Tentative Rulings for December 5, 2022
Department 7

To request oral argument, you must notify Judicial Secretary Amy Norton at (760) 904-5722 and inform all other counsel no later than 4:30 p.m.

This court follows California Rules of Court, Rule 3.1308 (a) (1) for tentative rulings (see Riverside Superior Court Local Rule 3316). Tentative Rulings for each law & motion matter are posted on the Internet by 3:00 p.m. on the court day immediately before the hearing at https://www.riverside.courts.ca.gov/OnlineServices/TentativeRulings/tentative-rulings.php. If you do not have Internet access, you may obtain the tentative ruling by telephone at (760) 904-5722.

To request oral argument, no later than 4:30 p.m. on the court day before the hearing you must (1) notify the judicial secretary for Department 7 at (760) 904-5722 and (2) inform all other parties of the request and of their need to appear remotely, as stated below. If no request for oral argument is made by 4:30 p.m., the tentative ruling **will become the final ruling** on the matter effective the date of the hearing. **UNLESS OTHERWISE NOTED, THE PREVAILING PARTY IS TO GIVE NOTICE OF THE RULING.**

IN LIGHT OF THE CORONAVIRUS PANDEMIC, AND UNTIL FURTHER NOTICE, COUNSEL AND SELF-REPRESENTED PARTIES ARE ENCOURAGED TO APPEAR AT ANY LAW AND MOTION DEPARTMENT REMOTELY WHEN APPEARING FOR ORAL ARGUMENTS.

For information and instructions on remote appearances via **ZOOM**, visit the court's website at https://www.riverside.courts.ca.gov/PublicNotices/remote-appearances.php

You may also make a Telephonic Appearance: On the day of the hearing, call into one of the below listed phone numbers, and input the meeting number (followed by #):

- Call-in Numbers: 1-833-568-8864 (Toll Free), 1-669-254-5252, 1-669-216-1590, 1-551-285-1373 or 1-646-828-7666
- Meeting Number: 161 766 6465

Please **MUTE** your phone until your case is called and it is your turn to speak. It is important to note that you must call fifteen (15) minutes prior to the scheduled hearing time to check in or there may be a delay in your case being heard.

Effective May 3, 2021, official court reporters will not be available in unlimited civil for any pretrial proceedings, law and motion matters, case management hearings, civil restraining orders, and civil petitions. (See General Administrative Order No. 2021-19-1)

1.

CVRI2101856	BEASLEY VS GYPSUM CREEK HOMES INC	MOTION TO STAY ENTIRE ACTION

Tentative Ruling: Defendant's Motion to Stay entire action due to a potential parallel criminal action is granted.

2.

CVRI2101872	SERRANO VS THE ADT SECURITY CORPORATION	MOTION TO COMPEL: FURTHER ANSWERS/RESPONSES TO INTERROGATORIES FORM INTERROGATORIES - GENERAL AND EMPLOYMENT BY ALEJANDRO SERRANO
CVRI2101872	SERRANO VS THE ADT SECURITY CORPORATION	MOTION TO COMPEL: ANSWER/RESPONSE TO PRODUCTION OF DOCUMENTS BY ALEJANDRO SERRANO
CVRI2101872	SERRANO VS THE ADT SECURITY CORPORATION	MOTION TO COMPEL: FURTHER ANSWERS/RESPONSES TO INTERROGATORIES SPECIAL INTERROGATORIES BY ALEJANDRO SERRANO

Tentative Ruling: Hearing is continued to 1/2/23; Parties are ordered parties to telephonically meet and confer, and submit a joint separate statement addressing any outstanding issues.

A party may file a motion compelling further answers to interrogatories and requests for production if it finds that the response is inadequate, incomplete, or evasive, or an objection in the response is without merit or too general. (CCP §§2030.300, 2031.310.) Unless notice of the motion is given within 45 days of the service of the response, or any supplemental response, or on or before any specific later date to which the propounding party and the responding party have agreed in writing, the propounding party waives any right to compel a further response. (CCP §§ 2030.300(c), 2031.310(c).) Defendant served responses on 8/3/21 via mail. During the nearly year long meet and confer process, the parties agreed to extend the deadline to 9/16/22. (RFP Motion, Ex. 4; Special Rogs Motion, Ex. 5; Form Rogs Motion, Ex. 8.)

