CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 39
HEARING DATE: 12/19/19

1. TIME: 9:00 CASE#: MS5031
CASE NAME: PARAQUAT CASES
HEARING ON DEMURRER TO PETITION of PARAQUAT CASES FILED BY SYNGENTA AG, SYNGENTA CROP PROTECTION, LLC, WILBUR-ELLIS COMPANY
**** TENTATIVE RULING: ****

Defendants' demurrer is **sustained without leave to amend as to Count IV**. **Otherwise, the demurrer is overruled**. Defendants shall file and serve answers to the complaints by January 16, 2020.

The parties agree that Defendants' demurrer applies to all the cases presently included in this Coordinated Proceeding. For ease of reference, the Court refers to the complaint filed in *Watts v. Syngenta AG*, Contra Costa Case No. MSC19-00637.

The main Plaintiffs allege that they were diagnosed with Parkinson's Disease after using Paraquat. The Plaintiffs have sued Defendants for (1) strict products liability, (2) negligence, (3) nuisance, (4) California Consumers Legal Remedies Act and (5) breach of the implied warranty of merchantability. In addition to the main Plaintiffs, some Plaintiffs have brought loss of consortium claims.

Defendants demur to each claim for the failure to state a cause of action. Defendants argue that all the claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §136, et seq. Defendants also argue that the doctrine of primary jurisdiction requires this Court to stay or dismiss this proceeding.

Finally, Defendants argue that the California Consumers Legal Remedies Act claims fail because Plaintiffs' exposure to Paraquat was not primarily for personal, family or household purposes and as such, the CLRA does not apply here. Plaintiffs concede this argument and therefore, the demurrer to Count IV is sustained without leave to amend.

Express Preemption

FIFRA provides that "A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter." (7 U.S.C. § 136v(a).) Thus, FIFRA does not preempt all state law, but specifically allows state regulation of pesticides that is more strict than that permitted by the Environmental Protection Agency ("EPA"). What a state may not do is impose "any requirements for labeling or packaging in addition to or different from those required" by EPA. (7 U.S.C. § 136v(b).) Thus, while Syngenta argues, in essence, that a uniform national pesticide system in which the EPA makes all decisions concerning pesticide use is a superior policy choice, Congress has chosen to draw the preemption provision more narrowly. Accordingly, the Supreme Court has recognized that FIFRA "leaves ample room for

States and localities to supplement federal efforts even absent the express regulatory authorization of § 136v(a). (*Wisconsin Public Intervenor v. Mortier* (1991) 501 U.S. 597, 613.)

The parties agree that Paraquat is regulated by the EPA under FIFRA, 7 U.S.C. §136, et seq. The focus of the inquiry here is section 136v, which states that the States "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act…"

Bates v. Dow Agrosciences L.L.C. (2005) 544 U.S. 431 explained that "[f]or a particular state rule to be pre-empted, it must satisfy two conditions. First, it must be a requirement '*for labeling or packaging*'*;* rules governing the design of a product, for example, are not pre-empted. Second, it must impose a labeling or packaging requirement that is '*in addition to or different from* those required under this subchapter.' " (*Id*. at 444.) The court went on to state that "[r]ules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual commitments plainly do not qualify as requirements for 'labeling or packaging.' None of these common-law rules requires that manufacturers label or package their products in any particular way. Thus, petitioners' claims for defective design, defective manufacture, negligent testing, and breach of express warranty are not pre-empted." Could this lead to "a crazy-quilt of anti-misbranding requirements different from the one defined by FIFRA itself"? Conceivably. But this is the exact argument rejected by the Supreme Court in *Bates*, which responded that "the clear text of § 136v(b) and *Medtronic* cannot be so easily avoided." (*Id.*, at 448.)

Here, as in *Bates*, Plaintiffs' strict products liability, negligence, nuisance and warranty of merchantability claims all include allegations that the product was improperly designed and manufactured. (Watts Comp. ¶¶ 74, 89(a), (b), 99, 129.) The negligence claim also includes allegations that the Defendants did not properly test Paraquat. (Watts Comp. ¶¶ 89(c)-(e).) As explained in *Bates*, these allegations are not preempted. Thus, the demurrer on preemption fails, because each cause of action alleges facts to support a state law claim that is not preempted by FIFRA.

Both parties discuss the failure to warn claims that are included in the complaints. Both the strict liability and negligence claims include allegations that Defendants failed to adequately warn of the risks associated with Paraquat and failed to provide proper instructions to avoid these risks. (Watts Comp. ¶¶ 81, 89(f), (g).) As *Bates* explained, claims based on the negligent-failure-to-warn "are premised on common-law rules that qualify as 'requirements for labeling or packaging.' " (*Bates, supra,* 544 U.S. 446.) *Bates* also explained that a state failure to warn claim is not preempted by FIFRA if the "common-law duties are equivalent to FIFRA's requirements that a pesticide label not contain 'false or misleading' statements." (*Id.* at 447.) In order to determine whether a state failure to warn claim is preempted by FIFRA, the court must look at state law requirements for that claim. (*Id.* at 453.) Notably absent from Defendants' briefing, however, is a discussion of the California law on strict products liability and negligence claims based on the failure to warn, and how it is "in addition to or different from" the EPA

requirements. Thus, Defendants have not shown that claims based on a failure to warn under California law are preempted.

