TENTATIVE RULINGS

JUDGE RANDALL J. SHERMAN

DEPARTMENT CX105

APRIL 26, 2024

Appearances, whether remote or in person, must be in compliance with Code of Civil Procedure §367.75, California Rules of Court, Rule 3.672, and Superior Court of California, County of Orange, Appearance Procedure and Information, Civil Unlimited and Complex, located at https://www.occourts.org/media-relations/covid/Civil_Unlimited_and_Complex_Appearance_Procedure_and_Information.pdf. Unless the court orders otherwise, remote appearances will be conducted via Zoom through the court's online check-in process, available at https://www.occourts.org/media-relations/civil.html. Information, instructions and procedures to appear remotely are also available at https://www.occourts.org/media-relations/aci.html. Once online check-in is completed, counsel and self-represented parties will be prompted to join the courtroom's Zoom hearing session. Participants will initially be directed to a virtual waiting room while the clerk provides access to the video hearing.

Court reporters will not be provided for motions or any other hearings. If a party desires a court reporter for a motion, it will be the responsibility of that party to provide its own court reporter. Parties must comply with the court's policy on the use of pro tempore court reporters, which can be found on the court's website at www.occourts.org/media/pdf/Privately_Retained_Court_Reporter_Policy.pdf.

If you intend to submit on the tentative ruling, please advise the other parties and the court by calling (657) 622-5305 by 9:00 a.m. on the hearing date. Make sure the other parties submit as well before you forgo appearing, because the court may change the ruling based on oral argument. Do not call the clerk about a tentative ruling with questions you want relayed to the court. Such a question may be an improper ex parte communication.

#	Case Name & No.	Tentative Ruling
1	**Edwards vs. CareerStaff Unlimited, LLC** **2020-01176349**	The tentative ruling is to continue the Final Report Hearing to June 7, 2024 at 10:00 a.m., for confirmation that the amount of the uncashed checks has been delivered to the State Controller's Office Unclaimed Property Fund in the names of the applicable payees. A declaration from the Administrator must be filed at least 16 days before the new hearing date. Plaintiffs are ordered to give notice to defense counsel unless notice is waived.
2	**Negrete vs. Winsupply Inc.** **2021-01188066**	The tentative ruling is to continue the Final Report Hearing to March 28, 2025 at 10:00 a.m., for confirmation that the amount of the uncashed checks has been delivered to the State Controller's Office Unclaimed Property Fund in the names of the applicable payees. A declaration from the Administrator must be filed at least 16 days before the new hearing date.

		Plaintiff is ordered to give notice to defense counsel unless notice is waived.
3	**Richard vs. Dimension Development Company, Inc. 2022-01261804**	Plaintiff's Motion for Approval of PAGA Settlement is granted, except that the court approves plaintiff's attorney costs only in the amount of $23,716.82, and awards an enhancement to plaintiff Candice Richard only in the amount of $3,000. The court disallows the $54.28 claimed for postage and mailing costs, because the court believes that such cost items are properly part of attorney overhead. The court allows only the $23,716.82 amount itemized in the chart in ¶7 of the Supplemental Declaration of Mark Yablonovich. Moreover, an enhancement award of $3,000 is sufficient and proper for an aggrieved employee group and settlement of this size, and considering that there was nothing extraordinary about plaintiff's contribution to the case and that plaintiff spent only about 30 hours on this case, which still results in an enhancement payment of about $100 per hour. The court concludes that the $650,000 PAGA settlement, as approved, is fair, adequate and reasonable, and approves the following specific awards: • $216,666.66 to plaintiff's counsel for plaintiff's attorneys' fees, as requested; • $23,716.82 to plaintiff's counsel for plaintiff's attorney costs, reduced from the $23,771.65 requested; • $3,000.00 to plaintiff Candice Richard as an enhancement award, reduced from the $10,000.00 requested; • $7,012.00 to the Administrator, Atticus Administration, LLC, as requested; • $299,703.39, which is 75% of the remaining balance of $399,604.52, to the LWDA as its share of PAGA penalties; and • $99,901.13, which is 25% of the remaining balance of $399,604.52, to the aggrieved employees as their share of PAGA penalties. The court sets a Final Report Hearing for January 31, 2025 at 10:00 a.m., to confirm that distribution efforts are fully completed, including the distribution of uncashed aggrieved employee checks after 180 days, that the Administrator's work is complete, and that the court's file thus may be closed. The parties must report to the court the total amount that was actually paid to the aggrieved employees. All supporting papers must be filed at least 16 days before the Final Report Hearing date. Plaintiff is ordered to give notice of the ruling to the LWDA and to defendants.
4	**Torcivia vs. Bailey Food and Beverage Group, LLC 2022-01290665**	The tentative ruling is to continue the hearing on plaintiff's Motion for Approval of Settlement of Claims Brought Under the Private Attorneys General Act and Reasonable Attorneys' Fees and Costs to August 2, 2024 at 10:00 a.m. Counsel must file supplemental papers addressing the court's concerns (not fully revised papers that would have to be re-read) at least 16 days before the next hearing