The parties are required to meet and confer. (CCP §§2030.300(b), 2031.310(b).) On 10/23/21, Plaintiff sent an e-mail addressing the following: general form interrogatories (no. 15.1), employment form interrogatories (nos. 204.5, 209.2, 215.1, 215.2, 216.1), special interrogatories (nos. 64-77), and requests for production (nos. 2-7, 10, 12-15, 17-21, 23-32, 34-35, 37-52, 56, 58-64). **Thus, Plaintiff did not meet and confer on employment form interrogatory no. 211.1, and requests for production nos. 9, 16, 22.**

On 11/4/21, Defendant sent an e-mail indicating that it would supplement the following: general form interrogatories (no. 15.1), employment form interrogatories (nos. 204.5, 209.2, 215.1, 215.1, 215.2, 216.2), special interrogatories (nos. 64-77), and requests for production (nos. 9, 15, 17, 20-21, 25, 26, 27, 34, 35, 38, 41, 44, 47, 48; subject to a parameter provided by Plaintiff for nos. 23, 49, 50 and 58; will remove the term non-privileged from nos. 2-7, 10, 12-14, 18-19, 22, 24, 28, 29, 30, 31, 32, 37, 39, 40, 42-43, 45-46, 51-52, 56, 62-64).

The confusion appears to be a 7/11/22 e-mail sent by Defendant, where it agrees to supplement employment form interrogatories (no. 209.2), and requests for production (nos. 15 and 17). Plaintiff's counsel responded on the same date: "This all looks fine." But it is not clear whether Plaintiff had agreed to withdraw its assertions as to the remaining requests. Defense counsel

indicates it was narrowed during a telephonic meet and confer on 7/11/22. (Gelpi Decl. ¶10-11.) In reply, Plaintiff does not address this—other than stating that Defendant agreed to provide supplemental responses. It is not clear what happened on 7/11/22, and whether the parties agreed to narrow the scope of discovery at issue.

Since Plaintiff failed to meet and confer on some requests, there clearly is confusion as to what occurred on 7/11/22, and Defendant did not file an opposition addressing the merits of its responses.

3.

CVRI2104507	HERMAN VS TRANSAMERICA LIFE INSURANCE COMPANY	DEMURRER ON 2ND AMENDED COMPLAINT FOR BREACH OF CONTRACT/WARRANTY (OVER $25,000) OF SIDNEY HERMAN BY TRANSAMERICA LIFE INSURANCE COMPANY

Tentative Ruling: The hearing is continued to 1/17/23. Defendant is ordered to meet and confer with Plaintiff in accordance with Cal. Code Civ. Proc. § 430.41 for the purpose of determining whether an agreement can be reached that would resolve the objections raised in the demurrer. As part of the meet and confer process, Defendant shall identify with legal support the basis of its objections. Plaintiff shall provide legal support for his position that the pleading is legally sufficient or, in the alternative, how the FAC could be amended to cure any legal insufficiency.

After meeting and conferring, Defendant shall 10 days before the hearing date set above to either: 1) vacate the hearing on the demurrer and file an Answer; 2) file with the court a declaration stating the parties have agreed that Plaintiff will file a First Amended Complaint before the date set above; or 3) file with the court a declaration stating the means by which the parties met and conferred and identifying the specific objections in the demurrer and supporting memorandum of points and authorities that the parties were unable to resolve.

Pursuant to Cal. Code Civ. Pro. §430.41, before filing a demurrer, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised. The demurring party shall file and serve with the demurrer a declaration stating either: (A) the means by which the demurring party met and conferred with the party who filed the pleading and that the parties did not reach an agreement; or (B) that the party who filed the pleading failed to respond to the meet and confer request of the demurring party. (Cal. Code Civ. Pro. §430.41(a)(3)(A)-(B).)

