

**Tentative Rulings for August 10, 2016**  
**Departments 402, 403, 501, 502, 503**

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There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

15CECG01935      *Barbara Moscardi v. Carl Nelson* (Dept. 402)

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The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

11CECG04395      *Switzer v. Flourney Management, LLC, et al.*, is continued to Wednesday, August 17, 2016, at 3:30 p.m. in Dept. 501

13CECG02596      *Worrell v. Case* is continued to Thursday, August 18, 2016 at 3:30 p.m. in Dept. 402

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(Tentative Rulings begin at the next page)

# Tentative Rulings for Department 402

(28)

## Tentative Ruling

Re: ***Park Place Retail Partners, LP v. Mast, et al.***

Case No. 16CECG00226 (Dept. 402)

Hearing Date: August 10, 2016

Motion: By Plaintiff Park Place Retail Partners, LP, for default judgment against Abbie Mast aka Abbie Farris, individually and doing business as GaGa Chic and Michael Mast, individually and doing business as GaGa Chic.

### **Tentative Ruling:**

To deny the request for Default Judgment without prejudice.

### **Explanation:**

The Court has reviewed the paperwork and supporting documentation on file in the action. Plaintiff seeks in its demand the amount of \$26,158.10. However, Plaintiff has provided no evidence to support that amount as required by California Rule of Court 3.1800, subdivision (a)(2). The Court does not know if the calculation is derived from the amount of rent owing under the remaining term of the Lease or whether it includes any extant amounts owed for improvements, as stated in the Complaint and accompanying declaration.

The Court also notes that Plaintiff has not filed a brief summary of the case as required by California Rule of Court 3.1800, subdivision (a)(1).

The Court is therefore inclined to deny the request for judgment without prejudice to the Plaintiff refile with the evidence and/or calculations supporting the requested amount.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

### **Tentative Ruling**

Issued By:     JYH     on 8/9/16.  
(Judge's initials) (Date)

(17)

**Tentative Ruling**

Re: **Rodriguez v. The Neil Jones Food Company dba Toma-Tek, et al.**  
Court Case No. 16 CECG 00775

Hearing Date: August 10, 2016 (Dept. 402)

Motion: Defendants Hernandez', Ramos' & Masi's Demurrers to the  
Complaint

**Tentative Ruling:**

To sustain the general demurrers with leave to amend.

**Explanation:**

*Administrative Exhaustion:*

Employees who believe they have suffered discrimination at the hands of their employers and wish to file civil claims for damages under FEHA must first exhaust their administrative remedies by filing a complaint with the DFEH and obtaining a right-to-sue notice. (See, e.g., *Rojo v. Kliger* (1990) 52 Cal.3d 65, 72, 83.)

Initially, the complaint adequately pleads administrative exhaustion:

Prior to the initiation of this lawsuit, Rodriguez obtained right to sue letters from the California Department of Fair Employment and Housing ("DFEH") pursuant to section 12900, et seq., of the California Government Code. A true and correct copies of said letter is attached hereto collectively as Exhibit A. Rodriguez also participated in a voluntary and non-binding appellate process through her union, Teamsters District Council 2. On February 24, 2016, Rodriguez's appeal was denied.

(Complaint ¶ 39.)

Exhibit A is captioned "Rodriguez/ The Neil Jones Food Company DbA Toma-Tek" and states "the above-referenced complaint was filed with the Department of Fair Employment and Housing (DFEH) has been closed effective March 07, 2016 because and immediate Right to Sue notice was requested." Nothing indicates who was, or was not, named in body of the complaint.

However, in plaintiff's opposition, plaintiff's counsel states that the individuals were named in plaintiff's "DFEH pre-complaint." As proof of this statement, a form entitled California Department of Fair Housing and Employment Pre-Complaint Inquiry, is attached to counsel's declaration as Exhibit 2. The form states: "The completion and submission of this Pre-Complaint Inquiry will initiate an intake Interview with a

Department of Fair Employment and Housing (DFEH) representative. The Pre-Complaint Inquiry is not a filed complaint.”

The complaint filed with the DFEH must be verified and state the “name and address of the person (or) employer ... alleged to have committed the unlawful practice complained of ...” (Gov. Code, § 12960, subd. (b).) To allege administrative exhaustion as to an individual defendant, that individual must be named in the DFEH administrative complaint. (*Medix Ambulance Service, Inc. v. Superior Court* (2002) 97 Cal.App.4th 109, 118.) While an intake questionnaire is not a complaint, and facts alleged in the intake questionnaire but not in the DFEH complaint cannot be the basis for liability (See *Holland v. Union Pac. R.R. Co.* (2007) 154 Cal.App.4th 940, 947, fn. 8), neither the judicial admission in plaintiff’s opposition nor anything judicially noticeable indicates that the individual defendants were not named in the ultimate administrative complaint. Accordingly, the demurrer for failure to exhaust administrative remedies is overruled.

*Hernandez:*

*Sexual Harassment:*

The FEHA prohibits sexual harassment in the workplace. (§ 12940, subd. (j)(1) [it is an unlawful business practice “[f]or an employer ... because of ... sex ... to harass an employee”]; see *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 277; *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460–461.) “Sexual harassment consists of any unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature. [Citation.] It usually arises in two contexts. ‘Quid pro quo’ harassment conditions an employee’s continued enjoyment of job benefits on submission to the harassment. ‘Hostile work environment’ harassment has the purpose or effect of either interfering with the work performance of an employee, or creating an intimidating workplace. [Citation.]” (*Rieger v. Arnold* (2002) 104 Cal.App.4th 451, 459; see *Miller v. Department of Corrections, supra*, 36 Cal.4th at p. 461, citing *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal.App.3d 590, 607–608.)

Plaintiff’s sexual harassment claim is based on the existence of a hostile work environment. To state a cause of action for hostile work environment sexual harassment, the plaintiff must allege that (1) she was subjected to unwelcome sexual advances, conduct or comments; (2) the harassment was premised on sex; and (3) the harassment was sufficiently pervasive or severe so as to alter the conditions of employment and create an abusive working environment. (*Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 202–203; *Fisher v. San Pedro Peninsula Hosp., supra*, 214 Cal.App.3d at p. 608.)

