

**TENTATIVE RULINGS**

**FOR: April 5, 2019**

The Court may exercise its discretion to **disregard** a late filed paper in law and motion matters. (Cal. Rules of Court, rule 3.1300(d).)

**Unlawful Detainer Cases** – Pursuant to the restrictions in Code of Civil Procedure section 1161.2, no tentative rulings are posted for unlawful detainer cases and appearances are required.

**Court Reporting Services** – The Court does not provide official court reporters in proceedings for which such services are not legally mandated. Parties are responsible for either making the appropriate request in advance or arranging for their own private court reporter. Go to <http://napacountybar.org/court-reporting-services/> for information about local private court reporters. Attorneys or parties must confer with each other to avoid having more than one court reporter present for the same hearing.

**PROBATE CALENDAR – Hon. Victoria Wood, Dept. A (Historic Courthouse) at 8:30 a.m.**

**In the Matter of Anthony Kurt Kessler Irrevocable  
Special Needs Trust**

**26-46892**

SIXTH ACCOUNT AND REPORT OF TRUSTEES AND PETITION FOR SETTLEMENT OF ACCOUNT AND FOR APPROVAL OF TRUSTEES' FEES

**TENTATIVE RULING:** GRANT petition. The matter is set for a biennial accounting in two years on April 6, 2021, at 8:30 a.m. in Dept. A. All accounting documents must be filed at least 30 days prior to the hearing. The clerk is directed to send notice to the parties.

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**Conservatorship of Ivan Madrigal**

**26-57409**

REVIEW HEARING

**TENTATIVE RULING:** After a review of the matter, the Court finds the co-conservators are acting in the best interest of the conservatee. Thus, the case is set for a biennial review hearing in two years, on April 6, 2021, at 8:30 a.m. in Dept. B. The court investigator shall prepare a biennial investigator report for the next hearing date. The clerk is directed to send notice to the parties.

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REVIEW HEARING

**TENTATIVE RULING:** After a review of the matter, the Court finds the conservator is acting in the best interest of the conservatee. Thus, the case is set for a biennial review hearing in two years, on April 6, 2021, at 8:30 a.m. in Dept. A. The court investigator shall prepare a biennial investigator report for the next hearing date. The clerk is directed to send notice to the parties.

**CIVIL LAW & MOTION CALENDAR – Hon. Victoria Wood, Dept. A (Historic Courthouse) at 8:30 a.m.**

**Stacee Cootes v. Jackson Street Wine Warehouse, LLC, et al.**

**17CV000427**

DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AS TO THE VERIFIED COMPLAINT

**TENTATIVE RULING:** Defendants Jackson Street Wine Warehouse, LLC (JSWW), and Randall Callahan (collectively, defendants) move for judgment on the pleadings as to each cause of action in plaintiff Stacee Cootes' verified complaint. Following oral argument on February 14, 2019, the Court permitted Cootes to file a second supplemental opposition and defendants to file a reply.<sup>1</sup> Cootes thereafter filed her second supplemental opposition along with a request for judicial notice. Cootes attached to the second supplemental opposition a proposed first amended complaint. Defendants filed their reply and an objection to the request for judicial notice. The Court subsequently granted Cootes' request to file a sur reply as well as a response to the objection to her request for judicial notice. The Court also allowed defendants to file a sur reply.

With this background in mind, the Court first addresses the requests for judicial notice and an objection to the sur reply before reaching the merits of the motion.

**A. Requests for Judicial Notice**

Defendants' request for judicial notice is GRANTED IN PART AND DENIED IN PART. The request is granted as to Government Code section 12926, Labor Code section 2922, Civil Code sections 1550, 1549, and 1714, and 42 U.S.C. § 1211 (exhibit A), and California Code of Regulations sections 10000 [statement of purpose], 10002 [filing a pre-complaint inquiry of employment discrimination with the department], generally to sections 10002-10034 [setting forth DFEH administrative process] (exhibit B), and the verified answer, verified cross-complaint, general denial, and complete file in this case (exhibit D). The Court does not take judicial notice of the truth of the matters asserted in the court records.

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<sup>1</sup> On February 21, 2019, Cootes filed doe amendments adding Raja Development Co., Inc. (doe one) and Cashel, Inc. (doe two) as defendants.

