SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE**:** August 26, 2005	**DEPT. 71**	**REPORTER A:**	**CSR #**
PRESENT HON. RONALD S. PRAGER		**REPORTER B:**	**CSR #**

JUDGE

CLERK: K. Sandoval

BAILIFF:

REPORTER'S ADDRESS: P.O. BOX 120128

SAN DIEGO, CA 92112-4104

JUDICIAL COUNSEL COORDINATION PROCCEEDINGS NO. JCCP 4221 1,11,111, AND 1V	TITLE [Rule 1550(b)] NATURAL GAS CASES

PIPELINE

DEFENDANTS' MOTION SUMMARY JUDGEMENT RE: CAUSATION

MOVING PARTIES:	**DEFENDANTS SEMPRA, SOCALGAS & SDG&E**
By Attorney:	Robert P. Cooper, Richard P. Levy, Mark E. Weber, Kay E. Kochenderfer, James P. Fogelman of Gibson, Dunn & Crutcher, LLP, Los Angeles, CA
RESPONDING PARTIES:	**PLAINTIFFS ANDREW AND ANDREA BERG, DBA WAVE LENGTH HAIR PRODUCTIONS; GERALD MARCIL AND JOHN CLEMENT MOLONY**
By Attorney:	Pierce O'Donnell, John J. Scheffer, Timothy J. Toohey, Nina D. Forecshle of O'Donnell Shaeffer Motimer LLP, Los Angeles, CA
RESPONDING PARTIES:	**PLAINTIFFS COUNTY OF LOS ANGELES, COUNTY OF SAN BERNARDINO, CITY OF**

VERNON, CITY OF UPLAND, CITY OF GLENDALE, CITY OF CULVER CITY, CITY OF BURBANK, LUNDAY-THAGARD COMPANY, DEMMENO-KERDOON, IMPERIAL IRRIGATION DISTRICT, EDGINGTON OIL CO. AND WORLD OIL CORP.

By Attorney: Maxwell M. Blecher, Gary M. Joye, James Robert Noblin of Blecher & Collins, P.C., Los Angeles, CA

TENTATIVE RULING

A defendant moving for summary judgment must "show" that either: (1) one or more elements of the "cause of action" cannot be established, or (2) there is a complete defense to the cause of action. (CCP section 437c(p)(2).) When plaintiff has the burden of proof at trial by a preponderance of the evidence, a defendant moving for summary judgment must present evidence that would require a reasonable trier of fact not to find the underlying material fact more likely than not. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851) "More likely than not" means that a moving defendant must generally present evidence that, if uncontradicted, "would constitute a preponderance of the evidence that an essential element of the plaintiff's case cannot be established." (*Kinds' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 879)

The moving party's evidence is strictly construed in determining whether it disproves an essential element of the plaintiff's claim "in order to avoid unjustly depriving the plaintiff of a trial." (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1601) A cause of action "cannot be established" if the undisputed facts presented by defendant prove the contrary of plaintiff's allegations as a matter of law. (*Id., Brantley, supra* at 1597)

If defendants fail to meet this burden, their motion must be denied and plaintiff need not make any showing at all. (*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468)

Of Defendants' 163 purported undisputed material facts submitted to support Defendants' contention that Plaintiffs cannot establish the essential element of causation, most if not all, do not unequivocally show the absence of causation. Most, if not all, of the purported facts require argument or inference to support Defendants' position. As such the purported evidence is insufficient to allow a reasonable trier of fact to find the absence of causation. Stated in the vernacular of *Aguilar*, Defendants' evidence is insufficient to allow a reasonable trier of fact not to find Defendants' alleged conduct more likely than not caused Plaintiffs' harm. (*Aguilar v.*

Atlantic Richfield Co. (2001) 25 Cal.4th 826, 851) Consequently, Defendants have failed to sustain their initial burden on summary judgment and their motion is denied. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826; *Kinds' Universe v. In2Labs* (2002) 95 Cal.App.4th 870)

The evidence submitted by Defendants to show Plaintiffs cannot establish causation or to show the absence of causation, include the following (1) industry background and history (SS 1-28), (2) determinations by regulatory agencies that California had adequate natural gas transportation capacity and Defendants couldn't secure shipper commitments for new projects (SS 28-35), (3) the existing gas market would not support expansion of capacity (SS 83-89), (4) the Altamont project failed to become viable – shipper deposits were returned, certifications were allowed to expire, and partnership and project eventually sold. (SS 90-99), and (5) the Rosarito project was not competitive due to regulatory restrictions, timing issues, requirements from the Mexican government, risks of loss or failure to timely complete the project or get sufficient shipper commitments. (SS 117-134). None of this evidence shows how the harm alleged by Plaintiffs was not caused by Defendants.

