, 739 [prejudice exists when proposed amendment would require delaying trial, resulting in added costs of preparation and increased discovery burdens].) While the court should apply a policy of liberality in permitting amendments to pleadings at any stage of the proceedings, including during trial, when no prejudice to the opposing party is shown, an unwarranted delay in presenting the amendment may, by itself, be a valid reason for denial. (*Falcon v. Long Beach Genetics, Inc.* (2014) 224 Cal. App. 4th 1263, 1280.)

Analysis: Opposition to Motion to Dismiss: Technically, this is not a motion. It is an opposition to a motion that was decided 6-5-24 after the Defendant did not file any opposition. The court is tempted to construe the opposition as a motion pursuant to CCP §473(b) or (d). However, the court notes that the opposition filed 9-18-24 does not request that the court set aside its 6-5-24 order. Instead, the opposition frames out that a motion for judgment on the pleadings is determined on the same principles as a demurrer, noting that there is no such thing as a motion to dismiss a civil action in pretrial in California. The court has previously noted this conundrum in its prior review of the Plaintiff's motion. However, what the Defendant has failed to do is present either any reasons pursuant to CCP§473(b) to set aside the order based on inadvertence, mistake, surprise, or excusable neglect. No facts or declarations regarding this failure have been submitted to the court for review. Nor has the Defendant made any motion to the court pursuant to CCP §473(d) to have the order deemed void or present any argument that the order is void on its face. While the court concurs with the Defendant's analysis of the law regarding the standard for determining a motion for judgment on the pleadings, it is unclear what, precisely, this late filed opposition is intended to accomplish.

As to the motion to file a Second Amended Complaint filed 9-20-24 by the Plaintiff, the court notes that there is no explanation here why the Plaintiff waited nearly two and a half years, and until after the close of discovery to file this motion. The Plaintiff proposes to add, what they characterize as a "catch all" cause of action framed as a count for contract implied in fact. They argue that the creation of the alter-ego argument in this cause of action will not create a change to the tenor of the complaint, noting that Franscioni and REFCO were defendants to the original complaint, and the only change is that they are now alleged to be alter egos of each other. Plaintiff avers this will create no need to reopen discovery and has not created any reason for delay. The Defendant

disputes this assertion vociferously. The court notes when placing the FAC and the proposed SAC side by side, that there are more than mere simplifications and clarifications in the SAC, as argued by Plaintiff's counsel. The SAC seeks to re-add Franscioni, who was previously dismissed as a Defendant and who is not a defendant in the FAC. It adds, significantly. Allegations that REFCO is Franscioni's alter ego and vice versa. (proposed SAC ¶4(a)-(f).), and radically alters the framing of the contract claims, shifting from arguing that the 2013 agreement was actually extended to 2021 and that its paragraph 17, dictates that this is the controlling agreement. (Proposed SAC ¶¶10-11.) These factual allegations are absent from the FAC. The court notes that Discovery has closed, and these new factual allegations were not present in the FAC and would necessitate reopening discovery to permit the Defendants the opportunity to properly prepare a defense to these new allegations, as well as to determine the strengths and weaknesses of the Plaintiff's new claims. The Plaintiff offers no explanation why these allegations were not made previously. Moreover, the new claims made by the Plaintiff, offered on information and belief, contradict prior admissions within the FAC, without explanation.

As the Plaintiff notes the facts on which these allegations were made were known to the parties for some time, nor is there any claim that this could not have been raised previously, certainly before the trial had been continued twice and discovery had closed. The court notes that the Defendant is able to state that alter ego litigation is complex and fact intensive. There are fifteen factors that need to be considered by the trier of fact in determining if a defendant is the alter ego of another. (*Vendors Inc. v. Oakland Meat Co.* (1962) 210 Cal. App. 2nd 825, 838-840.) These are fact specific factors and would require the reopening of discovery to take further depositions, possibly engage experts, and would necessarily expand the cost and scope of trial preparation and trial itself. This reframes this action from a simple breach of contract dispute to something fare more complicated, and to grant the motion for leave to file the SAC would prejudice the Defendant substantially.

Proposed ruling:

1) The opposition to the Motion to Dismiss, interpreted as a motion to set aside the order pursuant to CCP §473 (b) or (d) is Denied without prejudice.
2) The Plaintiff's motion for leave to file a Second Amended Complaint is Denied. To grant the motion would prejudice the Defendant, causing unreasonable delay in the trial which has twice been continued, force the reopening of discovery and expand the cost and time expenditure of trial preparation for the Defendant unreasonably. Moreover, the Plaintiff has failed to state why this motion to file a second amended complaint has been delayed two years and four months, or to explain the contradiction in the newly proposed complaint to the prior judicial admissions in the First Amended Complaint.

Matter on Calendar for Defendant City of Hollister's unopposed Demurrer to unverified Complaint.

Plaintiff: Samuel R. Perez

Defendant: Mark Emmett Berry (County of San Benito);

Defendant: Christopher Easton Brumfiel (City of Hollister);

Defendant: Rodrugo Guerrero (unrepresented)

This case arises from Plaintiff's claim for injuries sustained as a passenger in a vehicle struck by Defendant Guerrero's vehicle while Defendant Guerrero attempted to evade law enforcement. It is Plaintiff's allegation that the other defendants negligently or carelessly operated their vehicle(s) in pursuit of Defendant Guerrero's vehicle thus causing Defendant' Guerrero to strike Plaintiff's vehicle. Moreover, that Defendants San Benito County and City of Hollister negligently operated the vehicles, or carelessly supervised, selected, hired, retained, or entrusted their employees to operate their vehicles. Plaintiff thus pursues damages for negligence.