Here, the parties did not meet and confer prior to the filing of the Demurrer. On September 19, Transamerica's counsel emailed Plaintiff's counsel to requesting to meet and confer. (Decl. of Shilling, ¶¶ 3 and 4.) Plaintiff's counsel did not respond. (Id at ¶5.) Because the parties have not met and conferred telephonically as required, the hearing should be continued to allow them do so. Counsel for Transamerica is ordered to file a supplemental declaration describing the meet and confer effort and results.

4.

CVRI2202169	GLEASON VS PNC BANK NATIONAL ASSOCATION	DEMURRER ON 1ST AMENDED COMPLAINT FOR BREACH OF CONTRACT/WARRANTY (OVER $25,000) OF ROBERT GLEASON BY PNC BANK NATIONAL ASSOCATION

Tentative Ruling: The Demurrer to the first and second cause of action is sustained without leave to amend. However, Plaintiff is given an opportunity to plead a claim for violation of the EFTA (15 USC § 1693) and its implementing regulations 12 CFR 1005.1-1005.20 (Regulation E) (and/or the California counterpart).

A general demurrer lies where the pleading does not state facts sufficient to constitute a cause of action. (CCP § 430.10(e).) In evaluating a demurrer, the court gives the pleading a reasonable interpretation by reading it as a whole and all of its parts in their context. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) The court assumes the truth of all material facts which have been properly pleaded, of facts which may be inferred from those expressly pleaded, and of any material facts of which judicial notice has been requested and may be taken. (*Crowley v. Katleman* (1994) 8 Cal. 4th 666, 672.) However, a demurrer does not admit contentions, deductions or conclusions of fact or law. (*Daar v. Yellow Cab Company* (1967) 67 Cal.2d 695, 713.) If the complaint fails to state a cause of action, the court must grant the plaintiff leave to amend if there is a reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

BREACH OF CONTRACT/BREACH OF IMPLIED COVENANT (FIRST CAUSE OF ACTION)

The elements of a claim for breach of contract are "(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damage to plaintiff therefrom." *(Abdelhamid v. Fire Ins. Exchange* (2010) 182 Cal.App.4th 990, 999.) "If [an] action is based on alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written agreement must be attached and incorporated by reference." (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307.) Alternatively, "[t]o state a cause of action for breach of contract, it is absolutely essential to plead the terms of the contract either in *haec verba* or according to legal effect." (*Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 270, fn. 1.)[1] "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*." (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 349, *citing Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 36.) A breach of the implied covenant of good faith and fair dealing involves something beyond the breach of the contractual duty itself. (*Careau & Co. v. Security Pacific Business Credit*, *Inc.* (1990) 222 Cal.App.3d 1371, 1394.) "If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated. (*Id.* at 1395.)[2]

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[1] The relationship between a bank and its depositor is founded on contract and is ordinarily memorialized by a signature card that the depositor signs upon opening the account. (*Chazen v. Centennial Bank* (1998) 61 Cal.App.4th 532, 537.) There is no question that a bank has a duty to act with reasonable care in its transactions with its depositors. (*Id.* at 543; *Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801, 808.) "The duty is an implied term in the contract between the bank and its depositor." (*Chazen*, *supra*, 61 Cal.App.4th at 543.) California courts, however, have made clear that "[t]his contractual relationship does not involve any implied duty to supervise account activity or to inquire into the purpose for which the funds are being used." (*Kurtz-Ahlers, LLC v. Bank of America, N.A.* (2020) 48 Cal. App. 5th 952, 956 [internal quotation marks omitted].) Rather, "[c]ase law reflects the narrow scope of a bank's duties under the deposit agreement. Such duties include the duty to *honor* checks properly payable from the depositor's account; the duty to *dishonor* checks lacking required signatures; and the duty to render faithful and accurate accounts under the contract of deposit." (*Ibid* [internal citations and quotation marks omitted].)

[2] Tort recovery for breach of the implied covenant is available only in limited circumstances, generally involving a special relationship between the contracting parties, such as the relationship between an insured and its insurer. (*Bionghi v. Metro. Water Dist.* (1999) 70 Cal.App.4th 1358, 1370.)