Among the variety of federal district court cases on the issue, two are most worth discussing here. *Wilgus v. Hartz Mt. Corp.* (N.D.Ind. Feb. 19, 2013, No. 3:12-CV-86) 2013 U.S.Dist.LEXIS 24226 decided that allegations seeking to impose liability for improper warnings or product instructions are preempted by FIFRA. This decision was not based on California law and the analysis in *Wilgus* was not persuasive. *Wilgus* barely discussed *Bates* and it does not appear that the court considered what was required under Indiana law and whether those requirements were broader than those in FIFRA. In contrast, in *Hardeman v. Monsanto Co.* (N.D.Cal. 2016) 216 F. Supp. 3d 1037 the court considered what is required for a failure to warn claim in California and found that the California claims were not preempted by FIFRA. (*Id.* at 1037-1038.) In reply, Defendants take issue with *Hardeman's* description of requirements imposed by California law, but overall have failed to establish that California requirements are more broad than those imposed under FIFRA. Moreover, no matter how one parses the language of a variety of lower court decisions on the issue, much of Syngenta's argument simply cannot be reconciled with *Bates*.

Finally, Defendants place too much reliance on *Mut. Pharm. Co. v. Bartlett* (2013) 570 U.S. 472. *Bartlett* involved a design defect state law claim related to a generic pharmaceutical. This context is key since the makers of generic drugs are statutorily prevented from changing the composition of their drug or changing the label so that it differs from that of the named brand drug. (*Id.* at 475, 483-484.) Because of these specific limitations, the only way for the pharmaceutical to comply with both state law and federal law was to stop selling the pharmaceutical. The Supreme Court rejected an argument that state law is not preempted by federal law because the pharmaceutical company could always stop selling the product. (*Id.* at 486-487.) Defendants have not shown that FIFRA prevents Defendants from asking the EPA to change their compound or their label. In fact, FIFRA allows Defendants to ask the EPA for permission to amend its label. (7 U.S.C. §136a(f)(1); see also *Bates, supra,* 544 U.S. at 438-439.)

Conflict Preemption

Defendants cite to *Buckman Co. v. Plaintiffs' Legal Comm.* (2001) 531 U.S. 341 for the holding that State law fraud-on-the-FDA claims are preempted under conflict preemption. It is clear that *Buckman* does not apply here, since both sides agree that the complaints do not include a claim based on fraud-on-the-EPA. Defendants start their conflict preemption discussion with a note that the "Complaints all avoid any explicit statements that Defendants secured Paraquat's registrations by defrauding the EPA." (Memo p. 23.) Plaintiffs agree that their complaints are not based on fraud on the EPA. (Oppo. p. 22.)

Primary Jurisdiction

Defendants argue that the EPA is currently conducting a review of Paraquat and that this Court should invoke the doctrine of primary jurisdiction and dismiss or stay this case pending the outcome of the EPA review. As discussed below, much of the facts in support of this argument are based on documents without a proper request for judicial notice. Therefore, much of these documents are not properly considered when ruling on this demurrer. However, both sides agree that the EPA is currently conducting a registration review of Paraquat and the Court will accept this fact as true.

" ' "*Primary jurisdiction"…* comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.' [Citation.]" (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 390.) "[T]he primary jurisdiction doctrine advances two related policies: it enhances court decisionmaking and efficiency by allowing courts to take advantage of administrative expertise, and it helps assure uniform application of regulatory laws. [Citations.]" (*Id.* at 39.) "No rigid formula exists for applying the primary jurisdiction doctrine [Citation.] Instead, resolution generally hinges on a court's determination of the extent to which the policies noted above are implicated in a given case. [Citation.]" (*Id*. at 391.) Courts have discretion on whether to decline to adjudicate a case until the administrative process has been completed, unless there is a specific statutory scheme that prohibits a court from exercising discretion under the doctrine of primary jurisdiction. (*Id.* at 391-392, 394.)

Here, Defendants do not argue that FIFRA specifically prohibits the courts from exercising discretion under the doctrine of primary jurisdiction. Thus, this Court is free to exercise its discretion when deciding whether to stay these cases pending outcome of the EPA's review of Paraquat.