“ ‘The factors that can be considered in evaluating the totality of the circumstances are: (1) the nature of the unwelcome sexual acts or works (generally, physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred. [Citation.] [¶] In determining what constitutes “sufficiently pervasive” harassment, the

courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature. [Citation.] [¶] “[W]hile an employee need not prove tangible job detriment to establish a sexual harassment claim, the absence of such detriment requires a commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment.” [Citation.]’ [Citation.] ‘... “[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.” [Citation.]’ [Citation.]” (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 142.)

Hernandez alleges that none of the acts he committed took place within the year prior to the filing of the DFEH complaint. However, there are no dates pled in reference to Hernandez’ acts. While a demurrer based on statute of limitations lies where the dates in question are shown on the face of the complaint, if those dates are missing, there is no ground for a general demurrer. (See *Union Carbide Corporation v. Superior Court* (1984) 36 Cal.3d 15, 25.)

Hernandez also contends that plaintiff has not alleged facts sufficient to establish “a pattern of continuous, pervasive harassment.” (*Fisher v. San Pedro Peninsula Hosp.*, *supra*, 214 Cal.App.3d at p. 611.)

Where “there is no conduct other than favoritism toward a paramour, the overwhelming weight of authority holds that no claim of sexual harassment or discrimination exists.” (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1630.) An exception to this general rule exists, however, if the workplace affair entails “widespread” sexual conduct to which other employees are exposed, such as flagrant boasting about the relationship and/or public displays of affection. (*Miller v. Dep’t of Correction* (2005) 36 Cal.4th 446, 471.) As such, the favoritism that Hernandez showed his girlfriend, as pled, does not constitute actionable harassment.

Degrading name-calling can constitute harassment if sufficiently severe and pervasive. (See *Hope v. California Youth Authority* (2005) 134 Cal. App. 4th 577.) Here, the allegations are too vague and limited to determine that the name calling was severe and pervasive.

Plaintiff’s allegations that she was subjected to increased danger and unsafe working conditions as a result of her failure to participate in a scheme to fire a co-worker, sound more in retaliation than harassment, as they are not alleged to have been on account of her gender.

Accordingly, Hernandez’ general demurrer is sustained with leave to amend with respect to the claim of sexual harassment.

#### *Failure to Prevent Sexual Harassment:*

The duty to prevent sexual harassment is owed by the employer (Gov. Code, § 12940, subd. (k)), not the supervisor. (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1326.)



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### Tentative Ruling

Re: **Weingaertner v. Imaging Resources, LLC**  
Court Case No. 12CECG02355

Hearing Date: **August 10, 2016 (Dept. 402)**

Motion: Defendants' Motion for Terminating Sanctions, or alternatively, Motion to Compel Plaintiff's Verified Responses to Defendants' Request for Production of Documents and Special Interrogatories and Request for Monetary Sanctions

#### **Tentative Ruling:**

To deny the request for terminating sanctions. To deny the alternate request to compel production, as moot. To award monetary sanctions against Timothy V. Magill, only, in the amount of \$5,500.00, to be paid within 20 calendar days of the date of this order, with the time to run from the service of this minute order by the clerk. (Code Civ. Proc., §2030.290, Subd. (c); Code Civ. Proc., §2031.300, Subd. (c).) **Mr. Magill is ordered to be personally present at the hearing on August 10, 2016.**

To issue an Order to Show Cause and set a hearing on the court's own motion for September 1, 2016, ordering plaintiffs' counsel, Timothy V. Magill, to show cause why he should not be disqualified as counsel.

#### **Explanation:**

##### Terminating Sanctions:

Terminating sanctions are not warranted, as this would only serve to punish plaintiff for the behavior of her attorney. Sanctions are supposed to further a legitimate purpose under the Discovery Act, i.e. to compel disclosure so that the party seeking the discovery can prepare their case, and secondarily to compensate the requesting party for the expenses incurred in enforcing discovery. (*Ghanooni v. Super Shuttle* (1993) 20 Cal.App.4th 256, 262; *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 796.) Sanctions should not constitute a "windfall" to the requesting party, giving the moving party more than would have been obtained had the discovery been answered. (*Caryl Richards, Inc. v. Superior Court* (1961) 188 Cal.App.2d 300, 305.) Any sanctions imposed must be "suitable and necessary" to allow the propounding party to obtain the information sought, but they are not designed to "impose punishment." (*Id.* at p. 304.) Terminating sanctions in the first instance may be an appropriate sanction if the abuse of the discovery process is particularly egregious. (*R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 496—warranted due to forgery and spoliation of evidence.) However, the imposition of terminating sanctions is a drastic consequence, one that should not lightly be imposed, or requested. (*Ruvalcaba v. Government Employees Ins. Co.* (1990) 222 Cal.App.3d 1579, 1581.)

Even though terminating sanctions are not imposed at this time, plaintiff and her counsel are warned that the court finds that Mr. Magill's conduct regarding the discovery in question was particularly egregious, notwithstanding the health issues outlined in his declaration. Ms. Weingaertner and Mr. Magill should not interpret this decision as meaning such conduct has been excused or that any future similar conduct will not result in terminating sanctions, *even in the first instance*. The court has given plaintiff the benefit of the doubt and assumed she herself did not contribute to the delay in responding to the subject discovery, and that she in fact may have been ignorant about the conduct of her attorney. But since she is presumed to be aware of this motion, the court will not assume such ignorance in the future.

#### Monetary Sanctions:

Monetary sanctions against Mr. Magill are amply warranted. Defense counsel was sympathetic and accommodating to Mr. Magill's health condition, and attempted to avoid filing this motion. Mr. Magill repeatedly failed to supply promised responses on dates he had agreed to, and numerous times he completely ignored communications from defense counsel, including requests to meet and confer regarding the discovery responses. This delay caused several postponements of plaintiff's deposition, as the parties had agreed that her deposition would be taken before defendants, and defendants quite reasonably insisted on having the discovery responses before the deposition.