In the present case, Plaintiff alleges that PNC breached a duty of good faith and fair dealing when it failed to refund the money stolen by Neeley and Casto. (FAC, ¶ 18-20.) Plaintiff does not identify any contractual provision PNC allegedly breached and – even assuming that Plaintiff could plead PNC's statutory liability – offers no authority to support the argument that PNC's failure to refund the money breached an implied term of the contract. (See also *Widjaja v. JPMorgan Chase Bank, N.A.* (9th Cir. 2021) 21 F.4th 579, 585 [affirming dismissal of claims for breach of contract and breach of the implied covenant where plaintiff – who, as Plaintiff in the present case, also alleged that the bank violated the Electronic Funds Transfer Act – failed to identify any provision of the depositor agreement that was allegedly breached].) Accordingly, the demurrer to the first cause of action is sustained.

Further, unless Plaintiff can articulate how he can amend the FAC and how that amendment will change the legal effect of the first cause of action, the demurrer is sustained without leave to amend. (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1341.)

Notwithstanding, as discussed below, Plaintiff should be permitted to please a cause of action for violation of the Electronic Funds Transfer Act ("EFTA"), 15 USC, 1693, and its implanting regulations (and/or the California counterpart, Comm. Code § 11101 *et seq.*).

NEGLIGENCE (SECOND CAUSE OF ACTION)

"Actionable negligence involves a legal duty to use due care, a breach of such legal duty, and the breach as the proximate or legal cause of the resulting injury." (*Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal. 4th 568, 573 [*quoting United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 594] [internal quotation marks omitted].) In the present case, the FAC, as did the original complaint, does not identify any duty of care that PNC allegedly breached; rather, Plaintiff merely indicates that PNC may be liable under federal banking laws (or vicariously liable for its employees' violation of federal banking laws) and generally repeats the allegations set forth in support of the second cause of action for breach of contract. (See FAC, ¶¶ 24-27.) Accordingly, the demurrer to the second cause of action is sustained. Further, unless Plaintiff can articulate how he can cure the defects in his negligence claim, the demurrer to the second cause of action should be sustained without leave to amend. (*Ferrick*, *supra*, 231 Cal.App.4th at 1341.)

Importantly, a consumer's liability for an unauthorized transfer, or series of related unauthorized transfers, cannot exceed $50. (See 15 U.S.C. § 1693g; 12 C.F.R. § 1005.6(b).) However, that "baseline cap on liability is subject to two exceptions." (*Widjaja*, *supra*, 21 F.4th at 582.) First, the cap is raised to $500 "when the unauthorized transfers occur due to the loss or theft of an access device (such as an ATM card) and the consumer fails to notify her bank within two business days of learning that the device has been lost or stolen." (*Id.*, citing 15 U.S.C. § 1693g(a); 12 C.F.R. § 1005.6(b)(2).) Second, the liability cap is "lifted if: (1) an unauthorized transfer appears on the monthly statement banks must send to consumers under 15 U.S.C. § 1693d(c); (2) the consumer fails to report the unauthorized transfer to her bank within 60 days after the statement is sent to her; and (3) the bank can establish that unauthorized transfers made after the 60-day period would not have occurred but for the consumer's failure to provide timely notice of the earlier unauthorized transfer." (*Id.* at 582-83, citing 15 U.S.C. § 1693g(a).)

Where the second exception applies, the consumer's liability for unauthorized transfers occurring within the 60-day window cannot exceed $50 or $500, depending on the circumstances, but the consumer's liability is unlimited for unauthorized transfers effectuated after the 60-day period expires. (*See* 12 C.F.R. § 1005.6(b)(3).) However, "[a] consumer may be held liable for unauthorized transfers occurring after the 60-day period only if the bank establishes that those transfers "would not have occurred but for the failure of the consumer" to timely report the earlier unauthorized transfer reflected on her bank statement. (*Widjaja, supra,* 21 F.4th at 584, citing 15 U.S.C. § 1693g(a).)

In the present case, Plaintiff alleges that PNC violated 12 CFR 1005.6, which is one of the implanting regulation of the EFTA. (FAC, ¶¶ 15-16.) While Plaintiff's allegations do not clearly demonstrate that he is entitled to relief, Plaintiff is permitted the opportunity to plead a claim under the EFTA (and/or its California counterpart).