It is not at all clear that the EPA's decisions will affect a significant portion of Plaintiffs' claims and thus, assist with the goal of judicial efficiency. As *Bates* explained, there are a number of common law claims (including design defect) that are not covered by FIFRA. In addition, product registration under FIFRA is prima facie evidence, *but not conclusive proof*, that the pesticide, its labeling and packaging comply with the registration provisions of the Act. (7 U.S.C. § 136a(f)(2).)

Defendants also argue that invoking primary jurisdiction would protect the integrity of the FIFRA regulatory scheme. Defendants are concerned that allowing a jury to decide the claims raised in this proceeding would usurp the EPA's authority to regulate pesticides such as Paraquat. This argument is not persuasive. If a jury were to conclude that Plaintiffs' claims are meritorious and award damages then Defendants may be motivated to change their labeling or redesign their product, but as *Bates* explained, they would not be required to change it. Thus, the regulatory scheme in FIFRA would remain intact.

It does not appear that the issues raised by this Coordinated Proceeding are so complex that it would be helpful for the EPA to finish its review before these cases proceed. There may

well be complicated scientific principles raised in this proceeding, but such issues are regularly presented to Courts and juries throughout this State. Although *Bates* did not discuss primary jurisdiction, the Supreme Court expressed confidence that juries can decide issues of misbranding and there was no reason to think that an occasional verdict contrary to the EPA's conclusions "would result in difficulties beyond those regularly experienced by manufacturers of other products that every day bear the risk of conflicting jury verdicts." (*Bates, supra,* 544 U.S. at 452.)

Finally, to the extent that federal law on the doctrine of primary jurisdiction applies here, the Court finds the analysis in *Ryan v. Chemlawn Corp.* (7th Cir. 1991) 935 F.2d 129 to be on point.

For these reasons, the Court is not convinced that the doctrine of primary jurisdiction should be used in this case. Therefore, the Court exercises its discretion and will not stay this case pending the outcome of the EPA's review of Paraquat.

Procedural Matters

Defendants reference a number of documents from the EPA. Defendants provided the court with website addresses, but have not included copies of these documents. It appears that Defendants want the Court to take judicial notice of these documents, however, they did not make a formal request for judicial notice. If Defendants had made a formal request for judicial notice they would have also been required to provide copies of these documents. (California Rule of Court, Rule 3.1306, Evid. Code §453(b).) Nor would it be appropriate to accept the EPA documents as proof of the facts asserted in them, especially those related to the safety of the product. The Court did not consider these documents when ruling on this demurrer, except that the Court accepted the uncontested position that the EPA is currently conducting a registration review of Paraquat.

Finally, the briefs in this matter were all oversized. Moving and opposition papers are generally limited to 15 pages each and reply papers are limited to 10 pages. If the parties believe that additional pages will be needed when briefing an issue, they should seek permission from the Court *before* filing an oversized brief. In the future, the Court expects the parties to stay within the page limits or obtain Court approval to file oversized briefs.

2. TIME: 9:00 CASE#: MSC15-01440
CASE NAME: WITT VS. DISCOVERY BUILDERS
HEARING ON MOTION TO/FOR DISQUALIFY X-COMP, X-DEF ENGEO, INC."S COUNSEL FILED BY BRIGHTON STATION INVESTMENT PROPERTIES LLC ,
**** TENTATIVE RULING: ****

Discovery Builders, Inc. ("DBI") and Brighton Station Investment Properties, LLC, move to disqualify the law firm of Huguenin Kahn, LLP, and any attorneys it employs, from representing Engeo, Inc. in this matter. DBI claims that these attorneys, while part of another law firm, represented DBI in several matters, including one substantially related matter. Engeo's position in this case is adverse to DBI. The substantially related matter is Discovery Builders, Inc. v. DeSilva Gates Construction.

(The Court reminds all counsel of the provisions of Rule of Court 3.1112(k), which state: "All references to exhibits or declarations in supporting or opposing papers must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number.")

A. Background and Facts

The attorneys in question are Edward Huguenin, Jessica Moran, James Bothwell, Erick Tofft, and Michael Laidlaw. The prior law firm, Green & Hall, represented DBI in construction litigation while the five "targeted" attorneys worked there. DBI alleges that Huguenin obtained confidential information from Albert D. Seeno II, CEO of DBI, and that Mr. Tofft and Mr. Laidlaw also worked directly as counsel for DBI, including attending site inspections and depositions.

On behalf of DBI, Julie Herman, their Chief Risk Officer, reviewed documents and talked to people within DBI, but does not add any detail to the general assertions about representation, and appears to lack personal knowledge. Albert D. Seeno III declares only that he talked with Huguenin in October 2015.

Mr. Tofft and Mr. Laidlaw appeared at depositions for DBI. Presumably they learned things as part of their preparation. Presumably, they also obtained some information as part of participating in site inspections. The evidence does not indicate, however, that Tofft and Laidlaw ever worked on the DeSilva Construction matter, which is the only case substantially related to this matter.