The request is denied as to various excerpts of Cootes' deposition that purportedly contain inconsistent statements from the allegations in the complaint (exhibit C). In *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604-05, the court explained: "The court will take judicial notice of records such as admissions, answers to interrogatories, affidavits, and the like, when considering a [motion for judgment on the pleadings], only where they contain statements of the plaintiff or his agent which are inconsistent with the allegations of the pleading before the court. The hearing on [the motion for judgment on the pleadings] may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of affidavits, declarations, depositions, and other such material which was filed on behalf of the adverse party and which purports to contradict the allegations and contentions of the plaintiff. [Citation.]" Here, the deposition testimony which defendants cite is the subject of a request for judicial notice, but the request does not show that each excerpt was inconsistent with the complaint's allegations. Accordingly, the excerpts may not be considered in support of defendants' motion. Even if defendants had adequately explained the purported inconsistent statements, the excerpts are not relevant to the disposition of the motion.

Cootes' March 4, 2019 request for judicial notice is DENIED as to the following documents from *Baskett v. Raja Development Co., Inc., et al.*, Napa County Superior Court, Case No. 16CV001003: (1) Evidence and Exhibits in Support of Plaintiff Baskett's Motion for Summary Adjudication of Specified Affirmative Defenses; (2) Workers' Compensation Appeals Board's Second Amended Findings and Award Issued After Opinion and Order Granting Reconsideration and Decision and Reconsideration; and (3) the answer. Although court records, the materials from *Baskett* are irrelevant to the present action as they are based on different facts, a different plaintiff, and a different time period.

The request also is denied to the extent Cootes wants the Court to take judicial notice of the *Baskett* complaint. The complaint is attached to the Aguilera declaration, but Cootes did not request judicial notice of the document. (See Cal. Rules of Court, rules 3.1113(l).)

## **B. Objection**

Cootes objects to defendants' March 7, 2019 "Sur Sur Reply." Cootes maintains defendants did not request leave of court to file the document, the filing is not permitted under the code, and the document raises new arguments and rehashes arguments made from the reply papers. Cootes ignores the March 19, 2019 Minute Order, which provided defendants "may file a Sur Reply if any new issues arise . . . without the need for an ex parte motion." Although incorrectly labeled as a "Sur Sur Reply," the document is the sur reply permitted under the minute order.

Cootes also maintains that because defendants will not accept service for the named doe defendants, defendants lack standing to challenge the doe amendments. The Court deems the position waived as Cootes cites no authority to support her position.

### **C. Motion for Judgment on the Pleadings**

Defendants' motion for judgment on the pleadings as to the first cause of action for termination in violation of public policy, second cause of action for breach of implied contract of continued employment, third cause of action for breach of implied covenant of good faith and fair dealing, and fourth cause of action for negligence on the ground that each claim lacks facts sufficient to constitute a cause of action [Code Civ. Proc., § 438, subd. (c)(1)(B)(ii)] is GRANTED. Cootes' second supplemental opposition does not address the pleading deficiencies in her complaint as identified in defendants' motion. She instead references a proposed first amended complaint, and how it is supposedly properly pled when compared to the arguments raised in defendants' motion. It is apparent by Cootes' reference to her proposed first amended complaint that she has not met her pleading burden with regard to the allegations from her original complaint.

In short, the second supplemental opposition, is no opposition at all because, as defendants proffer, Cootes merely seeks to avoid the contentions raised in the motion by proposing a first amended complaint containing new causes of action, new defendants, and new factual allegations that are possibly inconsistent with the original verified allegations. The Court has not reviewed the proposed pleading. It is not the Court's role to cull through an as yet unfiled proposed first amended complaint to determine if it is adequately pled; only the current pleading and whether its allegations are properly pled are before the Court at this time. As essentially conceded in the opposition papers, the allegations of the operative pleading are insufficient and judgment on the pleadings, therefore, is appropriate.

Specifically with regard to the first cause of action for termination in violation of public policy, the motion is GRANTED on the ground the court lacks subject matter jurisdiction [Code Civ. Proc., § 438, subd. (c)(1)(B)(i)]. Cootes failed to allege she exhausted her administrative remedies by filing a complaint with the DFEH under FEHA and receiving a right to sue letter. In her supplemental opposition, Cootes attached a copy of her April 5, 2017 DFEH complaint, notice of case closure and right to sue, and notice to complainant or complainant's attorney. Cootes' DFEH complaint, however, alleges she was terminated from her employment with JSWW based on the fact she "was fired because I [was] diagnosed by Kaiser to have MS." (Supp. Opp., Ex. A at SC000006.) By contrast, Cootes' complaint before this Court alleges both defendants terminated her employment stemming from exposure to mold, not just JSWW. (Compl., ¶ 9.) Multiple sclerosis is not mentioned in the complaint.

There are at least two deficiencies. First, Cootes did not exhaust her administrative remedies by filing a DFEH complaint based on her health problems relating to exposure to mold, which are not, on their face, protected by FEHA. Second, the attached complaint indicates Cootes did not exhaust her administrative remedies by filing a DFEH complaint against Callahan as it was only filed against JSWW.