Assuming Defendants sustained their initial burden, the burden would shift to Plaintiffs to create triable issues of material fact to the evidence submitted by Defendants.

The party opposing summary judgment may rely on circumstantial evidence and inferences arising from evidence to create triable issues of material fact. (CCP section 437c(c).)

To defeat summary judgment, such inferences must be reasonable and cannot be based on speculation or surmise. (*Joseph E. DiLoreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, 161) Moreover, the inferences plaintiff relies on must satisfy the more likely than not evidentiary standard plaintiff will bear at trial. (*Leslie G. v. Perry & Assocs.* (1996) 43 Cal.App. 4th 472, 487)

Plaintiffs correctly state the standard of review on summary judgment in cases involving anti-trust cases. Plaintiffs rely on *Fisherman's Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal. App. 4th 309 which states

> In applying this exacting standard of review [on summary judgment], we are also mindful that both California and federal decisions urge caution in granting a defendant's motion for summary judgment in an antitrust case. 'We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute

> for trial by jury which so long has been the hallmark of "even handed justice."' (*Poller v. Columbia Broadcasting* (1962) 368 U.S. 464, 473) However, caution does not equal prohibition, and summary judgment remains available to the defendants in an antitrust lawsuit in appropriate cases. (*Sherman v. Mertz Enterprises* (1974) 42 Cal. App. 3d 769) *Fisherman's Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal. App. 4th 309, 320-21

In addition, Plaintiffs cite *Gordon v. Havasu Palms, Inc.* (2001) 93 Cal. App. 4th 244, 252 which states "[t]he issue of causation is usually a question for the jury." Plaintiffs also point to *Kolling v. Dow Jones & Co., Inc.* (1982) 137 Cal.App.3d 709, 718 which states

> In order to maintain a cause of action for a combination in restraint of trade pursuant to either the Cartwright or Sherman Acts, the following elements must be established: (1) the formation and operation of the conspiracy; (2) illegal acts done pursuant thereto; and (3) damage proximately caused by such acts. (Citations) Whether each element has been established is a question of fact to be determined by the trier of fact. (Citations)

"The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23)

> Similarly, [given] a breach of duty by the defendant, the decision whether that breach caused the damage (that is, causation in fact) is again within the jury's domain; but where reasonable men will not dispute the absence of causality, the court may take the decision from the jury and treat the question as one of law. (*Constance B. v. State of California* (1986) 178 Cal. App. 3d 200, 207, citations and quotes omitted, emphasis added.)

In addition,

> Cause in fact, as well as proximate cause, is ordinarily a fact question for the jury. (Citations) It cannot be said that the evidence shows a want of causation as a matter of law unless the only reasonable hypothesis is that such want exists; if reasonable minds may differ, it is a jury question. (Citations) (*Smith v. Lockheed Propulsion Co*. (1967) 247 Cal. App. 2d 774, 780, emphasis added)

Here, Plaintiffs present evidence, in rebuttal to evidence presented by Defendants, from which inferences may be drawn that allow reasonable minds to differ as to whether

Defendants' alleged conduct caused harm to Plaintiffs as a matter of law. (*See, among others*, Plaintiffs' Responsive Statement, Fact Nos. 24, 28-30, 35, 37, 72, 74-75, 77-78, 80, 82, 89, 92, 94, 100, 102, 106-107, 119, 125-128, 132, 134-144, 147, 150-153, 155, 159) Thus, even if Defendants had sustained their initial burden on summary judgment, they would similarly not be entitled to summary judgment as a matter of law on Plaintiffs' shifted burden and the motion would nonetheless be denied.