		date. Counsel must submit an amendment to the settlement agreement rather than any amended settlement agreement. Counsel also must provide a red-lined version of any revised papers, including the proposed letter to the aggrieved employees. Counsel also should provide the court with an explanation of how the pending issues were resolved, with references to any corrections to the settlement agreement and the proposed letter to the aggrieved employees, rather than with just a supplemental declaration or brief simply asserting that the issues have been resolved. Plaintiff provides no information as to plaintiff's potential recovery or defendants' potential exposure for the violations alleged. Plaintiff must provide the court with information showing what potential outcome aggrieved employees are giving up in exchange for this settlement. Plaintiff has not provided the court with the estimated average, high and low payments to aggrieved employees under the proposed settlement. These estimates are needed to assist the court in evaluating the reasonableness of the settlement. The settlement agreement states in one place that the PAGA Period is "September 3, 2021 through February 28, 2024 or date of PAGA approval, whichever date occurs first", but in two other places in the settlement agreement, and in the cover letter to aggrieved employees, the PAGA Period is defined as September 3, 2021 through December 12, 2023. The parties must agree on the correct PAGA Period and amend the settlement agreement and/or the cover letter accordingly. The definition of "Claims" in ¶1.6 of the settlement agreement, which arguably is used in the definition of "Released Claims" in ¶1.22 of the settlement agreement, is overbroad in using the unqualified phrase, "or that could have been alleged in the Action", rather than limiting it to claims that could have been alleged based on the facts alleged in the lawsuit. Amaro vs. Anaheim Arena Management, LLC (2021) 69 Cal. App. 5th 521, 537. The definition of "Claims" being released in ¶¶1.6 and 1.22 is also overbroad in not being limited to PAGA claims. There is an escalator clause in the settlement agreement, but this is a motion to have the settlement fully approved, and so a specific gross settlement amount must be approved on the granting of this motion. At this point in time the parties should know or be able to determine the number of aggrieved employees and qualifying pay periods based on whichever PAGA Period the parties are using. Paragraph 10.1 of the settlement agreement provides, "Upon the Effective Date, Plaintiff, Settlement Group Members, and State of California vis-à-vis the LWDA shall release the Released Parties for the Released Claims for the PAGA Periods [sic]." However, this court will not

		approve a direct release by plaintiff on behalf of the State of California, but will approve a change from "shall release" to "shall be deemed to have released". Paragraph 10.2 of the settlement agreement and plaintiff's declaration assert that plaintiff has individual wrongful termination and wage and hour claims against defendant that will be settled outside of court, pending approval of the outcome of the PAGA settlement. If plaintiff wants an enhancement in this action, she will have to disclose those settlement terms. The proposed cover letter to be sent to the aggrieved employees with their penalty checks must explain that no claims for unpaid or underpaid wages have settled, and that this settlement is without prejudice to the pursuit of any such claims. Plaintiff has not submitted her attorneys' bills or a detailed hourly breakdown of her attorneys' hours to support the court's review of plaintiff's attorneys' fees request. Plaintiff is required to provide sufficient information to support the court's lodestar cross-check of the fee request. Plaintiff's counsel also has failed to explain why a multiplier of 1.17 is warranted in this action. Plaintiff has not provided adequate documentation for the attorney costs request of $16,478.42, but has provided evidence of only $15,486.95 in costs. An invoice from the Administrator is required to support the $7,000.00 Administrator fee request. The Estimate provided, with a not-to-exceed figure rather than a fixed billed amount, is insufficient. The parties have not provided the court with any declaration from counsel as to any potential conflict of interest as to the proposed cy pres recipient, as required by CCP §382.4. Plaintiff's Proposed Order seeks a double recovery of plaintiff's attorney costs, including them in both ¶11 (which supposedly is just the attorneys' fees) and ¶12. Counsel should propose a realistic Final Report Hearing date, taking into account the time deadlines associated with funding the settlement, mailing distributions, allowing the check-cashing deadline to pass, and depositing uncashed check funds pursuant to the terms of the settlement agreement. The court usually sets these hearings nine months after settlement approval if the check cashing deadline is 180 days. The parties must report to the court the total amount that was actually paid to the aggrieved employees. All supporting papers must be filed at least 16 days before the Final Report Hearing date.

