

TENTATIVE RULINGS

DEPT C28

Judge Thomas S. McConville

May 13, 2024 at 2:00 p.m.

Court Reporters: Official court reporters (i.e., court reporters employed by the Court) are **NOT** typically provided for law and motion matters in this department. If a party desires a record of a law and motion proceeding, it will be the party's responsibility to provide a court reporter. Parties must comply with the Court's policy on the use of privately retained court reporters which can be found at:

- [Civil Court Reporter Pooling](#); and
- For additional information, please see the court's website at [Court Reporter Interpreter Services](#) for additional information regarding the availability of court reporters.

Tentative rulings: The court endeavors to post tentative rulings on the court's website in the morning, prior to the afternoon hearing. However, ongoing proceedings such as jury trials may prevent posting by that time. Tentative rulings may not be posted in every case. Please do not call the department for tentative rulings if tentative rulings have not been posted. The court will not entertain a request to continue a hearing or the filing of further documents once a tentative ruling has been posted.

Submitting on tentative rulings: If all counsel intend to submit on the tentative ruling and do not desire oral argument, please advise the Courtroom Clerk or Courtroom Attendant by calling (657) 622-5228. Please do not call the department unless all parties submit on the tentative ruling. If all sides submit on the tentative ruling and so advise the court, the tentative ruling shall become the court's final ruling and the prevailing party shall give notice of the ruling and prepare an order for the court's signature if appropriate under Cal. R. Ct. 3.1312.

Non-appearances: If nobody appears for the hearing and the court has not been notified that all parties submit on the tentative ruling, the court shall determine whether the matter is taken off calendar or the tentative ruling becomes the final ruling. The Court also might make a different order at the hearing. (*Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 442, fn. 1.)

Appearances: Department C28 conducts non-evidentiary proceedings, such as law and motion hearings, remotely by Zoom videoconference pursuant to Code of Civil Procedure section 367.75 and Orange County Local Rule 375. Any party or attorney, however, may appear in person by coming to Department C28 at the Central Justice Center, located at 700 Civic Center Drive West in Santa Ana, California. All counsel and self-represented parties appearing in-person must check in with the courtroom clerk or courtroom attendant before the designated hearing time.

All counsel and self-represented parties appearing remotely must check-in online through the court's civil video appearance website at <https://www.occourts.org/media-relations/civil.html> before the designated hearing time. Once the online check-in is completed, participants will be prompted to join the courtroom's Zoom hearing session. Participants will initially be directed to a virtual waiting room pending the start of their specific video hearing. Check-in instructions and instructional video are available at <https://www.occourts.org/media-relations/aci.html>. The Court's "Appearance Procedures and Information--Civil Unlimited and Complex" and "Guidelines for Remote Appearances" also are available at <https://www.occourts.org/media-relations/aci.html>. Those procedures and guidelines will be strictly enforced.

Public Access: The courtroom remains open for all evidentiary and non-evidentiary proceedings. Members of the media or public may obtain access to law and motion hearings in this department by either coming to the department at the designated hearing time or contacting the courtroom clerk at (657) 622-5228 to obtain login information. For remote appearances by the media or public, please contact the courtroom clerk 24 hours in advance so as not to interrupt the hearings.

Arguments: The court will allow arguments on the pending motions, but those arguments must not repeat arguments previously made in each parties' applicable briefs.

No filming, broadcasting, photography, or electronic recording is permitted of the video session pursuant to California Rules of Court, rule 1.150 and Orange County Superior Court rule 180.

#	Case Name	Tentative
50.		
51.		
52.	Mays v. Nguyen 2023-01322608	<p>Attorney Thomas C. Ramierz's unopposed motion to be relieved as counsel for plaintiff Matthew Mays is GRANTED.</p> <p>Service was proper, and all required forms were filed pursuant to California Rules of Court, Rule 3.1362.</p> <p>The order shall become effective upon the moving attorney's filing of the proof of service of the executed order on plaintiff.</p> <p>Moving counsel shall prepare a revised order reflecting all future dates.</p> <p>Further, the court continues the (1) Case Management Conference and (2) the Order to Show Cause why this case should not be dismissed due to plaintiff's failure to proceed with the case—namely, serving the summons and complaint on the named defendant Lam Dinh Nguyen. Should plaintiff fail to either (a) serve the defendant with the summons and complaint before the continued date or (b) appear and show the diligence taken to attempt to serve the summons and complaint on the defendant, the case shall be dismissed without prejudice.</p> <p>The continued date for (1) and (2) is August 26, 2024 at 9:00 a.m. in Department C28.</p> <p>Moving attorney shall provide notice.</p>
53.	McKenzie v. Weiss 2023-01333662	<p>Defendant Phyllis Billie Weiss's motions to compel plaintiff Janice A. McKenzie to provide responses to Form Interrogatories, Set One, Special Interrogatories, Set One, and Demand for Inspection and Production of Documents, Set One, are DENIED without prejudice. (Code Civ. Proc., §§ 2030.290, 2031.300.) The proofs of service of the Form Interrogatories, Set One, and Demand for Inspection and Production of Documents, Set One, reflect that the discovery was served via electronic service only. However, electronic service is not permitted on a self-represented party absent their affirmative consent, of which there is no evidence here. (Cal.</p>