Mr. Laidlaw declares that he may have covered some site inspections, but did not do anything else, and had no direct contact with the "Seeno entities." Mr. Tofft declares that he never was involved with Brighton Station, but that he did some site inspections, and covered some depositions in various Seeno matters. Mr. Huguenin declares that he never represented DBI or any Seeno entity. He was, however, managing partner of the northern California office of Green & Hall while that firm represented DBI. While he was part of the Green & Hall firm, other attorneys (Joe ElGuindy and Ryan Meyer) did the work on those matters, but they left the firm and took the client and the files with them. He did have a telephone conversation with Mr.

Seeno, but he did not represent Seeno or DBI at the time, and did not discuss any confidential matters.

B. Legal Standards

An attorney "who has formerly represented a client an a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent." (California Rules of Professional Conduct, Rule 1.9(a).) Where any attorney is directly involved in representing a former client, it is presumed that the attorney obtained confidential information. (*Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 709.) If an attorney in the same firm that represented the client did not directly represent the client, the attorney may still be disqualified if the lawyer had acquired protected information. (Rule 1.9(b).) Comment 4 to rule 1.9 makes it clear, however, that where a lawyer leaves a firm that had that represented the client, there is no bar unless the lawyer acquired protected knowledge or information.

"Substantially related matter" means that the two matters "involve a substantial risk of a violation of one of the two duties to a former client[.]" (CRPC, Rule 1.9, Comment 3.)

Where the attorney worked on a substantially related matter, the receipt of such confidential information is not automatically imputed to the attorney, but the targeted attorney bears the burden of proof that they did not receive confidential information. (*Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324, 1340-1341.) The test is not limited to whether the attorney actually received confidential information, but requires disqualification "if confidential information material to the current representation would normally have been imparted to the attorney during his tenure at the old firm." (*Id*.) Where there is no material link between the knowledge the attorney acquired in the prior matter and the new matter in which the attorney represents an adverse party, disqualification is not required. (*Wu v. O'Gara Coach Company, LLC* (2019) 38 Cal.App.5th 1069, 1083-1084.) Information "concerning an adversary's general business practices or litigation philosophy acquired during the attorney's previous relationship" does not require disqualification. (*Id*.)

Even where an attorney did not work on the same or a substantially related matter, the attorney is disqualified if he or she acquired confidential about the client.

In determining whether confidential information was disclosed, the moving party's declarations do not have to disclose confidential information, but have to provide "some showing of the nature of the communications or a statement of how they relate do the current representations[.]" (*Elliott v. McFarland Unified School Dist.* (1985) 165 Cal.App.3d 562, 572.)

C. Analysis

Apparently, Green & Hall represented DBI in nine matters, including the DeSilva Gates matter, which involves Brighton Station. DeSilva Gates is a grading contractor, and constructed the "building pads" at Brighton Station. It appears that the DeSilva Gates matter is substantially related to this matter, because it would seem that any representation of the client who is a

general contractor in a matter involving the same development (Brighton Station) would qualify. This leads to the next step, which is to determine whether the targeted attorneys either actually obtained confidential information or were likely to have done so. The evidence submitted by the targeted attorneys, which describes their work, shows that they did not receive such information, nor were they likely to do so. This is not rebutted by the fact that Mr. Huguenen was the managing partner of the northern California office of Green & Hall, which tells us little about his actual involvement in any particular matters. For that matter, DBI has not established that either Mr. Tofft or Mr. Laidlaw worked specifically on the DeSilva Gates matter.

As to DBI's contention that Green & Hall "provided language and advice regarding the contracts between Engeo and DBI that are at the center of the current dispute," the issue is not whether Green & Hall may have done so, but whether the targeted attorneys did so, or likely were exposed to the information. There is no evidence that they did or were.

As to the other construction matters that are not substantially related to this matter, the evidence does not show that the targeted attorneys received confidential information, or were been in a position to receive confidential information, while representing DBI. Indeed, very little information about that representation has been shown. The targeted attorneys' declarations are sufficient to show that they did not receive confidential information or likely were exposed to it, and DBI has not rebutted this showing.

The objections to the Declaration of Julie Herman on grounds of failure to establish personal knowledge are sustained. The objections to the Declaration of Albert D. Seeno III on grounds of failure to establish personal knowledge are sustained as to Paragraphs 1 through 5, and overruled as to Paragraphs 6 through 9.

The motion is denied.

3. TIME: 9:00 CASE#: MSC16-01199
CASE NAME: VINNIE KALSI VS. DISCOVERY BUI
HEARING ON MOTION TO/FOR DISQUALIFY X-COMP, X-DEF ENGEO, INC."S COUNSEL FILED BY DISCOVERY BUILDERS, INC., BRIGHTON STATION
**** TENTATIVE RULING: ****

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Mr. Tofft and Mr. Laidlaw appeared at depositions for DBI. Presumably they learned things as part of their preparation. Presumably, they also obtained some information as part of participating in site inspections. The evidence does not indicate, however, that Tofft and Laidlaw ever worked on the DeSilva Construction matter, which is the only case substantially related to this matter.