When Mr. Magill finally served responses to the Special Interrogatories, Set One ("Special Interrogatories"), and the Request for Production of Documents, Set Two ("RFP#2") on March 15, 2016, there was no verification to the Special Interrogatories, and no actual, verified, response to the RFP#2, but merely the delivery of a CD with copies of documents allegedly responsive to it. Mr. Magill's assistant responded to defense counsel's email about this by giving erroneous information (that the verifications had been mailed that day, when they had not been), and by minimizing defense counsel's concern over the document production by stating that the documents on the CD were all their office possessed or had obtained. She then stated that they were in the process of preparing a "formal" response (quote marks in the original) which would indicate this.

The use of the "scare-quotes" around the word *formal* in the assistant's email appears to imply defense counsel was being oppressive in insisting on a written response to the RFP#2 instead of simply accepting the CD with documents that had been provided on the strength of email representations from her that "this is all we have." Other emails from Mr. Magill and his staff similarly implied this. Clearly, a party seeking document discovery has the right to insist on an actual response, and to have the representation that "this is all we have" be from the *party* and *under penalty of perjury*. This is more than a minor technicality. A party to whom a demand for production is directed *must* respond with a statement that either: 1) she will comply with the demand; 2) she lacks the ability to comply; or 3) she objects to the demand. (Code Civ. Proc. § 2031.210.) And serving unverified responses to any discovery demand is

tantamount to no response at all. (*Appleton v. Superior Court* (1988) 206 Cal.App.3d 632, 636.)

When counsel finally were able to meet and confer, Mr. Magill agreed to provide the verifications and written response to the RFP#2 by April 15, 2016. When these were not provided, Mr. Magill's response to defendants' email about them was, astoundingly, was that his office had sent the formal response and verification "as of the end of April, 2016." He then further deflected the issue by complaining about defense counsel's alleged failure to comply with providing available dates for defendant's depositions when he had "been asking for dates for months." Defense counsel responded by letter dated May 10, 2016, clearly indicating that no RFP#2 response or verifications to either discovery had been received, despite the statement in Mr. Magill's email, and as for the depositions he reminded Mr. Magill (as he and his staff had been reminded in the past) that the parties had agreed that plaintiff's deposition would precede that of defendants and that her deposition would not take place until her discovery responses were finally served. Counsel asked Mr. Magill to immediately fax the RFP responses and verifications if in fact he had them.

If these documents had actually been in existence at that time, and had been lost in the mail, responding to this would have been a simple matter. And yet, Mr. Magill did not respond to the May 10th letter, or a follow-up email on May 18, 2016, or a follow-up telephone call. He did not provide the required discovery responses until June 15, 2016, after he had received his copy of this motion on or around June 10, 2016. (Note: defendants indicate their motion was filed on June 10, 2016, but even though it might have been served and mailed to the court on that date, the file stamp indicates the motion was not filed until June 17, 2016.)

Sanctions are mandatory unless the court finds that the party acted "with substantial justification" or other circumstances that would render sanctions "unjust." (Code Civ. Proc., §§ 2030.290, Subd. (c) and 2031.300, Subd. (c).) While Mr. Magill's declaration attempts to provide such justification, it fails to do so, especially as defense counsel were patient and more than accommodating regarding his health problems. The fact that an attorney has personal problems does not justify his failure to meet his ethical duties to his client and the court. "(E)ven in the face of serious personal problems, an attorney has a professional responsibility to fulfill his duties to his clients or to make appropriate arrangements to protect his clients' interests." (*Smith v. State Bar* (1985) 38 Cal.3d 525, 540.)

Furthermore, his health problems do not excuse erroneous statements of compliance when there has actually been no compliance; they do not excuse outright failure or refusal to respond to email, letter, and telephone communications; they do not excuse minimizing defendants reasonable insistence on requiring a "formal" response to RFP#2; they do not excuse deflecting the issue by attempting to cast defendants as the parties who were failing to cooperate with discovery over depositions.

Moreover, Mr. Magill's health problems do not excuse several apparently erroneous statements – perhaps deliberate misrepresentations – made within the opposing papers themselves:

- Numerous times Mr. Magill stated that actual verified responses to RFP#2 were served on March 15, 2016. (See Magill Decl., pp. 2:9-10, 2:14-16, 4:1-8.) He failed to provide any proof of this. The copy of RFP#2 attached to his declaration was signed by him on May 23, 2016 and was verified by plaintiff on May 20, 2016. Furthermore, Magill's own assistant acknowledged in emails in March that the "formal" response had not been sent in March, and that it was being worked on, and that the verifications had not been sent. And the email records provided by defendants show that when Mr. Magill made slightly different assertion in his email of May 7, 2016 – that he had sent the formal response and the verifications at the end of *April* – defendants quickly responded that they had not received these and asked him to resend them, if that was true; and Mr. Magill suddenly went silent.
- Mr. Magill states unequivocally at Paragraph 6 of his declaration that he served the Special Interrogatories "with verifications" on March 11, 2016, but provides no proof of this. The Special Interrogatories response attached to his and Mrs. Magill's Declaration is dated by Mr. Magill on June 15, 2016. And, curiously, the month on plaintiff's verification – i.e., the crucial piece of information needed to prove his assertion – is overwritten and illegible. Clearly, this fails to prove she originally signed it in March rather than June, when Magill finally served it; it only clouds the issue further. And yet, Mr. Magill went so far as to repeat this unfounded claim *in the formal discovery response* itself: "Plaintiff's attorney has discovered an original verification for these responses [i.e., the one purportedly signed in March] that he attaches to this amended response. It is being mailed to defendants immediately upon Plaintiff's attorney realizing that the verification was not included." (Magill Declaration, Ex. 5, p. 2:5-7, brackets added.) If the assertion made in his declaration is untrue, the sanctionable conduct is only compounded by his inclusion of it in the response itself.
- Mr. Magill states at Paragraph 16 (p. 5:9-11) that the CD sent to defendants in March had over 165 pages of documents, but provides no proof of this. Defense counsel states in Reply that the CD only had 23 pages of documents. To be fair, defense counsel also provided no proof of her assertion. However, her statement is supported by a comment made by defense counsel Laura Heyne in an email she sent on March 21, 2016: "Given the **extremely limited amount of documents** that Plaintiff has provided to Defendants, formal responses stating that all documents have been provided is necessary." (Emphasis added.) As between the two contentions, and on this record, defense counsel's is the more credible.
- Mr. Magill states several times that he "believed" that the formal response and the verifications had been served, but this assertion is not credible in the face of his continued *promises to provide* this discovery, and his failure to prove that it was sent at any time prior to June 15, 2016, and then only in response to being served notice of this motion.