		<p>Rules of Court, Rule 2.251, subd. (c)(3)(B); Rule 2.253, subds. (b)(2), (b)(3).)</p> <p>The motion to compel responses to Special Interrogatories fails to include a copy of the Special Interrogatories at issue; rather, moving party attached a copy of the Demand for Inspection and Production of Documents as Ex. A to that motion.</p> <p>On 4-29-24, moving party filed a proof of service indicating all three sets of discovery were personally served to plaintiff on 11-21-23. (ROA 81.) However, this was after the motions were filed on 11-8-23, and validly served by mail on 11-13-23 (ROA 41). There is no evidence that plaintiff failed to respond to the subject discovery once it was validly served on 11-21-23.</p> <p>Moreover, there is also no responsive pleading by plaintiff waiving the above defects. (See <i>Carlton v. Quint</i> (2000) 77 Cal.App.4th 690, 698 [response on merits can waive service defect].)</p> <p>Absent evidence of plaintiff's failure to respond after valid service of the subject discovery, the motions are DENIED without prejudice.</p> <p>Clerk to give notice.</p>
54.	<p>Maldonado v. Aluminum Precision Products, Inc. 2023-01299935</p>	<p>Plaintiff John Maldonado's motions to compel defendant Aluminum Precision Products, Inc. to provide further response to plaintiff's form and special interrogatories, and for sanctions is GRANTED in part and DENIED in part as follows:</p> <p>The motion is GRANTED as to form interrogatories 201.2, 201.6, 204.3, 204.7, 209.2 and 12.2. The motion is DENIED as to form interrogatories 204.5, 215.2, 12.1 and 12.3.</p> <p>The motion is GRANTED as to special interrogatories, 8, 17, 18, 19, 20, 21, 26, 27 and 28. The motion is DENIED as to special interrogatory 25.</p>

		<p>Defendant shall provide further, verified, code compliant responses, without objection to interrogatories within ten days. To the extent any information is withheld by defendant based on an assertion of privilege, defendant shall provide a privilege log with regard to that information. The privilege log shall be served within ten days.</p> <p>Sanctions are ordered in the total amount of \$2500. The sanctions shall be paid by defendant to plaintiff through plaintiff's counsel within 30 days.</p> <p>Plaintiff shall give notice.</p>
55.		
56.	<p>Hot Pepper, Inc. v. mMax Communications, Inc. 2022-01250772</p>	<p>Cross-defendants Hot Pepper, Inc. (HPI), XiaoLaJiao (Hong Kong) Technology Co., Ltd. (XLJ), Yuan Ning Sun (Sun), and Hot Pepper Mobile Inc.'s (HPM) (collectively, cross-defendants) demurrers to first amended cross-complaint are SUSTAINED as to the 1st, 2nd, 6th, and 13th causes of action, and otherwise OVERRULED.</p> <p>XLJ, Sun, and HPM's request for a stay of the derivative claims is DENIED.</p> <p>Cross-complainants Hong Peow Ong (Ong), Christine Tan (Tan), mMax Communications, Inc., and mMax Communications Pte Ltd. (MCSG) (collectively, cross-complainants) are granted 10 days leave to amend.</p> <p><u>Two sets of demurrers by the same set of cross-defendants.</u> As an initial matter, cross-defendants appear to believe that just because they have retained several different law firms to represent them in this action, they can bring two separate demurrers to the same pleading. No authority provides for this, and cross-defendants have failed to demonstrate otherwise. The difference between a direct and derivative claim is the capacity in which the <i>plaintiff or cross-complainant</i> is bringing the claim. It has no bearing on the capacities in which the defendants or cross-defendants are being sued. Cross-defendants' decision to employ different sets of counsel does not somehow split their identities into two. The court has excused this defect in this instance by treating the two</p>

demurrers as one, but cross-defendants should not expect the same treatment moving forward unless there is authority for the same.

