

**SUPERIOR COURT, STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA**

**Department 6**

**Honorable Evette D. Pennypacker, Presiding**

David Criswell, Courtroom Clerk  
191 North First Street, San Jose, CA 95113  
Telephone: (408) 882-2160

**DATE: October 10, 2023      TIME: 9:00 A.M.**

**TO REQUEST ORAL ARGUMENT:** Before 4:00 PM today you must notify the:

- (1) Court by calling (408) 808-6856 and
  - (2) Other side by phone or email that you plan to appear at the hearing to contest the ruling
- (California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

**TO APPEAR AT THE HEARING:** The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:

[https://www.scsccourt.org/general\\_info/ra\\_teams/video\\_hearings\\_teams.shtml](https://www.scsccourt.org/general_info/ra_teams/video_hearings_teams.shtml)

**TO HAVE THE HEARING REPORTED:** The Court does not provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:

[https://www.scsccourt.org/general\\_info/court\\_reporters.shtml](https://www.scsccourt.org/general_info/court_reporters.shtml)

**TO SET YOUR NEXT hearing date:** You no longer need to file a blank notice of motion to obtain a hearing date. **Phone lines are now open for you to call and reserve a date before you file your motion.** If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Civil Local Rule 8C is in the amendment process and will be officially changed by January 2024.

**Where to call for your hearing date:**

408-882-2430

When you can call:

Monday to Friday, 8:30 am to 12:30 pm

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
<a href="#"><u>1</u></a>	21CV377884	Jeffery Duncan vs Redwood Electric Group, Inc et al	Off calendar.
<a href="#"><u>2</u></a>	21CV390717	Fermin Marquez vs JUDGE HOSPITALITY CORPORATION et al	Off calendar.
<a href="#"><u>3</u></a>	21CV390717	Fermin Marquez vs JUDGE HOSPITALITY CORPORATION et al	Off calendar.
<a href="#"><u>4</u></a>	21CV390717	Fermin Marquez vs JUDGE HOSPITALITY CORPORATION et al	Off calendar.
<a href="#"><u>5</u></a>	21CV390717	Fermin Marquez vs JUDGE HOSPITALITY CORPORATION et al	Off calendar.
<a href="#"><u>6</u></a>	22CV409001	Michelle Ronolo vs FCA US, LLC et al	Pursuant to stipulation of the parties, this motion to compel is continued January 11, 2024.
<a href="#"><u>7</u></a>	19CV353862	David Feldman vs Robert Machado et al	Defendant Robert Machado's Motion to Stay is DENIED. Please scroll down to lines 7-9 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
<a href="#"><u>8</u></a>	19CV353862	David Feldman vs Robert Machado et al	Plaintiff's Motion for Leave to File a Second Amended Complaint is GRANTED. Please scroll down to lines 7-9 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
<a href="#"><u>9</u></a>	19CV353862	David Feldman vs Robert Machado et al	Plaintiff's Motion for Trial Preference is DENIED. Please scroll down to lines 7-9 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
<a href="#"><u>10</u></a>	21CV384211	Cindy Ho et al vs Cindy Nguyen et al	Kathryn C. Klaus and Rebecca D. Martino's Motion to Withdraw as Counsel for Khin San Vong is GRANTED. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to use order on file.
<a href="#"><u>11</u></a>	21CV384211	Cindy Ho et al vs Cindy Nguyen et al	Kathryn C. Klaus and Rebecca D. Martino's Motion to Withdraw as Counsel for Paul Wong is GRANTED. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to use order on file.
<a href="#"><u>12</u></a>	23CV416863	Angelica Carr vs Hui Liu	Petitioner Angelica Carr's Petition to Confirm Contractual Arbitration Award is continued to January 18, 2024 at 9 a.m. in Department 6 to permit Petitioner to effectuate service.
<a href="#"><u>13</u></a>	22CV393898	Synchrony Bank vs Betty Martinez	Plaintiff's request to set aside default and dismiss the entire action without prejudice is GRANTED. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) These orders will be reflected in the minutes.

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**Calendar Lines: 7-9**

**Case Name:** *David Feldman vs Robert Machado et al*

**Case No.:** 19CV353862

Before the Court is (1) Defendant Robert Machado's Motion to Stay Pending Resolution of Related Case, (2) Plaintiff's Motion for Leave to File a Second Amended Complaint, and (3) Plaintiff's Motion for an Order Deeming the January 16, 2024 is Subject to Trial Preference Pursuant to Code of Civil Procedure section 36 (e). Below is the Court's tentative ruling pursuant to California Rule of Court 3.1308.