On this record, monetary sanctions are justified, as this conduct represents a misuse of the discovery process. (Code Civ. Proc. § 2023.010, subd. (d).)

**Order to Show Cause:**

The facts stated in Mr. Magill's declaration regarding his health raise serious concerns as to whether or not he is able to effectively represent plaintiff at this juncture.

The California Rules of Court, Rule 3-110 states: (A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence. (B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and **physical ability reasonably necessary for the performance of such service**. (Emphasis added.) The California Supreme Court has found that an attorney has a duty to withdraw in such a situation. (*In re Sanders* (1999) 21 Cal.4th 697, 712.)

Mr. Magill's narrative indicates he suffers from several serious health issues, and it is clear these did contribute to the extreme delay in responding to the discovery propounded by defendants, even if the court has found this did not excuse his failure to respond. He declares that these health issues have caused him to close his law office and work out of his home, and to file for bankruptcy.

Also of important consideration, he indicates he currently receives private disability pay, and that he has begun the process to qualify for Social Security Disability, which appears to mean he is attempting to be declared "totally disabled," or at least obtain a ruling of some percentage of disability. In *Erreca v. Western States Life Ins. Co.* (1942) 19 Cal.2d 388 the California Supreme Court stated that "the term 'total disability' does not signify an absolute state of helplessness but means such a disability as renders the insured unable to perform the substantial and material acts necessary to the prosecution of a business or occupation in the usual or customary way." (*Id.* at p. 396, emphasis added.) Clearly, the fact Mr. Magill is seeking a finding of disability begs the question of his capacity to effectively represent plaintiff.<sup>1</sup>

In *Smith v. Superior Court of Los Angeles County* (1968) 68 Cal. 2d 547, the Court ruled that a trial court possessed an affirmative duty to make an inquiry where there was "objective evidence of *physical incapacity* to proceed with a meaningful defense of his client, such as illness, intoxication, or a nervous breakdown." (*Id.* at 559, emphasis in the original.) Where client abandonment is at issue, it is the Court's equitable powers to regulate its own proceedings that come into play. (See, e.g., Civil Code section 128.) Where the question of whether a breach of the ethical rules

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<sup>1</sup> The court does not find defendants' Reply argument regarding plaintiff's bankruptcy trustee abandoning this action as having any import on this motion. This has nothing to do with Mr. Magill's "standing to pursue this matter," as they argue. If anything, it may have an impact on the payment of his fees, and the source therefor. The court assumes this act by the trustee would mean the property (this lawsuit) reverts back to the plaintiff, and she becomes responsible for decisions about prosecuting her claim, and her representation. Defendants provided no authority otherwise.



# **Tentative Rulings for Department 403**

(24)

## **Tentative Ruling**

Re: ***Padron v. City of Parlier***  
Court Case No. 16CECG00211

Hearing Date: **August 10, 2016 (Dept. 403)**

Motion: Plaintiff's Motion for Protective Order

### **Tentative Ruling:**

To deny. To grant monetary sanctions against plaintiff in the amount of \$340.00 in attorney fees, payable to defendant no later than September 12, 2016. In the event a hearing is called for by plaintiff, the court will consider increasing the sanctions awarded to include defendants' costs for appearance.

### **Explanation:**

The burden on a party seeking a protective order is to show "good cause" for the order sought. (*Fairmont Ins. Co. v. Superior Court* (2000) 22 Cal.4th 245, 254.) Facts must be presented by way of admissible evidence, and conclusory statements that the particular relief is "necessary" do not suffice. (*Goodman v. Citizens Life & Cas. Ins. Co.* (1967) 253 Cal.App.2d 807, 819.) Plaintiff has failed to establish any good cause for requiring the court to order that defendants may only seek discovery by way of an oral deposition instead of interrogatories. He has not even presented, with this motion, the discovery that was served, much less made a showing of even a single specific request or demand which is unwarranted, oppressive, or an undue burden. Furthermore, his Notice of Motion and brief deal only with the interrogatories propounded, and not the other discovery propounded by defendants; thus, any protective order necessarily could not encompass "all" discovery, as plaintiff requests. He cites only to Code of Civil Procedure section 2030.090, which deals with protective orders regarding interrogatories.

Subdivision (b)(5) of section 2030.090 does not authorize a protective order simply based on plaintiff's analysis that it would "best serve the discovery purpose" because the case "is not complex." While the requirement to meet and confer before filing a motion for protective order is required, the failure of opposing party to allow a meeting is not a ground for granting a protective order. Defendant's alleged refusal to settle with plaintiff is not a ground for a protective order. Defendants' alleged violation of the Brown Act is not a ground for granting a protective order. Furthermore, even if defendants or the City of Parlier's in-house counsel, Lozano Smith, disclosed "information in the claim" at an open City Council session, thereby "rendering the claim public information," this is not a disclosure of confidential or protected information since the complaint is itself a public record.



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**Tentative Ruling**

Re: ***Powell et al. v. High Class Limousines, et al.***  
Case No. 15CECG00961

Hearing Date: **August 10, 2016 (Dept. 403)**

Motion: Defendant Israel Casas' Motion for Determination of Good Faith Settlement

**Tentative Ruling:**

To grant. (Code Civ. Proc. § 877, *et seq.*)

**Explanation:**

Under Code Civ. Proc. § 877.6, "Any party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors, upon giving notice in the manner provided in subdivision (b) of Section 1005." (Code Civ. Proc. § 877.6(a)(1).)