		The Order to Show Cause re Sanctions for Failure to File Status Conference Statement is vacated. The Trial date and Pre-Trial Conference date are also vacated. Plaintiff is ordered to give notice to defense counsel unless notice is waived.
5	**Heredia vs. Alan Smith Pool Plastering, Inc. 2020-01163609**	Plaintiff's Motion for Final Approval of Class Action and Representative Action Settlement; Enhancement Award; Reasonable Attorneys' Fees and Costs is granted. The court concludes that the $800,000 class action and PAGA settlement is fair, adequate and reasonable, and approves the following specific awards: • $280,000.00 to plaintiff's counsel for plaintiff's attorneys' fees, with $140,000.00 (50%) awarded to Bibiyan Law Group, P.C., and $140,000.00 (50%) awarded to J. Gill Law Group, P.C., as requested; • $18,297.42 to plaintiff's counsel for plaintiff's attorney costs, with $10,194.75 awarded to Bibiyan Law Group, P.C., and $8,102.67 awarded to J. Gill Law Group, P.C., as requested; • $7,500.00 to plaintiff Gustavo Rosete Heredia as an enhancement award, as requested; • $8,746.50 to the Administrator, ILYM Group, Inc., as requested; and • $37,500.00 to the LWDA for its share of PAGA penalties, as requested. The total amount that will be payable to all class members and aggrieved employees if they are paid the amount to which they are entitled pursuant to the judgment is $447,956.08. The court sets a Final Report Hearing for January 31, 2025 at 10:00 a.m., to confirm that distribution efforts are fully completed, including the distribution of the amount of the uncashed class member checks to Legal Aid at Work after 180 days, that the Administrator's work is complete, and that the court's file thus may be closed. The parties must report to the court the total amount that was actually paid to the class members, and submit an Amended Judgment or Amendment to Judgment that complies with CCP §§384(b) and 384.5, and Gov. Code §68520. Specifically, the Amended Judgment or Amendment to Judgment must state how much money is being paid to the nonparty, including any interest that accrued on the funds, and, if known, the purpose of the distribution to the nonparty and how it plans to expend the funds. All supporting papers must be filed at least 16 days before the Final Report Hearing date. Plaintiff is ordered to give notice of the ruling to the LWDA and to defendants.
6	**Velez vs. Principia Inc. 2022-01246778**	All counsel must appear so that the court can discuss with them the status of the settlement.

7	**Vasquez vs. Hollybrook Montecito Operations, LLC 2020-01139787**	The tentative ruling is to continue the hearing on plaintiffs' Motion for Final Approval of Class Action Settlement to August 2, 2024 at 10:00 a.m. Counsel must file supplemental papers addressing the court's concerns (not fully revised papers that would have to be re-read) at least 16 days before the next hearing date. There is no explanation as to why the number of putative class members decreased from 355 to 321. There is no explanation as to why two named plaintiffs were required for this action such as to support two enhancement awards, especially since plaintiff Angelica Barcelon wasn't added to this case until after it had settled. Plaintiffs also should explain why Barcelon's declaration says in ¶2 that she spoke with her attorneys in preparation for the mediation, when the mediation was on March 6, 2023 but Barcelon didn't become a plaintiff until June 7, 2023. An invoice from the Administrator is required to support the $8,550.00 Administrator fee request. The [Proposed] Order Granting Final Approval of Class Action Settlement and Entering Judgment must be amended to identify the two putative class members who opted out and thus will not be bound by the judgment. The [Proposed] Order Granting Final Approval of Class Action Settlement and Entering Judgment also must provide how the parties will comply with CRC Rule 3.771(b), which states: "Notice of the judgment must be given to the class in the manner specified by the court." The notice may be included with the checks that are mailed to the class members or posted on the administrator's website. Counsel should propose a realistic Final Report Hearing date, taking into account the time deadlines associated with funding the settlement, mailing distributions, allowing the check-cashing deadline to pass, and depositing uncashed check funds pursuant to the terms of the settlement agreement. The court usually sets these hearings nine months after settlement approval if the check cashing deadline is 180 days. The parties must report to the court the total amount that was actually paid to the class members. All supporting papers must be filed at least 16 days before the Final Report Hearing date. Plaintiffs have not shown that they served the LWDA with their moving papers. Plaintiffs are ordered to give notice of the ruling to the LWDA and to defendant, to serve the LWDA with their original moving papers as well as any new papers filed for future hearings, and to file a proof of service showing such compliance.

