NOTICE:

To request limited oral argument on any matter on this calendar, you must call the Court at (916) 874-7848 (Department 54) by 4:00 p.m. the court day before this hearing and advise opposing counsel. If no call is made, the tentative ruling becomes the order of the court. Local Rule 3.04.

Department 54
Superior Court of California
800 Ninth Street, 3rd Floor
Shelleyanne W.L. Chang, Judge
E. Higginbotham, Clerk
V. Carroll, Bailiff

Wednesday, September 09, 2009, 9:00 AM

Item 1 **07AS03392**

CAROL J JOHNSON, ET AL VS. RICHARD J. BENVENUTI

Nature of Proceeding: Motion to Compel Answers to Deposition Questions and Production of

Filed By: Spomer, John E.

The matter is continued to 9/17/2009 at 09:00AM in this department.

Item 2 **2008-00006687-CU-MM**

ELOY SALDIVAR VS. SUTTER MEDICA CENTER

Nature of Proceeding: Motion to File Amended Complaint

Filed By: Saldivar, Eloy

On the court's own motion, the matter is continued to September 29, 2009, so that it may be heard with the demurrers scheduled for hearing on that date.

Item 3 **2008-00018836**

JEANNE MAROOSIS VS. EMIL MAREK MAGOVAC

Nature of Proceeding: Motion for Modification of Preliminary Injunction

Filed By: O'Neill, Cara M.

The matter is dropped from calendar pursuant to Judge Chang's August 18, 2009 ruling.

Item 4 **2008-00023396-CU-PA**

CHRISTOPHER E. JOHNSON VS. MARCUS DEWAYNE ANTHONY, ET AL

Nature of Proceeding: Motion to Withdraw as Counsel

Filed By: Moreno, John J.

The unopposed motion to be relieved as counsel is dropped from calendar.

The moving papers suffer from several defects. First, use of Judicial Counsel form MC-052 (declaration in support of attorney's motion to be relieved as counsel) is mandatory. CRC rule 3.1362(c). Second, counsel did not serve and lodge with the court a proposed order (form MC-053). Id., subd. (e). Third, as counsel's declaration indicates that he has not confirmed his client's address, the moving papers must be served on the clerk of the court in the manner required by CRC rule 3.252 CCP § 1011(b); CRC rule 3.1362(d). Finally, the notice of motion does not include notice of the court's tentative ruling system as required by Local Rule 3.04(D).

Item 5 **2008-00029164-CU-BT**

SUSAN L. COLOMBE VS. TCM FINANCIAL SERVICES, LLC

Nature of Proceeding: Motion to Quash Service of Summons FROM 8/7

Filed By: Painter, Charles S.

Defendant TCM Financial Services, LLC's motion to quash service of summons pursuant to CCP § 418.10 is granted. The default entered on February 10, 2009 is ordered set aside.

It is undisputed that plaintiff did not serve defendant's "agent for service of process," here, Business Filings Incorporated (BFI). CCP § 416.10 (a). Instead, plaintiff served BFI's agent for service of process, CT Corporation. According to plaintiff, it "served CT due to the fact that BFI does not provide a California address." Opp. memo., p. 4. Plaintiff, however, offers no authority that service of an agent's agent satisfies § 446.10(a). Plaintiff cites Corporations Code § 1505(a)(1), but that statute does not permit such service. Assuming that the absence of a California address for BFI is the equivalent of defendant not having an agent for service of process, plaintiff's next recourse was to serve defendant's "president, chief executive officer . . . or a person authorized by the corporation to receive service of process." § 416.10(b). See Gibble v. Car-Lene Research, Inc. (1998) 67 Cal.App.4th 295, 311 (Plaintiff does not contend that she attempted to do so.) Then, if plaintiff could still not "accomplish service," under subdivisions (a) and (b), she had "to seek the assistance of the court and the Secretary of State in obtaining jurisdiction" over defendant. Id. at 312; see also Corp. Code § 1702(a). Service of an agent's agent is simply not part of the statutory scheme.