"The issue of the good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counter affidavits filed in response, or the court may, in its discretion, receive other evidence at the hearing." (Code Civ. Proc. § 877.6(b).)

"A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault." (Code Civ. Proc. § 877.6(c).)

Where the motion for good faith settlement is not contested, a barebones motion which sets forth the ground of good faith, accompanied by a declaration which sets forth a brief background of the case, is sufficient to meet the settling party's burden of showing good faith. (*City of Grand Terrace v. Superior Court* (1987) 192 Cal.App.3d 1251, 1261.)

Inasmuch as the motion is uncontested, and the settling defendant has shown that he is insolvent (see *Aero-Crete, Inc. v. Superior Court* (1993) 21 Cal.App.4th 203, 208-209), the court finds that the motion is sufficient to show a prima facie showing of good faith.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will





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**Tentative Ruling**

Re: ***Astone v. St. Agnes Medical Center et al.***  
Superior Court Case No. 15 CECG 01371

Hearing Date: August 10, 2016 **(Dept. 403)**

Motion: Summary Judgment by Defendants Dr. Parveez and  
California Cancer Associates

**Tentative Ruling:**

To overrule the Defendants' objections to the Declaration of Dr. Nilson. See *infra*. To deny the motion. Plaintiff has met his burden pursuant to CCP § 437c(p)(2). A triable issue of material fact exists as to whether the standard of care was breached by Dr. Parveez and whether that breach caused the Plaintiff's injuries. See Declaration of Nilson at ¶¶ 14-16.

**Explanation:**

**Ruling on Objections**

"Admissions or concessions made during the course of discovery (deposition testimony) govern and control over contrary declarations lodged at a hearing on a motion for summary judgment." [*Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609, 1613 (parentheses added)]; see also *D'Amico v. Board of Med. Examiners*, (1974) 11 Cal.3d 1 at 22; *Archdale v. American Int'l Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 473] But, summary judgment cannot be based solely on "fragmentary and equivocal concessions" made during a deposition. [*Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 482 (citing text); *Scheidig v. Dinwiddie Const. Co.* (1999) 69 Cal.App.4th 64, 77-78] Admissions that are ambiguous or merely tacit may be contradicted in a party's summary judgment declarations. [*Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 861-862]

Defendants point to deposition testimony located at pages 93, 94, 121 and 122 of the deposition of Dr. Nilson. See Exhibit A attached to the Declaration of Paloutzian filed in reply. As for the answer on pages 93-94, it appears to be ambiguous. See *Benavidez*, *supra*. As for the answers on pages 121-122, it does not appear to contradict Dr. Nilson's opinion. Therefore, the objections will be overruled. The contradiction must be clear and unambiguous. See *Price v. Wells Fargo Bank*, *supra* and *Scheidig v. Dinwiddie Const. Co.* *supra*.

**Merits**

The appropriate standard of care required of a medical professional is not a matter of common lay knowledge. Therefore, except in cases of "egregious" medical





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**Tentative Ruling**

Re: ***Kathryn Fike, Gary Fike & Susan Schulte v. The California Home for the Aged, Inc. dba California Armenian Home***  
Superior Court Case No. 16 CECG 01944

Hearing Date: August 10, 2016 **(Dept. 501)**

Motion: By Plaintiff Kathryn Fike for Trial Setting Preference

**Tentative Ruling:**

To overrule the objections to the Declaration of Guadagni.

To grant the motion and set the trial for November 28, 2016.

**Explanation:**

This case stems from a fall and subsequent hip fracture suffered by Plaintiff Kathryn Fike while in the care of Defendant's skilled nursing facility known as California Armenian Home. On June 17, 2016, Plaintiff and her two children filed a Complaint alleging 4 causes of action:

1. Elder Abuse;
2. Negligence;
3. Violation of Patients' Bill of Rights; and
4. Negligent Infliction of Emotional Distress.

On June 29, 2016, Plaintiff Kathryn Fike filed a motion seeking trial setting preference on the grounds that she is over 70 years of age and is being treated for various medical conditions. Opposition was filed followed by a reply.

**CCP § 36. Motion for preference; Time of trial; Continuance states in relevant part:**

**(a)** 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.

**(c)** Unless the court otherwise orders:

**(2)** At any time during the pendency of the action, a party who reaches 70 years of age may file and serve a motion for preference.

(f) Upon the granting of such a motion for preference, the court shall set the matter for trial not more than 120 days from that date and there shall be no continuance beyond 120 days from the granting of the motion for preference except for physical disability of a party or a party's attorney, or upon a showing of good cause stated in the record. Any continuance shall be for no more than 15 days and no more than one continuance for physical disability may be granted to any party.

The Declaration of Karman Guadagni, Plaintiffs' counsel, is submitted in support of the motion. She states that the Plaintiff is 87 years of age and suffers from chronic obstructive pulmonary disease (COPD), dementia, chronic kidney disease, hypotension, nonischemic cardiomyopathy and atherosclerotic heart disease. In addition, Mrs. Fike has a pacemaker, is borderline diabetic and has a history of a stroke and acute post hemorrhagic anemia, among other illnesses. See Declaration at ¶¶ 3-5. He submits that her overall health is steadily declining. Id.

In opposition, Defendant objects to the Declaration of Guadagni on grounds of Statutory Conformance (Code of Civ. Proc., § 36.5); Foundation (Evid. Code, §§ 402, 403, 702); Unintelligible (Cal. Rules of Court, rule 3.1335(b)); Secondary Evidence (Evid. Code, § 1521); Inadmissible Oral Evidence (Evid. Code, § 1523); Opinion (Evid. Code, §§800, 801, 802, 803, 804); Hearsay (Evid. Code, § 1200); and Incompetent/Unqualified Expert (Evid. Code, § 720). See Evidentiary Objection filed on July 28, 2016. The objections will be **overruled**. A declaration supporting a motion for § 36(a) preference "may be signed by the attorney for the party seeking preference based upon information and belief as to the medical diagnosis and prognosis of any party." [CCP § 36.5 (emphasis added)] The Declaration of Guadagni has met the requirements of CCP § 36.5.