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As to DBI's contention that Green & Hall "provided language and advice regarding the contracts between Engeo and DBI that are at the center of the current dispute," the issue is not whether Green & Hall may have done so, but whether the targeted attorneys did so, or likely were exposed to the information. There is no evidence that they did or were.

As to the other construction matters that are not substantially related to this matter, the evidence does not show that the targeted attorneys received confidential information, or were

been in a position to receive confidential information, while representing DBI. Indeed, very little information about that representation has been shown. The targeted attorneys' declarations are sufficient to show that they did not receive confidential information or likely were exposed to it, and DBI has not rebutted this showing.

The objections to the Declaration of Julie Herman on grounds of failure to establish personal knowledge are sustained. The objections to the Declaration of Albert D. Seeno III on grounds of failure to establish personal knowledge are sustained as to Paragraphs 1 through 5, and overruled as to Paragraphs 6 through 9.

The motion is denied.

4. TIME:9:00 CASE#: MSC18-00859
CASE NAME: TERRY VS TF LOUDERBACK
HEARING ON MOTION TO/FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT FILED BY CHRISTOPHER TERRY
TENTATIVE RULING:

Plaintiff moves for approval of this class action and PAGA suit. On December 5, 2019, the Court issued a tentative ruling discussing the settlement, and directing counsel to file a supplemental issue addressing certain issues, including the basis for the settlement amount. That tentative ruling will not be restated here.

Specifically, the Court requested that counsel describe in a meaningful way the "rounding errors" that are the gravamen of the complaint, the nature of the informal discovery they obtained, and how the case came to include all claims concerning six different types of wage violations. The Court also requested that counsel address the low level of PAGA penalties.

In response, counsel provided a declaration discussing these issues. For example, it appears that the rounding errors may not have significantly reduced the wages received. Moreover, defendant's written meal period policies appeared to be consistent with law, and there was little evidence that they were violated. Finally, counsel noted significant legal issues, including federal preemption (because the plaintiffs are truck drivers), and the availability of penalties for derivative wage statement violations arising from the missed meal periods. Similarly, PAGA and other statutory penalties could be deeply discounted for a variety of reasons, e.g., good faith. (While counsel asserts that it is their duty to maximum other recover at the expense of the PAGA penalties, and that the absence of objection from LWDA should be weighted heavily, the Court declines to rely on those assertions.)

The motion is granted. Plaintiff's counsel is directed to prepare an order reflecting both tentative rulings and the other findings included in the proposed order.

5. TIME 9:00 CASE#: MSC18-01361
CASE NAME:SPENCER VS BENESYS
HEARING ON MOTION TO/FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT
FILED BY ALEXANDER SPENCER JR
TENTATIVE RULING:

Plaintiff Alexander Spencer moves for approval of his class action and PAGA settlement.

Background:

The original complaint was filed July 6, 2018. The operative complaint is the First Amended Complaint, filed August 14, 2018, which alleged failure to pay wages, failure to provide meal and rest periods, wage statement violations, and waiting time violations.

The agreement, provides a settlement class consisting of non-exempt employees employed from July 6, 2014, through the date of preliminary approval, and is estimated to include 163 potential members. A gross settlement of $825,000, non-reversionary, will be paid to the Settlement Administrator. The employer's share of payroll taxes (not income tax withholding) on the wage portions of the payments will be paid by Defendant, separate from the gross settlement amount.

PAGA penalties would be $20,000, resulting in a payment to the LWDA of $15,000. A class representative incentive payment to Mr. Spencer would be $15,000. Settlement administration costs would not exceed $15,000. Simpluris, Inc., is the settlement administrator, and bid $4,995 for the work, so one would expect that the ultimate administration costs would be less than $15,000.) Litigation costs would not exceed $20,000. Attorney fees would not exceed 33.33% of the fund, i.e, $275,000. The net recovery for the class would be $485,000. This would result in an average net recovery of $2,975.46 for each class member. (

The notice to the class is provided, providing the opportunity to object or opt out of the settlement. The class members will not be required to file a claim. Various prescribed follow-up steps will be taken with respect to mail that is returned as undeliverable. Uncashed checks will be paid the State of California Unclaimed Property Fund.

The settlement states that no payments will be made until at least fifteen days after Effective Date, but does not indicate the maximum time for making payments. (Counsel will need to clarify this.)

The Spivak declaration includes an attachment indicating that the LWDA was given notice of the proposed settlement at the same time the moving papers were submitted to the Court.

Legal Standards:

The primary determination to be made is whether the proposed settlement is "fair, reasonable, and adequate," under *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, 1801, including "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in

settlement, the extent of discovery completed and the state of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction … to the proposed settlement."