1st cause of action for failure to pay wages. The first amended cross-complaint (FAXC) fails to state facts sufficient to constitute this cause of action. (See CACI No. 2700 [elements of the claim include, inter alia, facts showing defendant owes plaintiff wages under the terms of the employment, and the amount of unpaid wages]; see Lab. Code, §§ 201, 202; *Oppenheimer v. Moebius* (1957) 151 Cal.App.2d 818, 819 [affirming ruling on demurrer; “a complaint in a statutory action for unpaid wages does not state a cause of action against the employer unless it alleges the amount of wages accrued and unpaid at the time the employment relationship terminated”]; see also *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790 (*Covenant Care*) [statutory claims must be pled with particularity].)

2nd cause of action for failure to pay waiting time penalties. The FAXC fails to state facts sufficient to constitute this cause of action. (See CACI No. 2704 [elements]; Lab. Code, § 203; *Oppenheimer v. Moebius, supra*, 151 Cal.App.2d at pp. 819-820 [“a count for a statutory penalty for failure to pay wages does not state a cause of action unless it alleges facts from which the amount of the claimed penalty can be ascertained”]; see also *Covenant Care, supra*, 32 Cal.4th at p. 790.)

6th & 13th causes of action for constructive fraud. The FAXC fails to state facts sufficient to constitute these causes of action, and cross-complainants do not oppose dismissal of these claims. (See Civ. Code, § 1573 [constructive fraud]; *Tyler v. Children’s Home Society* (1994) 29 Cal.App.4th 511, 548 [elements]; *Knox v. Dean* (2012) 205 Cal.App.4th 417, 434 [elements, specificity]; see also ROA No. 218–Opp. at p. 2, fn. 2; Opp. at p. 7, fn. 2.)

7th & 8th causes of action for conversion and violation of Penal Code section 496. These claims concern the

conversion/theft of a domain name, and not of any trademarks or trade names. (FAXC ¶¶ 142-146, 147-150; see *id.* ¶¶ 55-60; see also *Kremen v. Cohen* (9th Cir. 2003) 337 F.3d 1024, 1029-1030 [under California law, internet domain name is a form of intangible property].) The mere fact that HPI may own its trademarks and trade names does not somehow show that it also owns the subject domain name.

12th & 14th-19th causes of action, derivative claims.
Contrary to cross-defendants' contentions, the mere fact that the FAXC alleges direct claims stemming from the same course of conduct does not ipso facto "legally preclude" the derivative claims.

The two types of actions, direct or derivative, are normally treated as mutually exclusive: "i.e., the right of action and recovery belongs either to the shareholders (direct action) or to the corporation (derivative action)." (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 650-651.) In other words, a plaintiff cannot pursue the same remedy for the same injury both individually and derivatively.

But the same course of conduct may cause separate injuries to both the individual shareholder and the corporation. (See *Denevi v. LGCC, LLC* (2004) 121 Cal.App.4th 1211, 1221-1222 (*Denevi*); *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 124.) "[A] single course of action by a majority shareholder might give rise to derivative claims, individual claims, or both." (*Ibid.*; see *Schrage v. Schrage* (2021) 69 Cal.App.5th 126, 149 ["A minority shareholder may bring a cause of action for breach of fiduciary duty against majority shareholders as an individual claim or as a derivative claim, depending on the circumstances."]; *Jara v. Suprema Meats, Inc.* (2004) 121 Cal.App.4th 1238, 1252-1253, 1257-1258; see also *Sutter v. General Petroleum Corp.* (1946) 28 Cal.2d 525, 530 ["a stockholder may sue as an individual where he is directly and individually injured although the corporation may also have a cause of action for the same wrong"]; *Goles v. Sawhney* (2016) 5 Cal.App.5th 1014, 1018, fn. 3.)

"[O]ne who has suffered injury both as an owner of a corporate entity and in an individual capacity is entitled to pursue remedies in both capacities." (*Denevi*, 121 Cal.App.4th at pp. 1221-1222.)

Further, to the extent that the direct vs. derivative claims alleged in the FAXC are mutually exclusive, cross-defendants wholly fail to show that it is the derivative claims that are improper. (See *Schrage v. Schrage, supra*, 69 Cal.App.5th at pp. 149-150 [direct versus derivative claims]; see also *City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1099 [it is not the court's role to develop a party's argument for him, and "therefore need not consider undeveloped challenges"].)

The FAXC also adequately pleads demand futility, with the requisite specificity. (See Corp. Code, § 800, subd. (b)(2) [demand futility, specificity]; *Kanter v. Reed* (2023) 92 Cal.App.5th 191, 205-206 [pleading demand futility, applicable tests]; *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 791-792; see also FAXC ¶¶ 3-4, 7-11, 13-14, 16, 38-44, 61-65, 67, 74-75, 77-99, 168-219.)