**I. Background**

On August 29, 2019, Plaintiff David Feldman filed this lawsuit against his former attorney Robert Machado alleging (1) deceit and intentional fraud, (2) promissory fraud, (3) concealment fraud, (4) constructive fraud, and (5) elder financial abuse. Feldman filed a first amended complaint on November 12, 2019 asserting the same five claims and seeking \$3,123,340.00 in actual damages, punitive damages, and treble damages. By stipulation of the parties, Feldman added a sixth cause of action for negligence to the First Amended Complaint on November 10, 2021.

Feldman alleges Machado defrauded him by failing to represent him as an attorney in certain matters after Feldman was told Machado would do so. Based on his conduct in Feldman's legal matters, Machado plead guilty to violating Penal Code section 32 as a misdemeanor and the State Bar suspended his law license. Machado is no longer eligible to practice law in California. Feldman discovered the fraud in 2014, but the parties entered a tolling agreement at that time.

Given its age, this case has substantial procedural history. Feldman first sought trial preference when he moved *ex parte* for trial preference under Code of Civil Procedure section 36 on December 26, 2019 based on his then age of 73 and "history of melanoma, sleep apnea, and high blood pressure, and a family history of heart disease." (Memo of Points and Authorities, p. 8.) The Court (Hon. Patricia Lucas) denied Feldman's motion without prejudice to bring a noticed motion.

Feldman again moved *ex parte* for trial preference under Section 36 on January 8, 2020. The Court (Hon. Sunil Kulkarni) held a hearing by order dated February 27, 2020, then denied Feldman's motion without prejudice, noting "If Plaintiff's health deteriorates such that there becomes a substantial

risk Plaintiff cannot adequately represent himself in this litigation (thus ‘prejudicing [his] interest in the litigation’), he can re-file this motion.”

On January 22, 2021, Feldman again moved for trial preference under Section 36, averring that he was then 75 years old and had contracted COVID-19 which “negatively impacted [his] health and cause[d him] to experience debilitating effects related to Covid-19 including fatigue, digestive problems, anxiety and muscle weakness.” (January 22, 2021 Declaration of David L. Feldman, ¶ 3.) By order dated April 15, 2021, the Court (Hon. Christopher Rudy) again denied Feldman’s motion, finding “there is no evidence that Feldman’s exposure to COVID-19 has resulted in a deterioration of his health.” In a separate order that same day, the Court also denied Feldman’s motion for financial disclosures finding that Machado’s no contest plea to a misdemeanor could not be used as prima facie proof that Machado’s acts are the proximate cause of Feldman’s damages.

On June 15, 2021, the case was set for trial for November 22, 2021. By order dated November 8, 2021, the Court (Hon. Christopher Rudy) continued the trial to April 4, 2022 and permitted Feldman to file an amendment to the First Amended Complaint pursuant to stipulation by the parties.

On March 22, 2022, after mediation at JAMS, the parties again stipulated to continue the trial, and the Court (Hon. Christopher Rudy) reset trial for September 19, 2022. On September 15, 2022, the parties again stipulated to continue the trial date. After holding a trial setting conference, the Court reset trial for May 22, 2023.

On May 18, 2023, Feldman dismissed the negligence cause of action. The mandatory settlement conference was held on May 19, 2023, and the case did not resolve. Apparently because of a lack of courtrooms, the case did not go to trial on May 22, 2023. After a further trial setting conference, the case was set for trial to commence on January 16, 2024.

Feldman now again moves for trial preference. Feldman also seeks to file a Second Amended Complaint. For his part, Machado seeks a stay pending the resolution of other litigation. Machado and Feldman each oppose the other’s motion(s).

## **II. Motion for Stay**

In his motion for stay, Machado claims a trial on Feldman’s cross complaint in *TAT Capital partners Ltd., et. al. v. David Feldman, et. al.*, Santa Clara County Superior Court Case No. 1-05-

CV035531, which the court required to be severed and filed separately in *ZF Micro Devices, Inc. et. al. v. TAT Investment Advisory Ltd., et. al.*, Santa Clara County Superior Court Case No. 2009-1-CV13470, should be completed before the court conducts the trial in this case. Specifically, Machado claims Feldman's alleged damages in this case are "almost entirely dependent" on the outcome of the *TAT Investment* case, which is also pending in this court. Feldman disagrees, arguing he is not a party to the other litigation, and the damages the entity in the other litigation seeks are wholly separate than those Feldman seeks against Machado here.