Because this matter also proposes to settle PAGA claims, the Court also must consider the criteria that apply under that statute. The Legislature's express command that PAGA settlements be approved by the court necessarily implies that there is some substantive dimension to the review. (Labor Code § 2699(l).) The Court's review, however, is somewhat hampered by the lack of guidance in the statute or case law concerning the basis upon which a settlement may be approved. The Court has found no binding authority, but one federal District Court has addressed the issue. In *O'Connor v. Uber Techs, Inc*. (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1133, the court denied approval of class action settlements that included PAGA claims in part because the plaintiffs' claims added up to as much as $1 billion in PAGA penalties but parties settled those claims for $1 million, or 0.1% of their alleged maximum value. As the court stated, "where plaintiffs bring a PAGA representative claim, they take on a special responsibility to their fellow aggrieved workers who are effectively bound by any judgment. [citation omitted] Such a plaintiff also owes responsibility to the public at large; they act, as the statute's name suggests, as a private attorney general, and 75% of the penalties go to the LWDA 'for enforcement of labor laws . . . and for education of employers and employees about their rights and responsibilities under this code.'" (*Id*., at 1134.) In that case, the LWDA itself filed a brief stating that "[i]t is thus important that when a PAGA claim is settled, the relief provided for under the PAGA be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the pubic and, in the context of a class action, the court evaluate whether the settlement meets the standards of being 'fundamentally fair, reasonable, and adequate' with reference to the public policies underlying the PAGA." (*Id*., at 1133.) The *Uber Techs* court noted that "a court may reduce the penalty when 'to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.'" (*Id*., at 1134, citing Labor Code § 2699(e)(2).) Nonetheless, the court noted that the plaintiff had provided no "coherent analysis" to justify the "relatively meager value" assigned to the PAGA claim.

California law provides some general guidance concerning judicial approval of any settlement. First, public policy generally favors settlement. (*Neary v. Regents of University of California* (1992) 3 Cal.4th 273.) Nonetheless, the court should not approve an agreement contrary to law or public policy. (*Bechtel Corp. v. Superior Court* (1973) 33 Cal.App.3d 405, 412; *Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1127.) Moreover, "[t]he court cannot surrender its duty to see that the judgment to be entered is a just one, nor is the court to act as a mere puppet in the matter." (*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664.) As a result, courts have specifically noted that *Neary* does not always apply, because "[w]here the rights of the public are implicated, the additional safeguard of judicial review, though more cumbersome to the settlement process, serves a salutatory purpose." (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 48, 63.)

Attorney fees and incentive payment:

Plaintiffs seek 33% of the total settlement amount as fees, relying on the "common fund" theory. Even a proper common fund-based fee award, however, should be reviewed through a lodestar cross-check. In *Lafitte v. Robert Half International* (2016) 1 Cal. 5th 480, 503, the

Supreme Court endorsed the use of a lodestar cross-check as a way to determine whether the percentage allocated is reasonable. It stated: "If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment." (*Id*., at 505.) Following typical practice, however, the fee award will not be considered at this time, but only as part of final approval.

Similarly, the request for a $15,000 representative incentive payment will be considered at the final approval stage.

Discussion:

Counsel states that the estimated maximum potential recovery was $11,470,027.96, broken down into categories of recovery, i.e., civil penalties, statutory penalties, and wages. The recovery in the settlement is therefore 7.2% of the maximum recovery. Counsel provides a detailed analysis of calculation of the maximum value of the claims. Counsel then explains the basis for the discount, e.g., that the policies might be found to be lawful, that there was no common practice; that there would be "good faith" defenses to the civil penalty claims. For example, defendant's written meal and rest break policies "appear to be largely consistent with California law," and inspected records indicated that many employees took timely meal periods or that rest periods were made available. Finally, counsel noted significant legal issues, including federal preemption and the availability of penalties for derivative wage statement violations arising from the missed breaks. Similarly, PAGA penalties could be deeply discounted for a variety of reasons. Accordingly, while the "discount" of potential liability here is much greater than ordinarily seen, the moving papers establish that is fair, reasonable, and adequate under the circumstances.

Accordingly, the motion will be granted, subject to counsel providing clarification (as noted above) of when the settlement checks are to be mailed out. Nor has counsel specified when the initial class notice will be provided. Counsel are directed to provide a brief declaration setting forth those dates, and a proposed order that includes them. This can be provided by a short declaration submitted with a proposed order. It is not necessary to identify an exact date if counsel can identify a trigger date, e.g., "30 days from the Effective Date." Counsel is to submit the necessary declaration no later than December 31, and the matter will be deemed submitted.