In addition, none of the cases plaintiff cites on page 8 of its memorandum stand for the proposition that where the statutory requirements for service are not met, a court nonetheless has jurisdiction when a defendant has actual notice of the lawsuit. Indeed, as defendant points out, one of them, Summers v. McClanahan (2006) 140 Cal.App.4th 403, states the contrary. "[N]o California appellate court has gone so far as to uphold a service of process solely on the ground the defendant received actual notice when there has been a complete failure to comply with the statutory requirements for service." Id. at 414. Therefore, even if defendant had notice of the lawsuit, which defendant disputes, that notice alone would not confer jurisdiction on this court.

The court finds that plaintiff failed to serve defendant as required by CCP § 416.10. Defendant's motion to quash, therefore, must be granted. Although the court appreciates plaintiff's concern that she will now have to successfully prosecute her action in order to obtain a result equal to the one she thought she had obtained by

default, the result here is consistent "with the policy favoring determination of cases on their merits." Elkins v. Superior Court (2007) 41 Cal.4th 1337, 1364.

Having granted defendant's motion pursuant to CCP § 418.10, the court need not consider defendant's other arguments.

Defendant's request for judicial notice is granted. The answer defendant filed on September 1, 2009 is ordered stricken as plaintiff has not yet perfected service of the complaint on defendant.

This minute order is effective immediately. No formal order pursuant to CRC rule 3.1312 or other notice is required.

Item 6 **2008-00029829-CU-MM**

CARRIE BUDLONG VS. KEVIN GLEAVE, CMT

Nature of Proceeding: Motion to Compel Further Responses to Form Interrogatories and

Filed By: Capabianco, Jennifer J.

The matter is continued to 9/23/2009 at 09:00AM in this department.

Item 7 **2009-00033484-CU-OE**

CALVIN CHANG VS. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

Nature of Proceeding: Motion to Quash Deposition Subpoena

Filed By: Mooney, Donald B.

The motion by non-parties The People's Vanguard of Davis, Inc. and David Greenwald's to quash the records subpoena issued by plaintiff to Google, Inc. is GRANTED in part and DENIED in part, as follows.

Plaintiff's subpoena seeks identifying information, including names and addresses, of those individuals who under the names "Mack Chuchillo" and "anonymous" posted on the internet certain comments about plaintiff and his lawsuit. The comments were posted on a blog operated by moving parties just a few days after plaintiff filed suit in February 2009.

Moving parties seek to quash the subpoena on procedural and substantive grounds. First, plaintiff failed to comply with Code of Civil Procedure §1985.3, including serving a copy of the subpoena and a notice of privacy rights on those individuals whose records are sought prior to serving the deponent possessing the records. Second, the individuals posting the comments have a First Amendment right not only to express their views but also to do so anonymously, which right easily trumps plaintiff's alleged interest in their identity. Third, under *Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, the identity of anonymous internet posters is not discoverable unless plaintiff makes a *prima facie* showing of libel to overcome the posters' rights. Here, there can be no such showing since none of the posted comments is a "provably false assertion of fact," as opposed to a non-actionable opinion. Notwithstanding plaintiff's belief that some of the posted comments were made by defendant university's personnel,

violation of the posters' constitutional right cannot be not justified by plaintiff's desire to confirm his suspicion. Moving parties also request fees and costs in excess of $3,500.

In opposition, plaintiff first contends that moving parties lack standing to quash the subpoena since they are neither the deponent required to comply with the subpoena nor the party against whom the evidence is sought. Plaintiff also argues that §1985.3 is inapplicable since the records sought are not "personal records" under §1985.3 and that neither Google nor the anonymous posters have objected to the subpoena. Next, plaintiff insists that regardless of the anonymous posters' personal liability for libel, the information sought is discoverable because it is relevant to other claims asserted against the named defendants. Specifically, several postings appear to have been authored by "managing agents" of the university and if so, they violate the terms of its earlier settlement agreement with plaintiff. Moreover, plaintiff has satisfied the requirements of the *Krinsky* decision, cited in the moving papers, including both notice and a *prima facie* showing on his various causes of action. Finally, plaintiff notes that "time is of the essence" since Google likely routinely purges the type of information sought after nine months and further requests a $7,000 award of fees and costs since the present motion was not substantially justified.