No stay. Nothing provides for a stay of derivative claims just because the pleading also alleges direct claims. Separately litigating claims based on a common course of conduct would be inefficient and result in a waste of judicial resources. (See *Freiberg v. City of Mission Viejo* (1995) 33 Cal.App.4th 1484, 1489 [inherent power to stay proceedings in the interests of justice and to promote judicial efficiency].)

Request for judicial notice. Cross-complainants' request for judicial notice is denied. With respect to exhibits A-B, private party documents are not proper matters of judicial notice. (See Evid. Code, § 452, subd. (h) [judicial notice may be taken of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably

		<p>indisputable accuracy"]; <i>Travelers Indemnity Company of Connecticut v. Navigators Specialty Insurance Company</i> (2021) 70 Cal.App.5th 341, 354-355 [matters in private party documents are not facts that are not reasonably subject to dispute and that can be determined by indisputable accuracy].) As for exhibits C-E, judicial notice is unnecessary. Binding case law already sets forth the requirements for pleading demand futility. (See <i>Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison</i> (1998) 18 Cal.4th 739, 748, fn. 6 [denying request where judicial notice is neither necessary, helpful, or relevant]; <i>Building Industry Assn. of the Bay Area v. City of San Ramon</i> (2016) 4 Cal.App.5th 62, 73, fn. 11 [same]; <i>Kanter v. Reed</i> (2023) 92 Cal.App.5th 191, 205-206 [pleading demand futility]; see also <i>Grassi v. Superior Court</i> (2021) 73 Cal.App.5th 283, 290 [judicial notice of published legislative history is unnecessary; citation to the material is sufficient].)</p> <p>Cross-defendants shall give notice.</p>
57.		
58.	<p>DistinctImage International, LLC v. Renew Spinal Care, Inc.</p> <p>2018-00986980</p>	<p>Attorney Brett H. Ramsaur and Ramsaur Law Office's motion to be relieved as counsel of record for defendants Renew Spinal Care, Inc., GS Hospitality LLC, and Joe Samuel Bailey is on calendar.</p> <p>No tentative to be posted. Counsel Ramsaur shall be ready to state in general terms the reason for his withdrawal at the time of the hearing.</p>
59.	<p>Rodriguez v. Baronhr Group, LLC</p> <p>2023-01300671</p>	<p>The unopposed motion of Leah Lively and Shir Davidovicz to be relieved as counsel of record for Defendants BaronHR Group, LLC and Legendary Staffing, Inc. is GRANTED.</p> <p>Service on Defendants and counsel of the other Parties was proper, and all required forms were filed pursuant to California Rules of Court, Rule 3.1362.</p> <p>The order will take effect once moving attorneys file proof of service of this Order on BaronHR Group, LLC and Legendary Staffing, Inc.</p>

		Moving attorneys shall provide notice.
60.	Sunwest Bank v. Encino Towers, LLC 2023-01329501	<p>Cross-Defendant Sunwest Bank’s Application to Expunge Lis Pendens is GRANTED.</p> <p>Pursuant to CCP 405.22, “a claimant shall, prior to the recordation of notice, cause a copy of the notice to be mailed, by registered or certified mail, <u>return receipt requested</u>, to all known addresses of the parties to whom the real property claim is adverse. . .Immediately following recordation, a copy of the notice shall also be filed with the court in which the action is pending.” (Emphasis added.)</p> <p>Failure to comply with CCP 405.22’s requirements renders the “notice of pendency of action . . . void and invalid as to any adverse party. . . .” CCP 405.23.</p> <p>Here, the proof of service for the disputed lis pendens (ROA 229) reflects that the lis pendens was served by certified mail, but it fails to state that it was served return receipt requested, as required by CCP 405.22. Also, the notice was not immediately filed with the court, as it was recorded on or around January 29, 2024, but not filed until April 11, 2024. As a consequence, the notice of lis pendens is void.</p> <p>The court GRANTS the application, and orders the notice of lis pendens filed by cross-complainant Encino Towers EXPUNGED.</p> <p>Based on the foregoing, the court declines to reach the other arguments made by the parties.</p> <p>Cross-complainant’s evidence objection is overruled.</p> <p>The court awards \$2500 in attorney fees and costs against cross-complainant Encino Towers, payable to counsel for cross-defendant within thirty days. (See Code Civ. Proc. § 405.38.)</p> <p>Cross-defendant shall give notice.</p>
61.		
62.		