One point the parties do agree on is that the Court has discretion to control the order of proceedings before it. California Rules of Court, Rule 3.515 (a) provides: "Any party may file a motion for an order under Code of Civil Procedure section 404.5 staying the proceedings in any action being considered for, or affecting an action being considered for, coordination, or the court may stay the proceedings on its own motion."

The Court has studied the extensive record in this case, and the motion to stay is DENIED. First, even if Machado is correct, trial proceeding in this case first will narrow the issues to be decided in the retrial of the other pending case. Next, for Feldman to obtain damages in this case at all, he will first have to prove Machado's liability. The issues involved in such proof here are not so similar to those at issue in the other pending matter to justify a stay of this case.

### **III. Motion for Leave to File Second Amended Complaint**

Feldman seeks leave to amend his complaint to add a breach of fiduciary duty claim without conditions. Machado opposes the motion on procedural grounds and argues that granting leave to amend would require additional trial preparation costs and discovery.

"[T]he trial court has wide discretion in allowing the amendment of any pleading. (*Bedolla v. Logan & Frazer* (1975) 52 Cal. App. 3d 118, 135-136.) However, "the exercise of this discretion must be sound and reasonable and not arbitrary or capricious. (*Richter v. Adams*, 43 Cal.App.2d 184, 187; *Eckert v. Graham*, 131 Cal.App. 718, 721.) '[It] is a rare case in which 'a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case.' (*Guidery v. Green*, 95 Cal. 630, 633; *Marr v. Rhodes*, 131 Cal. 267, 270.) If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse

permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion. (*Nelson v. Superior Court*, 97 Cal.App.2d 78; *Estate of Herbst*, 26 Cal.App.2d 249; *Norton v. Bassett*, 158 Cal. 425, 427.)” (*Morgan v. Superior Court of Los Angeles County* (1959) 172 Cal. App. 2d 527, 530-531 (error for trial court to fail to give leave to amend). However, “even if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of itself—be a valid reason for denial.” (*Roemer v. Retail Credit Co.* (1975) 44 Cal. App. 3d 926, 939-940; see also *Moss Estate Co. v. Adler* (1953) 41 Cal. 2d 581, 585-587.)

Defendant’s claimed prejudice here is that additional discovery and trial preparation will be needed. The Court disagrees. The breach of fiduciary claim is based on the same set of facts the parties have been litigating for years. Accordingly, the motion for leave to file a second amended complaint to add the breach of fiduciary duty claim is GRANTED.

#### **IV. Motion for Trial Preference**

Feldman again seeks trial preference, specifically that the January 16, 2024 trial date be deemed set pursuant to Code of Civil Procedure section 36 (e). Feldman reports that he is now 77 years old, has had more than one bout of COVID-19, has been admitted to the hospital and needed emergency room treatment for sepsis, and needs this case to come to a close for his health. Feldman also requests that the Court take judicial notice of his prior motions for trial preference, which request is granted. The Court has reviewed those prior motions and related orders.

Machado opposes the motion on the grounds that, *inter alia*, Feldman fails to submit any proof of his need for a trial preference, “litigation toll” is not sufficient grounds, and Feldman has not sought trial preference in the other pending case.

Feldman previously moved for trial preference under Code of Civil Procedure 36 (a), which states: “A party to a civil action who is over 70 years of age may petition the court for a preference, which the court shall grant if the court makes both of the following findings: (1) the party has a substantial interest in the action as a whole. (2) The health of the party is such that a preference is necessary to prevent prejudicing the party’s interest in the litigation.”

This time, it appears Feldman makes his motion under Code of Civil Procedure 36(e), which states: “Notwithstanding any other provision of law, the court may in its discretion grant a motion for preference that is supported by a showing that satisfies the court that the interests of justice will be served by granting this preference.” (Code Civ. Proc. § 36 (e).)

Feldman appears to argue that because he had to prepare for trial twice only to have the case continued for lack of a courtroom both times, the interests of justice dictate that the January 16, 2024 trial date be designated as set pursuant to Section 36. While the Court agrees that it is a great burden on parties to prepare for trial when no courtroom ends up being available, that is not what Section 36 is aimed to remedy. Thus, the motion for trial preference under Section 36 is DENIED.

However, the court is prioritizing cases that have been continued solely for lack of courtroom availability—particularly those cases that have been continued more than once—and anticipates having additional available trial judges in 2024. Accordingly, based on the court’s own internal procedures—not Section 36, this case will likely have priority to take an open courtroom.