At the outset, the Court rejects plaintiff's contention that moving parties do not have standing to bring the present motion. The records reveals that in response to the subpoena, Google notified moving parties that records relating to the blog were sought and that Google considered moving parties to have a legitimate interest in such records.

Next, although the First Amended Complaint's 16th cause of action for libel is against the named defendants and Does 1 through 10, plaintiff's opposition expresses no clear intent or desire to pursue a libel claim against the posters of the internet comments. Moreover, plaintiff has not made the requisite *prima facie* showing of a valid libel claim against them in order to justify the requested disclosure of their personal information. In particular, plaintiff's opposition nowhere showed or attempted to show that the comments posted to the blog were 'assertions of fact which are provably false' and not non-actionable opinions, as required by *Paterno v. Superior Court (Ampersand Publishing)* (2008) 163 Cal.App.4th 1342, 1349-1350. This issue was specifically raised in the moving papers (see, p.7:15-21; p.8:4-10), but plaintiff's points & authorities state nothing more than the comments are alleged to be "*per se* defamatory" and plaintiff "is entitled to the discovery necessary…to determine the identity of the poster [*sic*]" (see, p.8:15-18). While it is true that this portion of the opposition cites to plaintiff's own declaration, the relevant portion of the declaration (p.6:12) merely reiterates the comments posted to the blog without any demonstration that the comments are 'statements of fact which can be proven false.' Accordingly, the Court concludes plaintiff has failed to meet his burden of justifying the disclosure of the posters' identity in order to proceed with libel claims against them.

On the other hand, the Court agrees that if the comments posted on the blog were authored by "managing agents" of the university, they would constitute evidence relevant to the existing claims against the university, including breach of the settlement agreement. Since plaintiff has identified specific reasons to believe the postings were likely made by certain "managing agents" of the university (*i.e.*, the use of unique terms and reference to information not generally known), the subpoena appears reasonably calculated to lead to admissible evidence. Nevertheless, because there remains a substantial possibility that the comments were posted by individuals with no

connection at all to the university and disclosure of their personal information would therefore be unjustified, the Court imposes the following conditions on plaintiff's discovery of the identity of the posters to the blog.

At his sole expense, plaintiff shall retain an independent third party to perform the IP address trace (described in plaintiff's declaration (p. 5:1-18)) of the source(s) of those comments posted to "The People's Vanguard of Davis" blog on February 4 and 5, 2009. Plaintiff shall provide this independent third party with the names (and any other relevant information known to plaintiff) of the specific university personnel believed to have posted such comments on the blog. The third party shall be the sole deposition officer and exclusive recipient of any and all records/information produced in response to this subpoena and any other subpoenas which may be issued by plaintiff's counsel in an attempt to identify those who posted these comments. If the third party concludes, based on the records/information produced in response to the subpoena(s) issued for this purpose and any other records/information to which he has access, that any of the posted comments were authored by an individual specifically identified by plaintiff, the third party shall release the records/information relating to such posting and such individual to all counsel, including the moving parties'. If on the other hand the third party concludes that any of the posted comments were not authored by an individual specifically identified by plaintiff, then the third party shall be prohibited from releasing any records/information relating to such posting and such individual. In this way, plaintiff (via his counsel) will receive records/information relating to a posted comment only if there is reason to believe it was authored by an individual already suspected by plaintiff. The third party shall retain all records/information relating to this matter until this litigation is concluded and all appeals have been exhausted.

Both sides' request for monetary sanctions is denied since both the motion and the opposition were substantially justified.

Although the notice of motion provided notice of the Court's tentative ruling system as required by Local Rule 3.04(D), the notice does not comply with recent changes to that rule. Moving counsel is directed to review the Local Rules, effective January 1, 2009.

This minute order is effective immediately. No formal order or other notice is required. (Code Civ. Proc. §1019.5; CRC Rule 3.1312.)

Item 8 **2009-00035402-CU-PO**

ELENA ARGENTE VS. THE AMERLAND GROUP, LLC

Nature of Proceeding: Motion to Compel Responses to Request for Production of Documents

Filed By: Sigel, Jason J.