The opposition also appears to challenge the purpose of the statute. See Memorandum of Points and Authorities filed in opposition at page 3 lines 9-20. But, CCP § 36 was enacted by the Legislature and its provision are mandatory if the conditions for preference are met. See *Swaithes v. Sup.Ct. (Hunter)* (1989) 212 CA3d 1082, 1086. As a result, the court cannot balance conflicting interests of opposing litigants. Trial must be set within 120 days even if opposing parties have not completed discovery or pretrial preparations! [*Swaithes v. Sup.Ct. (Hunter)*, *supra* at 1086] Here, the Declaration at bench meets the requirements set forth in CCP § 36 (a)(2)-- the health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation. Accordingly, the Plaintiff's motion will be granted.

As for the requests made in the opposition regarding bifurcation of the claims of the other two Plaintiffs, extending the discovery cut-off and extending the time for a motion for summary judgment to be heard, these requests must be filed and calendared as Defendant's own motions. At this time, the only motion before the Court is the motion seeking trial preference.

Pursuant to California Rules of Court, rule 3.1312, subd.(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute



# Tentative Rulings for Department 502

(29)

## Tentative Ruling

Re: ***Rio Mesa Holdings, LLC v. Fidelity National Title, et al.***  
Superior Court Case No. 13CECG00867

Hearing Date: August 10, 2016 (Dept. 502)

Motion: Stay enforcement of judgment

### **Tentative Ruling:**

To grant, staying enforcement of any judgment to be entered until 10 days beyond the last date on which a notice of appeal may be timely filed.

### **Explanation:**

The trial court may stay the enforcement of a judgment or order, whether or not an appeal will be taken. (Code Civ. Proc. §918(a).) Where enforcement of a judgment or order would be stayed on appeal only by the giving of an undertaking, the trial court does not have the power to stay enforcement thereof for more than 10 days beyond the last date on which a notice of appeal could be filed, without the consent of the adverse party. (Id. at (b).)

Here, Defendant seeks a temporary stay pursuant to Code of Civil Procedure section 918, subdivision (a), so that it does not have to "incur the potentially unnecessary time and expense of posting a bond" while it proceeds with its post-trial motions. Defendant alleges that Plaintiff will not suffer any prejudice because Defendant has the "financial wherewithal" to satisfy the judgment should judgment be affirmed on appeal.

Although it claims prejudice, plaintiff has mentioned none specifically, has not supported any prejudice factually, and, given defendant's financial position, the court can discern none. Stays of enforcement are routinely ordered during the post-trial motion period and are expressly authorized by the legislature.

Pursuant to California Rules of Court, rule 3.1312, and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

### **Tentative Ruling**

Issued By: DSB on 8/8/16.  
(Judge's initials) (Date)



(28)

**Tentative Ruling**

Re: ***In re Minor's Compromise of Faith A. Esqueda***

Case No. 16CECG02017

Hearing Date: August 10, 2016 (Dept. 502)

Motion: Petition to Approve Compromise of Disputed Claim (Minor's Compromise).

**Tentative Ruling:**

To grant. Order to be submitted for signature. Hearing off calendar.

For the minor, counsel or guardian is ordered to forward to the depository a Receipt and Acknowledgment on Judicial Council form MC-356, along with a signed copy of the Order to Deposit. Once the depository has signed the Receipt, counsel or guardian shall file the completed Receipt with the court, within 30 calendar days of the clerk's service of the minute order.

**Explanation:**

The paperwork supports the request for minor's compromise appears to be in order. The Court is therefore inclined to grant the Petition as set forth above.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

**Issued By:** DSB **on 8/8/16.**  
(Judge's initials) (Date)

## **Tentative Rulings for Department 503**

(30)

Re: ***Estate of Ann Hart v. Willow Creek Healthcare Center, LLC.***  
Superior Court No. 15CECG02999

Hearing Date: Wednesday August 10, 2016 (**Dept. 503**)

Motion: (1) Defendant Willow Creek's Demurrer to Plaintiffs' First Amended Complaint

(2) Defendant Willow Creek's Motion to Strike Plaintiffs' First Amended Complaint

### **Tentative Ruling:**

To Sustain Defendant's demurrer to cause of action two (Elder Abuse) due to Plaintiffs' failure to specifically plead the elements.

To Sustain Defendant's demurrer to cause of action three (Battery) due to Plaintiffs' failure to adequately plead the elements.

To Order Defendant's motion to strike Plaintiffs' requests for punitive and treble damages and attorney's fees off calendar.

Demurrers are sustained without prejudice. Plaintiff is granted 10 days leave to amend. (Cal. Rules of Court, rule 3.1320(g).) The time in which an amended pleading may be filed will run from service by the clerk of the minute order. (Code Civ. Proc., § 472b.)

### **Explanation:**

#### **DEMURRER**

Cause of Action 2: Elder Abuse and Dependant Adult Civil Protection Act (EADACPA)  
To trigger the enhanced remedies under the EADACPA, a plaintiff must allege that the denial or withholding of goods or services **caused** the elder or dependent adult to suffer physical harm, pain, or mental suffering. (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 406-407 [emphasis added]; *Knox v. Dean* (2012) 205 Cal.App.4th 417, 430.) And the facts constituting the neglect and establishing the causal link between the neglect and the injury "must be pleaded with particularity," in accordance with the pleading rules governing statutory claims. (*Covenant Care* (2004) 32 Cal.4th 771, 790.)