### **D. Leave to Amend**

Defendants' motion is GRANTED WITH LEAVE TO AMEND IN PART and WITHOUT LEAVE TO AMEND IN PART.

The motion is granted with leave to amend as to the second, third, and fourth causes of action because it appears *possible* the claims can be amended. This does not mean the Court approves of or finds sufficient the allegations of the proposed first amended complaint, which attempts to add entirely new parties and new claims, for which separate leave of court would be required.

The motion is granted without leave to amend as to the first cause of action. Although the current claim based on mold is denied without leave to amend, because there is a possible discrimination claim under Cootes' DFEH complaint based on an FEHA protected illness (multiple sclerosis), she may have a basis to file a motion for leave to file a *new* claim for wrongful termination. Again, the filing of new claims at this stage of the proceedings would require separate leave of court.

If Cootes elects to file an amended complaint as authorized in connection with this motion, she may do so within 10 calendar days of service of notice of entry of order. The Court notes, however, that if the proposed first amended complaint is filed as currently pled with new causes of action and new defendants, it will likely be subject to a motion to strike for not first seeking leave of court. If Cootes wishes to file an amended complaint adding new claims and parties, she should consider first filing a motion for leave to file an amended pleading that exceeds the leave authorized in conjunction with this motion. Such a motion would allow the Court to properly consider all factors it must consider in addressing leave to amend at this late stage of the proceedings. If Cootes files a motion for leave to amend by April 12, 2019, the deadline in which to file a first amended complaint will be stayed until after the Court rules on the motion for leave. In the alternative, Cootes may first file an amended complaint as authorized in connection with this motion, and then seek leave to file a second amended complaint with new claims, parties, and allegations.

The Court makes no ruling at this time as to whether the February 21, 2019, doe amendments adding Raja Development Co., Inc. (doe one) and Cashel, Inc. (doe two) as defendants are proper. The Court, however, expresses concern as to whether Cootes was aware of these corporate defendants well before naming them as doe defendants. If defendants want to challenge the amendments, they may bring a motion, subject to any argument that they are not the proper parties to challenge the amendments.

Whether the first amended complaint Cootes ultimately files is a sham is not properly before the Court at this time.

Cootes' request for sanctions contained in her supplemental opposition is DENIED.

The Court will not tolerate future motions containing unauthorized supplemental oppositions, sur replies, or other extraneous materials not originally filed with the opening papers, opposition, or reply. Any papers not filed in accordance with the Code of Civil Procedure may be stricken on the Court's own motion. Nor is the Court likely to look favorably upon requests to file additional briefing due to the nature of the claims in the case.



**(1) MOTION BY PLAINTIFF NORTHERN TO COMPEL INITIAL RESPONSES TO SET ONE FORM INTERROGATORIES**

**TENTATIVE RULING:** The motion is GRANTED. By failing to serve a timely response to Set One Form Interrogatories, Defendant has waived his right to object and/or to produce writings pursuant to Code of Civil Procedure section 2030.230. (Code Civ. Proc. § 2030.290, subs. (a).) Defendant is ordered to serve initial responses within 10 calendar days of notice of entry of order. (Code Civ. Proc. § 2030.290, subs. (b).) Plaintiff to serve notice.

**(2) MOTION BY PLAINTIFF NORTHERN TO HAVE DOCUMENTS DEEMED GENUINE**

**TENTATIVE RULING:** The motion is GRANTED. By failing to serve a timely response to Set One Requests for Admission, Defendant has waived his right to object. (Code Civ. Proc. § 2033.280, subs. (a).) The Court orders that the genuineness of the following documents is deemed admitted: Exhibits A through O to Attachment two to Requests for Admission, attached as Exhibit 23 to the Declaration of Andre J. LeLievre supporting Plaintiff Northern’s Motion to Have Documents Deemed Genuine. (Code Civ. Proc. § 2033.280, subs. (b).) Plaintiff to serve notice.

**(3) MOTION BY PLAINTIFF NORTHERN TO COMPEL INITIAL RESPONSES TO SET ONE SPECIAL INTERROGATORIES**

**TENTATIVE RULING:** The motion is GRANTED. By failing to serve a timely response to Set One Special Interrogatories, Defendant has waived his right to object and/or to produce writings pursuant to Code of Civil Procedure section 2030.230. (Code Civ. Proc. § 2030.290, subs. (a).) Defendant is ordered to serve initial responses within 10 calendar days of notice of entry of order. (Code Civ. Proc. § 2030.290, subs. (b).) Plaintiff to serve notice.



**DEFENDANT’S MOTION TO CONTINUE TRIAL**

**TENTATIVE RULING:** The motion is GRANTED. Appearance is required to discuss the setting of a new trial date and any other applicable dates.