Plaintiff's motion to compel further responses to requests for production is DENIED.

Plaintiff seeks to compel defendant SimplexGrinnell LP's further responses to request for production Nos. 3, 12 and 13. These requests seek documents "concerning the fire which is the subject of this action," all statements "concerning the subject fire" from any person, and all statements "concerning the subject fire" from any of defendant's employees, respectively. The documents which plaintiff now seeks the production of are two reports by defendant's employees, Messrs. Hash and Borsch. These reports were identified in defendant's supplemental responses to these requests, which also

included objections based on privilege. Plaintiff contends that since the privilege was not asserted in the initial responses, the privilege has been waived and the documents must be produced.

In opposition, defendant insists these two reports are responsive to plaintiff's request Nos. 1, 2 and 4 (not at issue here) and to which privilege objections were timely asserted in its initial responses. Specifically, the opposition represents to the Court that these two reports only "relate to [defendant's] work on the alarm system-not the fire" (Oppos., p.3:2-3) and therefore, they are responsive to Nos. 1, 2 and 4 (requesting documents relating to defendant's scope of work at the property and to the disabling of the fire alarm system, along with reports by defendant's own employees, respectively). Moreover, to the extent they do not relate to the subject fire, the reports are not actually responsive to request Nos. 3, 12 or 13, but merely to appease plaintiff's broad interpretation of Nos. 3, 12 and 13 during the meet-and-confer process, defendant voluntarily supplemented its response to both identify the reports and to assert the privilege in an abundance of caution. Finally, if there were a waiver of the privilege, defendant requests relief from same pursuant to Code of Civil Procedure §2031.300(a) on the grounds that both prerequisites stated therein are satisfied.

Based on defendant's uncontested representation that the two reports at issue do not relate to the fire itself but rather only its work on the alarm system at the property, the reports appear to be more appropriately characterized as responsive to Request Nos. 1, 2 and 4 and do not appear responsive to Nos. 3, 12 and 13. Accordingly, since it is undisputed that defendant timely asserted the privilege objection in response to Nos. 1, 2 and 4, the Court does not conclude that there was a waiver of any privilege but even if the Court were to find such a waiver, defendant would otherwise be entitled to relief under Code of Civil Procedure §2031.300(a). For these reasons, the motion is denied.

Furthermore, the Court notes that the present motion is brought pursuant to Code of Civil Procedure §2031.310 (Notice of Motion, p.2:5) but plaintiff fails to "set forth specific facts showing good cause justifying the discovery sought by the inspection demand," as required by Code of Civil Procedure §2031.310(b)(1). Instead of explaining by reference to specific facts why this discovery via document requests/production (as opposed to other less invasive and/or burdensome means) is warranted here (see, Weil & Brown, Civil Procedure Before Trial, Ch. 8:1495.1), plaintiff concludes that good cause exists merely because "the information sought is reasonably calculated to lead to…admissible evidence and is directly relevant to the issues in this case." (Motion, p. 2:22-24.) However, this does not satisfy the "good cause" requirement (Weil & Brown, *supra*, at Ch. 8:1495.6 *et seq*.) and on this basis as well, the motion is denied.

Finally, to the extent plaintiff is seeking to compel the actual production of documents, the motion must be denied because it was not also brought pursuant to Code of Civil Procedure §2031.320, which governs motions to compel compliance, whereas as a motion under Code of Civil Procedure §2031.310 can only compel further written responses.

Plaintiff's request for monetary sanction is denied because defendant's objections and opposition were substantially justified.

This minute order is effective immediately. No formal order or other notice is required. (Code Civ. Proc. §1019.5; CRC Rule 3.1312.)

Item 9 **2009-00035402-CU-PO**

ELENA ARGENTE VS. THE AMERLAND GROUP, LLC

Nature of Proceeding: Motion to Compel Responses to Form Interrogatories

Filed By: Sigel, Jason J.

Plaintiff's motion to compel further response to form interrogatory 15.1 and for monetary sanctions is DENIED.