Here, Plaintiffs allege Defendant "dumped" Decedent without regard to her well-being, due to improper financial motives, and that as a result, she suffered unnecessarily and died prematurely (FAC, p12). These allegations do not meet the stringent requirements

of EADACPA because Plaintiffs allege that decedent suffered from dementia (FAC, ¶12) and injury to her head and ribs (FAC, ¶ 4), but then allege decedent's cause of death to be "acute respiratory failure," "congestive heart failure," "acute renal failure," and "congestive heart failure" (FAC, cert. of death attach). This is not causation. Plaintiffs must allege the specific danger of not providing continued acute care for decedent's particular conditions, allege that any qualified physician or nurse (as the case may be) would know or should have known that these conditions made discharge inappropriate, or that the decision to discharge was nonetheless intentionally made based on improper financial or other motives, in conscious disregard of the risk to the patient's life or health. Demurrer is sustained to cause of action two, Elder abuse with leave to amend. *New pleadings must remove this cause of action or add additional facts to satisfy the elements.*

### Cause of Action 3: Battery

A surgical operation or other medical treatment performed without consent is a battery. (*Estrada v. Orwitz* (1946) 75 Cal.App.2d 54, 57; *Berkey v. Anderson* (1969) 1 Cal.App.3d 790, 803; *Cobbs v. Grant* (1972) 8 Cal.3d 229, 239.)

Here, Plaintiffs assert that Defendant battered Decedent "by removing the decedent without her consent in early December 2014 to Harmony Bay and the care of defendant Beshears, on the basis of an unlawful power of attorney that Willow Creek knew gave Beshears no medical authority over the decedent" (FAC, p13). Simply discharging patients is not a medical treatment or surgical operation. Demurrer is sustained to cause of action three, Battery with leave to amend. *New pleadings must remove this cause of action or add additional facts to satisfy the elements.*

## **MOTION TO STRIKE**

### Punitive damages

Defendant moves to strike Plaintiffs' request for punitive damages. However, in sustaining the demurrer to Plaintiffs' second cause of action (EADACPA), the issue of Plaintiffs' entitlement to punitive damages is eliminated. *Motion to strike is ordered off calendar.*

### Attorney's fees

Defendant moves to strike Plaintiffs' request for attorney fees. However, in sustaining the demurrer to Plaintiffs' second cause of action (EADACPA), the issue of Plaintiffs' entitlement to attorney's fees is eliminated. *Motion to strike is ordered off calendar.*

### Treble damages

California Rule of Court, rule 3.1113, subdivisions (a) and (b) require the moving party to serve and file a memorandum that contains "a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced." Here, Defendant's motion to

strike does not and cannot reference any prayer for “treble damages” because it does not exist. *Motion to strike is ordered off calendar.*

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

**Issued By:** A.M. Simpson **on** 8/3/16.  
(Judge's initials) (Date)

**Tentative Ruling**Re: **Nieto v. Gamez**

Case No. 16 CE CG 02239

Related Action: **Gamez v. Nieto**, case no. 16 CE CL 04531Hearing Date: August 10<sup>th</sup>, 2016 (Dept. 503)

Motion: Plaintiff's Motion to Consolidate Pending Action and to Vacate Trial Date in Eviction Case

Defendant's Motion for Protective Order for Posting of Undertaking, and for Payment of Past Due Rent and Monthly Rent into Escrow Account

**Tentative Ruling:**

To grant plaintiff's motion to consolidate pending actions and to vacate the trial date in the unlawful detainer action. (Code Civ. Proc. § 1048.) Case no. 16 CE CG 04531 shall be the lead case.

To deny defendant's motion to require plaintiff to pay monthly rent and past due rent into an escrow account, and to post an undertaking, without prejudice, as it is unsupported by any admissible evidence. (Code Civ. Proc. § 1170.5, subd. (c).)

**Explanation:**

**Motion to Consolidate Cases and Vacate Trial Date in UD Case:** The court intends to grant the motion to consolidate the UD case and the unlimited civil case together, and to stay the trial of the UD case until the issue of ownership of the property can be resolved. The two cases clearly involve many of the same legal and factual issues, since they both concern the same property and the rights to ownership or possession of that property. Therefore, consolidation is proper here. (Code Civ. Proc. § 1048.) Also, since UD proceedings cannot resolve the issue of title to the property, it is proper to stay the trial in the UD action until the issues of the unlimited civil case can be resolved. (*Martin-Bragg v. Moore* (2013) 219 Cal.App.4th 367, 385.)

Here, plaintiff Nieto has alleged that she entered into an oral contract to purchase the property, that she has made \$135,000 in payments under the contract, and that she has been residing on the property since September of 2008. Even if she has defaulted on her payments, Defendant Gamez is not entitled to evict her until the issue of the ownership of the property has been resolved. "The vendor chose to sell his land. In doing so, he created the relationship of seller and buyer, not that of licensor and licensee. Certain legal remedies are available to him, but not the summary one of unlawful detainer." (*Goetze v. Hanks* (1968) 261 Cal.App.2d 615, 617.) Thus, the court intends to grant the motion to consolidate the actions and stay the UD trial.

**Motion to Require Plaintiff to Pay Rent Into Escrow Account and to Post an Undertaking:** Code of Civil Procedure, section 1170.5, subdivision (a), states that, "If the defendant appears pursuant to Section 1170, trial of the [unlawful detainer] proceeding shall be held not later than the 20th day following the date that the request to set the time of the trial is made." (Code Civ. Proc. § 1770.5, subd. (a).)

However, "If trial is not held within the time specified in this section, the court, upon finding that there is a reasonable probability that the plaintiff will prevail in the action, shall determine the amount of damages, if any, to be suffered by the plaintiff by reason of the extension, and shall issue an order requiring the defendant to pay that amount into court as the rent would have otherwise become due and payable or into an escrow designated by the court for so long as the defendant remains in possession pending the termination of the action." (Code Civ. Proc. § 1770.5, subd. (c).)