8	**Valenzuela vs. Delivery.com LLC 2023-01336839**	Defendant Delivery.com LLC's Application to File Documents Under Seal is denied. Defendant has failed to make a sufficient showing to establish the findings required under CRC Rule 2.550(d), including establishing an overriding interest that overcomes the right of public access to the record, and that a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed. Defendant asks the court to seal four pages of a deposition transcript, asserting that the transcript excerpts contain proprietary and confidential information of defendant Delivery.com, including information related to the location of Delivery.com's business operations and employees and the geographic concentration of orders submitted through Delivery.com, and that such information constitutes both trade secret information and financial information that is subject to protection. However, p. 5 of the deposition transcript simply identifies the city in which most of defendant's employees work, pp. 31-32 reference, but do not include, a geographic breakdown of defendant's transactions, including three "spots" in a named state, identified only with highly vague references to three parts of that state, and note that "hits" are concentrated in a certain large city, and p. 36 simply says that defendant has no employees in a certain state. None of this information is shown to constitute proprietary or confidential information of defendant Delivery.com, or trade secret information or financial information that should be subject to protection. As a result, this court will not order the sealing of the four deposition transcript pages. Defendant is ordered to give notice of the ruling unless notice is waived.
9	**Murchison vs. MVP Event Productions, LLC 2021-01234789**	Defendant Legends Hospitality, LLC's Motion for Protective Order is granted in part and denied in part. The motion is granted in that the court will prohibit all discovery relating to alleged wage and hour violations occurring on or before August 20, 2021. The motion is further granted in that the court stays discovery as to alleged wage and hour violations suffered by employees other than plaintiff after August 20, 2021. The motion is denied in that the parties may continue to take discovery as to alleged wage and hour violations plaintiff personally suffered after August 20, 2021. Defendant's Request for Judicial Notice is granted. The settlement of the Hightower lawsuit in Santa Clara County released wage and hour claims through August 20, 2021. Plaintiff alleges he worked for defendants from August 2021 through October 2021. The Bates lawsuit in Sacramento County was filed in April 2022, after this lawsuit was filed, but before plaintiff named Legends as a defendant in this action on April 21, 2023. The Bates lawsuit has settled, but the court has not yet granted settlement approval. Plaintiff here apparently intends to opt out of that settlement (although he is not allowed to opt out of the PAGA portion of the settlement) and pursue