6. TIME: 9:00 CASE#: MSC19-00361
CASE NAME: JENNIFER MORITA VS LENNAR HOME
HEARING ON MOTION TO/FOR COMPEL RESP TO ROGS AND RFPD AND FOR SANCTIONS FILED BY LENNAR HOMES OF CALIFORNIA,INC
**** TENTATIVE RULING: ****

Off calendar at the request of the parties.

7. TIME: 9:00 CASE#: MSC19-02040
CASE NAME: SAMUEL CAMARISTA VS MERITAGE H
HEARING ON MOTION TO/FOR COMPEL ARBITRATION AND STAY ACTION, FILED BY MERITAGE HOMES OF CALIFORNIA INC
**** TENTATIVE RULING: ****

Withdrawn by the moving party.

8. TIME: 9:00 CASE#: MSC19-02116
CASE NAME: J. LEMKE VS S. LEMKE/ M. LEMKE
HEARING ON MOTION TO/FOR EXPUNGE LIS PENDENS FILED BY SCOTT E. LEMKE, MICHELLE M. ROGERS LEMKE
**** TENTATIVE RULING: ****

Defendants move to expunge the lis pendens filed by Plaintiff. Plaintiff moves for leave to file a First Amended Complaint.

Facts:

On October 21, 2019, plaintiff Joseph Lemke filed a complaint against defendants Scott Lemke and Michelle Rogers Lemke for (1) quiet title; (2) breach of oral contact; (3) fraud in the inducement (4) declaratory judgment; and (5) preliminary injunction. Plaintiff recorded a notice of Lis Pendens.

Defendant filed a motion to expunge, and applied for an order shortening time for the hearing, which was granted without opposition.

Plaintiff Joseph is the stepfather of defendant Scott, who is married to defendant Michelle ("Misti"). (First names are used for clarity, no disrespect is intended.) Joseph alleges that in 1998, he helped defendants purchase a home in San Ramon by co-signing the mortgage and lending them $68,000 toward their down payment. (Complaint, Par. 9, 10.) He alleges that they agreed that for two years he would make the mortgage payments and defendants would pay "rent" to him. He alleges that he advised defendants that the $68,000 loan was payable on

demand, but otherwise would come out of their inheritance. When the home was purchased, all parties (including Joseph's wife at the time), were placed on title. After two years, title was transferred solely to Defendants. After that, defendants took various loans out on the property, and August of 2019, defendants advised plaintiff that they were moving and would rent out the property. Plaintiff demanded repayment of the loan, and Scott contended that it was not a loan, but an early inheritance.

Based on these alleged facts, Joseph contends that he holds 25% title to the property, and that defendants breached an oral contract to repay the $68,000 loan. He further alleges that defendants committed fraud, because they induced him to transfer his share of title to the property by promising to repay the loan.

Since the motion to expunge was filed, plaintiff has sought permission to file a First Amended Complaint. The proposed First Amended Complaint would clarify that the promise to repay the $68,000 loan on demand was part of the original agreement to transfer back part of the title, and that Joseph would not have transferred the title back without that agreement.

In their motion, defendants actually do not dispute the factual allegations of the original complaint, except that they contend that the $68,000 payment was not a loan, but an early inheritance.

Legal Standards:

The lis pendens must be ordered expunged if it is improper because (a) the pleading on which it is based does not contain a "real property claim," (CCP § 405.31) **or** (b) the party who recorded the lis pendens cannot establish the "probable validity" of the real property claim by a preponderance of the evidence. (CCP § 405.32) (See *Castro v. Superior Court* (2004) 116 Cal.App.4th 1010, 1017.)

"Probable validity" of the claim for purposes of avoiding expungement means that it is more likely than not that the party who asserted the real property claim will obtain a judgment on the claim in his or her favor. (CCP § 405.3; *Howard S. Wright Const. Co. v. Superior Court* (2003) 106 Cal.App.4th 314, 319 fn. 5.)

Although defendant is the moving party, the burden is on the party opposing the expungement motion--i.e., the plaintiff claimant--to establish the probable validity of the underlying real property claim by a preponderance of the evidence. (CCP §§ 405.30, 405.32; *Howard S. Wright Const. Co., supra* 106 Cal.App.4th at 319.)

A "real property claim" is defined in Code of Civil Procedure section 405.4 as a "a cause or causes of action in a pleading which would, if meritorious, affect (a) title to, or the right to possession of, specific real property[.]" A quiet title action is, on its face, a real property claim. Indeed, Code of Civil Procedure section 761.010 requires the filing of lis pendens immediately upon commencement of a quiet title action.

The court is required to "direct" an award to the prevailing party of the attorney fees and costs of making or opposing the motion unless it finds that either the other party acted with

substantial justification; or other circumstances make the imposition of attorney's fees and costs unjust. (CCP § 405.38.)