8-30-24 Defendant City of Hollister's Demurrer to Unverified Complaint: Defendant demurs based on Plaintiff's failure to state a cause of action. (CCP§430.10(e).) Specifically, Plaintiff's unverified complaint presents a single cause of action against all defendants in "Negligence-Statutory Liability" arising from a police pursuit wherein the vehicle Plaintiff was a passenger in was truck by a vehicle driven by Defendant Guerrero while Guerrero was fleeing police pursuit. Upon service, City's counsel requested meet and confer with Plaintiff's counsel, and they met and discussed Plaintiff's complaint's failure to state a statutory basis for liability against the City. Plaintiff's counsel concurred and agreed to file an FAC. (Hall Dec. ¶2) However, Plaintiff advised a new firm would assume representation. Since that time Plaintiff continues to be represented by the same firm, and no amended complaint has been filed. This demurrer follows. Plaintiff's first cause of action fails to state a claim because Plaintiff fails to allege a statute providing for Public Entity Liability or creating a specific duty of care. Because the City is a public entity (Gov't Code §811.2) a tort claim sounding in negligence (as set forth in ¶16 of the complaint) is subject to the limitation in the Government Claims Act. (§810 et seq.) The act distinguishes between two theories of liability for a public entity 1) direct liability based on the entity's own conduct and legal obligations and 2) vicarious liability arising from misconduct of a public employee occurring in the scope of their employment. (*Zelig v. County of Los Angeles* (2002) 27 Cal. 4th 1112, 1127.) Direct liability provides that a public entity is not liable for injury arising out of its own acts or omissions except as provided by statute. (Gov't Code §815(a).) This limitation requires that liability be based on a specific statute declaring them liable or at minimum creating a specific duty of care, rather than using the general tort provisions of Civ Code §1714. Here no specific statute creating liability for the alleged acts or omissions is cited. (Complaint ¶¶11-20)

The motion is unopposed.

Legal Authority: Demurrer challenges the legal sufficiency of a complaint or answer. Where the complaint fails to state sufficient facts to frame a cause of action under any legal theory. (*New Livable Cal. V. Assn. of Bay Area Govt's.* (2020) 59 Cal. App. 5th 709, 714-715.) Demurrer tests the

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legal sufficiency of the factual allegations. (*Genis v. Schainbaum* (2021) 66 Cal. App. 5th 1007, 1014.) Demurrer does not test the truth or accuracy of the facts alleged, nor does it weigh the facts in the complaint. Rather, the court must assume the truth or accuracy of all properly pleaded factual allegations. It does not test the merits of the case. The facts that must be included in a complaint to properly allege a cause of action are the essential elements of the cause of action which are determined by the substantive law defining the cause of action. (*Foster v. Sexton* (2021) 61 Cal. App. 5th 998, 1018.) A plaintiff must establish that the person sued is legally responsible for the tort. (*Abir Cohen Treyzon Salo, LLP v. Lahiji* (2019) 40 Cal. App. 5th 882, 889.) A Judge properly sustains a defendant's general demurrer without leave to amend on the ground that the defendant did not owe the plaintiff a duty of care. (*Modisette v. Apple, Inc.* (2018) 30 Cal. App. 5th 136, 139, 141-142.) The immunity provision under the Government Claims Act (Gov't Code §§810, et seq.) bars any statutory liability that might otherwise exist for injuries resulting from the alleged condition. Immunity under this statute does not deprive the court of fundamental jurisdiction, but rather operates as an affirmative defense to liability that a defendant may forfeit or waive by not raising it in a timely manner in its demurrer or answer to the complaint. (*Quigley v. Garden Valley Fire Protection Dist.* (2019) 7 Cal. 5th 798, 802-804, 807-815.)

Analysis: This case sounds in negligence (negligent hiring, negligent supervision and retention, negligent entrustment, and negligent maintenance (complaint ¶16) and is made against a public entity as defined by statute. As such, the Plaintiff's claims are subject to the Government Claims Act (Gov't Code §§810, et seq.) The act provides for immunity under its provisions by barring any statutory liability that might otherwise exist unless a statute specifically allows that liability or creates a duty of care. Here the Plaintiff has failed to state any such provision that either creates a liability as alleged, or a duty of care to the Plaintiff. (Gov't Code §815 sub (a); see also *Zelig v. County of Los Angeles, supra,* at 1127.) For tort liability to arise, it must be based on a specific statute declaring them to be liable, or at least creating some duty of care, rather than premising liability on the general provisions of Civil Code §1714. (*Eastburn Regional Fire Protection Authority* (2003) 31 Cal. 4th 1175, 1183.) Thus, the Plaintiff's first and only cause of action against the Defendant City of Hollister Fails. Moreover, while it is generally the policy of the courts to liberally allow amendments to complaint when it is defective as to form or substance, it is also proper to deny amendment when no amount of pleading may cure the defect. Here, there is no statute imposing tort liability on a public entity for either the negligent hiring, supervision or control or negligent entrustment of a police vehicle to an officer, or negligent maintenance of a police vehicle. As such, the complaint cannot be amended to cure this defect.

Proposed Ruling:

The court sustains Defendant City of Hollister's demurrer to the Complaint, without leave to amend

END OF TENTATIVE RULINGS

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