		his individual claims here, making those claims ripe for ongoing discovery. However, since virtually all settlements are ultimately approved, this court considers it burdensome for Legends to have to respond to plaintiff's discovery as to violations suffered by employees other than plaintiff after August 20, 2021 until after the Bates court rules on settlement approval. Since the Bates court might deny settlement approval, this court will not prohibit such discovery at this time, but will stay it pending that determination. But if the Bates settlement is approved, plaintiff presumably will be able to pursue this case only as to his own individual claims. Although plaintiff asserts that this case includes many Legends employees who were not placed through MVP, plaintiff himself was placed through MVP, meaning that he may not be a proper class representative for those employees. On motion and for good cause shown, the court may establish the sequence and timing of discovery for the convenience of parties and witnesses and in the interests of justice. CCP §2019.020(b). This ruling is based on what this court considers to be in the interests of justice. Plaintiff's request for monetary sanctions is denied. Defendant acted with substantial justification in bringing this motion. Defendant Legends Hospitality, LLC is ordered to give notice of the ruling.
10	**Rivas vs. Ortronics, Inc.** **2022-01287621**	Defendant Agile Staffing, Inc.'s Motion to Compel Arbitration and to Stay Action is denied. Defendant Ortronics, Inc.'s Joinder in Co-Defendant Agile Staffing, Inc.'s Motion to Compel Arbitration and Stay Action is denied. Plaintiff's Evidentiary Objections to the Declaration of Ivan Nuno are sustained. Defendant Agile seeks to enforce an arbitration agreement purportedly signed by plaintiff on December 3, 2021 as part of his on-boarding process. However, the court concludes that Agile has failed to meet its burden of authenticating plaintiff's purported electronic signature to the arbitration agreement. Agile provides the declaration of one of its customer service representatives and the on-site representative for Agile at Ortronics, Inc., Laura Caratachea, who is responsible for ensuring that employees complete their onboarding documentation. (Caratachea Dec. ¶3.) She states she was responsible for plaintiff's orientation, and gave plaintiff the opportunity to review on-boarding documents and sign them using TempWorks HRCenter software to secure electronic signatures from employees. (Id. ¶4.) However, plaintiff requested to complete the paperwork remotely before starting work, which Caratachea allowed, instructing him to use ApplyAgileNow.com and giving him his unique username oscarc503 and a password. (Id. ¶6.) She provides a screenshot of plaintiff's dashboard from the software

		showing that he completed the onboarding documentation on December 3, 2021 between 10:06 a.m. and 10:53 a.m., with the first document he completed being the arbitration agreement. (Id. ¶7.) She also provides a version of the arbitration agreement that contains a stamp with a digital signature of December 3, 2021 at 18:06:55 UTC. (Id., Exh. D.) Plaintiff claims that he did not sign anything electronically, including the purported arbitration agreement. (Supp. Rivas Dec. ¶3.) He states that he texted Caratachea with his direct deposit information, but did not personally use the website she linked to him via text message on December 3, 2021. (Id. ¶4.) Plaintiff states that he does not own a personal computer, and only uses his cell phone to view e-mails and text messages. (Id. ¶5.) His text messages with Caratachea do not show that he himself completed the onboarding documentation. (Id., Exh. 1.) Rather, the text messages show that the onboarding system used by Agile is not secure in a way such that only plaintiff could have filled out the onboarding forms, and is evidence that Caratachea or anyone with access to the username and password that she sent to plaintiff could have completed the onboarding documents for plaintiff. Courts have held that there is insufficient authentication of an arbitration agreement where there is evidence that a third party employee completed the onboarding process for other employees without their participation, did so remotely, without the employees being present, and the plaintiff employee did not touch the computer during that process and never reviewed or signed any arbitration agreement. Bannister v. Marinidence Opco, LLC (2021) 64 Cal. App. 5th 541, 546-547. To authenticate an electronic signature, a movant must show that the electronic signature is "the act of the person". Id., citing Civ. Code §1633.9(a). "The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable." "A party may establish that the electronic signature was 'the act of the person' by presenting evidence that a unique login and password known only to that person was required to affix the electronic signature, along with evidence detailing the procedures the person had to follow to electronically sign the document and the accompanying security precautions." Id. at 545. Authentication is inadequate if the party seeking to enforce the agreement "did not establish that [the employee] was assigned a unique, private user name and password such that she is the only person who could have accessed the onboarding portal and signed the agreement", but rather a third party employee had access to the information necessary to access the onboarding portal via employee personnel records. Id. at 547. Agile asks the court to assume that plaintiff followed Caratachea's text instruction to complete the onboarding