Analysis:

The first issue is whether a real property claim is stated. A quiet title action would seem to qualify. The difficulty here is that, even assuming the truth of the factual allegations, plaintiffs alleged *facts* (as distinct from legal conclusions), show only a claim for damages for breach of contract. While plaintiff does allege that there was an initial agreement that his share of ownership of the property would be transferred, he also alleges that defendants complied, by paying "rent" to him for two years, leading to the transfer. In the complaint, he alleges that defendants fraudulently induced him to transfer his share of title to them by falsely representing that they would repay the loan on demand, but does not allege that his duty to transfer his share of title was contingent on the repayment of the loan. Based on these allegations, there arguably are two separate agreements: (1) the rent/transfer agreement; and (2) the $68,000 loan. The latter is unsecured, and creates no claim to real property. In essence, plaintiff is saying that if he had known that defendants considered the $68,000 an inheritance, he would not have transferred title, but the allegations of the original complaint do not support that claim.

Joseph, perhaps recognizing the potential merit of the motion to expunge, has moved to amend the complaint to allege specifically that the loan agreement was part of the title-shifting agreement. This requires only a relatively subtle change to the pleading. The amended complaint would further allege that, before transferring title, Joseph reiterated that the loan must be repaid on demand, and defendants "did not dispute it." (Because the proposed changes to the pleading make the pleading more specific, rather than contradict the original complaint, this would not be an appropriate situation in which to invoke the "sham pleading" or "judicial admission" doctrines.)

While the analysis of whether a "real property claim" is stated is analogous to that undertaken on a demurrer, even a demurrer assumes only the truth of facts alleged, not legal conclusions. Thus, the fact that the factual allegations of the original complaint would not support a conclusion that there is a real property claim is problematic for plaintiff.

Joseph asserts that the duty to show the probable validity of the claim does not apply here, because it applies only where the defendant moves to expunge on that ground under CCP section 405.32, and defendant here has moved to expunge only under section 405.31, i.e., that there is no "real property claim. Section 405.30, however, provides that "[t]he claimant shall have the burden of proof under Sections *405.31 and 405.32*." (Emphasis added.) Moreover, the body of defendants' brief raises the section 405.32 issue.

Although a verified complaint may be used as evidence in lieu of a declaration, this case is a good example of why the practice is not preferred. Given the very general nature of the allegations of the complaint (and proposed amended complaint), the verified pleading is a poor substitute for a declaration that would set forth detailed evidentiary facts helping to establish the

merits. Plaintiff has not filed any supporting declaration to establish the probable merit of the claim.

The proposed amended complaint, if amended, arguably would be sufficient to state a claim for a fraudulent conveyance. A suit to set aside a fraudulent conveyance is considered a real property claim under the statute. (*Kirkeby v. Superior Court* (2004) 33 Cal.4th 642, 649.)

The Court does not decide, however, whether a valid real property claim has been stated, because, assuming that it has, plaintiff has failed to establish the probable validity of the claim under section 405.32. For the reasons discussed above, the verified complaint, even with the proposed amendment, is not sufficient to establish probable validity.

With respect to the motion to amend the complaint, defendant makes a valid argument that it should not be allowed if it would materially affect the decision on the motion. The Court's view, however, is that, even under the proposed amended complaint, the plaintiff has failed to show probable validity of the claim. Accordingly, the motion for leave to file the first amended complaint is granted.

The motion to expunge is granted.

Defendant seeks $3,750 in costs and fees associated with the motion. Fees are to be awarded to prevailing party on the motion "unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust." (CCP § 405.38.) In this instance, plaintiff has a plausible quiet title action, and the code specifically requires that a lis pendens be filed where there is a quiet title action. (CCP § 761.010(b).) Thus, the Court finds that there was substantial justification for the lis pendens. The request for fees is denied.

9. TIME:9:00 CASE#: PS19-0160
CASE NAME: THE BANK OF NEW YORK VS HARMS
HEARING ON MOTION FOR JUDGMENT ON THE PLEADINGS
SET BY COURT
TENTATIVE RULING:

Defendant Dale Harms moves for judgment on the pleadings on a number of grounds, all of which relate to a claim that the complaint is improperly verified, because it does not justify the fact that the complaint is verified by the plaintiff's attorney, and is stated on information and belief. The verification is sufficient on its face, because Code of Civil Procedure section 446 permits verification by an attorney when his or her office is in a different county from the client, and expressly provides that such a verification shall be on information and belief. While such a verification may not be used as evidence at the trial, it is sufficient to allow the case to proceed.

Defendant also makes various evidentiary objections to the complaint, but evidentiary objection are properly directed to the submission of evidence, not whether the pleadings are adequate.

Denied.
10. TIME:9:05 CASE# MSC19-02116 **CASE NAME: J. LEMKE VS S. LEMKE/M. LEMKE** **HEARING ON MOTION TO/FOR LEAVE TO FILE AMENDED COMPLAINT** **FILED BY JOSEPH LEMKE** ***TENTATIVE RULING:*** See line 8.