This lawsuit was filed in February 2009 and defendant SimplexGrinnell LP filed an answer in April 2009. Shortly thereafter, defendant responded to discovery from plaintiff and on May 18, 2009, plaintiff's counsel sent a meet-and-confer letter, which led to supplemental responses from defendant. On July 10, 2009, plaintiff's counsel sent another meet-and-confer letter stating there were still deficiencies in the supplemental responses and demanding still further responses. On July 24, 2009, defendant's counsel responded with a letter which, as it relates to form interrogatory 15.1, indicated that "all facts, witnesses, and documents of which we are aware" have been identified and requested plaintiff's counsel to contact him to discuss further. Plaintiff's counsel interpreted this as a refusal to provide any further response and proceeded with filing the present motion.

Plaintiff insists on a further response to form interrogatory 15.1 which not only identifies each material allegation of the complaint that defendant denies but also provides all facts, witnesses and documents upon which the denial is based. Plaintiff justifies the need for this information by characterizing interrogatory 15.1 as necessary to "narrow the facts, allegations and defenses" and as "a cornerstone of the discovery process" which promotes efficiency and prevents trial by ambush.

Defendant opposes the motion on the grounds that discovery is just commencing, defendant provided a good faith response based on information presently known, plaintiff ignored to invitation to further meet-and-confer, and defendant will be supplementing its responses as the litigation proceeds.

While plaintiff is correct that interrogatory 15.1 is an important tool to determine which material allegations are in dispute, along with the facts, witnesses and documents that support a defendant's denial of such allegations, and can promote efficiency and prevent surprise at trial, this Court finds that a further response to this interrogatory at this stage of litigation is not warranted here. Defendant appears to have provided a good faith response based on information presently available. Future discovery proceedings in this case, likely to be exhaustive, will undoubtedly reveal significant new information and will routinely alter the parties' understanding of the facts and their counsels' strategies. Given that discovery is just commencing and there is no trial date which might otherwise justify a formal, final response to this interrogatory, plaintiff's counsel should have discussed with opposing counsel potential alternatives to the present motion.

Plaintiff's request for monetary sanctions is denied since the motion was not substantially justified and since defendant's response not only to the interrogatory itself

but also to plaintiff's July 10, 2009 meet-and-confer letter was substantially justified.

This minute order is effective immediately. No formal order or other notice is required. (Code Civ. Proc. §1019.5; CRC Rule 3.1312.)

Item 10 **2009-00045315-CU-NP**

STEVEN P. MEANS VS. CASCADE HOUSE

Nature of Proceeding: Motion to Strike (Duong)

Filed By: Fleming, Francis J.

Defendant Nha Duong's unopposed motion to strike plaintiff's prayer for exemplary damages is granted. Comp., at 3:15. The court agrees with defendant that plaintiff fails to allege facts to support such an award under CC § 3294.

Defendant may file and serve an answer no later than September 21, 2009.

This minute order is effective immediately. No formal order pursuant to CRC rule 3.1312 or other notice is required.

Although defendant provided plaintiff notice of the court's tentative ruling system as required by LR 3.04(D), the notice does not comply with recent changes to that rule. Moving counsel is directed to review the court's Local Rules, effective January 1, 2009.

Item 11 **2009-00045315-CU-NP**

STEVEN P. MEANS VS. CASCADE HOUSE

Nature of Proceeding: Motion to Strike (Vu)

Filed By: Fleming, Francis J.

Defendant Thi Lam Vu's unopposed motion to strike plaintiff's prayer for exemplary damages is granted. Comp., at 3:15. The court agrees with defendant that plaintiff fails to allege facts to support such an award under CC § 3294.

Defendant may file and serve an answer no later than September 21, 2009.

This minute order is effective immediately. No formal order pursuant to CRC rule 3.1312 or other notice is required.

Although defendant provided plaintiff notice of the court's tentative ruling system as required by LR 3.04(D), the notice does not comply with recent changes to that rule. Moving counsel is directed to review the court's Local Rules, effective January 1, 2009.

Item 12 **2009-00054261-CU-PT**

IN RE: JOANNE LESLIE HANBURY

Nature of Proceeding: Order to Show Cause - Petition for Change of Name

Filed By: Hanbury, Joanne L.

The petition is granted.