		documents, but plaintiff denies this, and Agile presents no evidence to the contrary. Here, the password and login information were known to Caratachea, so it was possible for her to go in and sign the documents for plaintiff. This is not a situation where the username and password are known only by the employee. Further, the full text exchange shows that Caratachea filled out at least one form for plaintiff, the direct deposit form, showing that she had equal access to his onboarding documents. As a result, Based on the foregoing, Agile has failed to authenticate that plaintiff signed the arbitration agreement, and the court must deny the motion to compel arbitration. A Status Conference is also set for today and will go forward. Plaintiff is ordered to give notice of the ruling unless notice is waived.
11	**Oglander vs. Tax Rise, Inc.** **2023-01347301**	Defendants TaxRise, Inc., MIADVG, LLC and Essam Abdullah's Demurrer to First Amended Complaint is sustained with 15 days leave to amend as to the Ninth Cause of Action, and is overruled as to the First through Seventh Causes of Action. Defendants' Request for Judicial Notice is granted. As to the First Cause of Action, the Phase II service agreement between the parties contains a California choice-of-law provision which states that the rights and obligations of the parties under the agreement shall be construed and enforced in accordance with, and governed by, the laws of the State of California. (FAC, Ex. 4 §5(11).) Further, defendants are California residents, and the Home Solicitation Sales Act seeks to regulate conduct by defendants. Thus, plaintiff may seek to enforce the Act. As to the Second Cause of Action, plaintiff's allegations adequately plead the existence of a fiduciary relationship between the parties, and adequately pleads a breach of defendants' fiduciary duties. As to the Third Cause of Action for Fraud, an exception to the economic loss rule is if a party is fraudulently induced to enter into the contract. Food Safety Net Services v. Eco Safe Systems USA, Inc. (2012) 209 Cal. App. 4th 1118, 1131. Here, plaintiff has alleged that promises made by defendant TaxRise were false and made without the intention to perform them. Plaintiff also alleges that defendant MIADVG knowingly and substantially assisted in TaxRise's fraud and assisted TaxRise with knowledge of its fraudulent conduct. Thus, MIADVG may be found liable for aiding and abetting a breach of fiduciary duty even if it owed no independent duty to plaintiff. Nasrawi v. Buck Consultants LLC (2014) 231 Cal. App. 4th 328, 345. As to the Fourth Cause of Action for Fraudulent Omission, there are triable issues as to whether there was a fiduciary

		relationship between the parties, whether defendants gave partial disclosures requiring disclosure of additional material facts, whether defendants had exclusive knowledge of material facts not known to plaintiff, whether defendants had a duty to disclose who would perform the tax investigation, whether defendants met their obligation to disclose refund rights to plaintiff, whether defendants should have disclosed to plaintiff that he was only likely to receive an installment payment plan as a solution, whether defendants should have disclosed that they did not plan to prepare, file or negotiate tax petitions on plaintiff's behalf, whether defendants failed to conduct a comprehensive investigation, and whether defendants ever intended to submit a penalty abatement request to the IRS. As to the Fifth Cause of Action for Violations of the CLRA, plaintiff alleges that TaxRise failed to adequately disclose his cancellation and refund rights, misrepresented that it would submit a penalty abatement request on his behalf, misrepresented that it would provide services to him with respect to his state tax liability, and failed to disclose to plaintiff that he would not qualify for a penalty abatement. These alleged misrepresentations and omissions are adequate to state a claim under the CLRA. As to the Sixth Cause of Action, whether plaintiff should have reasonably expected that the second call he had with TaxRise would be recorded because he was informed that his first call with a TaxRise representative was recorded is an issue of fact that may not be decided at the demurrer stage. The Seventh Cause of Action for Violations of the Unfair Competition Law is based in part on the allegations in the previous claims, and since there are triable issues as to the previous claims, the UCL claim also may not be resolved at the pleading stage. In the Ninth Cause of Action for Breach of Contract, plaintiff alleges that TaxRise breached its oral agreement during their November 23, 2022 phone call to assist plaintiff with his tax issues with New York state. However, this alleged oral agreement was made before plaintiff entered into an integrated, written agreement with TaxRise in the Phase II service agreement. Moreover, Civil Code §1625 provides, "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." Defendants' Motion to Strike Portions of First Amended Complaint is denied. Plaintiff makes several allegations about administrative proceedings against Optima Advocates, Inc., a defunct third-party entity previously owned by defendant Essam Abdullah. Defendants seek to strike those allegations and some exhibits as inadmissible, irrelevant with no probative value, intended to embarrass

		defendant Abdullah, and improper character evidence. Defendants' arguments are based primarily on evidentiary objections, and thus are not a proper attack on the pleadings. This court will decide at the proper time whether the allegations as to Optima may be considered by the trier of fact. If defendants believe that some of plaintiff's discovery as to Optima is not relevant to the subject matter of the action nor reasonably calculated to lead to the discovery of admissible evidence, they can bring a motion for a protective order. Defendants are ordered to give notice of the ruling unless notice is waived.