"The determination of the amount of the payment shall be based on the plaintiff's verified statement of the contract rent for rental payment, any verified objection thereto filed by the defendant, and the oral or demonstrative evidence presented at the hearing. The court's determination of the amount of damages shall include consideration of any evidence, presented by the parties, embracing the issue of diminution of value or any set off permitted by law." (*Ibid.*)

Here, defendant moves for an order to have plaintiff deposit with the court the amount of monthly rent that she would otherwise have paid under the rental contract, as well as for an undertaking to protect defendant from any damages he might suffer due to the plaintiff's continued possession of the premises. However, plaintiff contends that section 1170.5 is not applicable here because the parties entered into a contract to sell the property to her, and thus defendant cannot take advantage of the remedies available under the unlawful detainer statutes. (*Goetze v. Hanks* (1968) 261 Cal.App.2d 615, 617; *Greene v. Municipal Court* (1975) 51 Cal.App.3d 446, 451.)

Yet defendant contends that, while he did originally agree to sell the property to plaintiff in September of 2008, he subsequently cancelled the sale contract in 2011 when plaintiff defaulted on the payments. He points to the fact that he filed an unlawful detainer against plaintiff in November of 2011 and obtained a judgment against her by default in December of 2011. He contends that the judgment had the effect of cancelling the purchase contract, and that the plaintiff only remained on the property after the judgment under a rental contract.

However, there is nothing to indicate that the judgment addressed or attempted to resolve the question of property ownership, or whether the sales contract had been cancelled or was enforceable. Nor would it have been proper for the court to address these issues, since unlawful detainer cases are limited to the question of which party is entitled to possession of the premises, as well as whether the landlord is entitled to incidental damages related to the tenant's possession. (*Asuncion v. Superior Court* (1980) 108 Cal.App.3d 141, 144.)

“[A] judgment in unlawful detainer usually has very limited res judicata effect and will not prevent one who is dispossessed from bringing a subsequent action to resolve questions of title, or to adjudicate other legal and equitable claims between the parties.” (*Vella v. Hudgins* (1977) 20 Cal.3d 251, 255, internal citations omitted.)

Thus, to the extent that defendant argues that plaintiff cannot prevail on her quiet title claim to the property because of the previous unlawful detainer judgment, defendant is incorrect. The unlawful detainer judgment does not preclude a finding that plaintiff is entitled to ownership of the property. At most, it resolved the question of whether she was entitled to remain in possession of the property, but this issue was rendered moot when defendant allowed her to stay on the property for several more years in exchange for continued payments.

Also, while defendant claims that the parties entered into a new contract for rental of the property in exchange for payments of \$1,500 per month, he offers no evidence to support this assertion. He alleges in his brief that there was an oral rental agreement, but he has not provided a declaration to testify to the existence of any such agreement. His statements in his points and authorities brief are not evidence. Thus, there is no admissible evidence to demonstrate that an oral rental agreement existed. Because the defendant has not presented any evidence to show that he is likely to prevail on his unlawful detainer claim, he has not met his burden under section 1170.5, even assuming that section 1170.5 applies here.

Also, defendant has not presented any admissible evidence as to what rental payments plaintiff may owe, as required under section 1170.5, subdivision (c). Defendant claims that plaintiff agreed to pay him \$1,500 per month for rent, but again he has not provided a declaration or other admissible evidence to support this assertion. While plaintiff does not deny that she agreed to pay \$1,500 a month to defendant, she claims that the payments were for purchase of the property and not for rent. Thus, defendant has not established that he is entitled to an order compelling plaintiff to deposit rent payments with the court while the case is pending.

In addition, to the extent that defendant seeks an order compelling plaintiff to deposit past due rent payments of \$12,000 with the court, he has not presented any evidence that plaintiff currently owes him \$12,000 in unpaid rent. Again, plaintiff contends that she was paying to purchase the property, and defendant has not offered any evidence to rebut this assertion or to show that an oral agreement to rent the property existed. Also, section 1170.5, subd. (c) does not authorize an order to require the tenant to pay all past due rental payments with the court, but only future rent payments as well as damages for the tenant holding over. (Code Civ. Proc. § 1170.5, subd. (c).) Therefore, the court intends to deny the motion to require plaintiff to deposit past due rent with the court.

Finally, the court intends to deny the motion to the extent defendant seeks an order to have plaintiff post a bond in the amount of \$111,000. Defendant contends that such a bond is necessary to secure him from damages he may incur as a result of the plaintiff remaining in possession of the property. However, defendant has not

submitted any evidence to support his claim that the property is likely to be harmed in any amount, much less that it will lose \$111,000 in value if plaintiff remains in possession.

Defendant claims that he is indigent and that he may lose the property to foreclosure if the plaintiff stays on the property without paying rent, yet he offers no evidence to support his assertions as to his ability to pay the mortgage or the potential harm to the property if plaintiff does not leave. Defendant cites his fee waiver application as evidence of his inability to pay the mortgage. However, while defendant did receive a fee waiver in the UD action, he has not filed a fee waiver application in the unlimited civil action, and indeed it appears he paid his full filing fee in the unlimited case. Therefore, defendant has failed to demonstrate that he cannot pay his mortgage without plaintiff's rental payments.

Nor has defendant cited to any statutory authority that would require plaintiff to post a bond in order to remain in possession of real property where she has claimed that there is a contract to purchase the property. Consequently, the court intends to deny the request to have plaintiff post a bond of \$111,000.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

### **Tentative Ruling**

**Issued By:** A.M. Simpson **on** 8/3/16.  
(Judge's initials) (Date)

**Tentative Ruling**

Re: ***Saint Agnes Medical Center v. Data Central Collection Bureau***  
Case No. 13 CE CG 02789

Hearing Date: August 10<sup>th</sup>, 2016 (Dept. 503)

Motion: Plaintiff's Application for Default Judgment

**Tentative Ruling:**

To deny the application for default judgment, without prejudice. (Code Civ. Proc. §§ 580, 585.)

**Explanation:**

Plaintiff has now obtained a default based on service of the first amended complaint pursuant to the court's order denying the prior default judgment application. However, the new default judgment application seeks money damages far in excess of the amounts alleged in the complaint.

"[I]n all default judgments, the demand sets a ceiling on recovery." (*Greenup v. Rodman* (1986) 42 Cal.3d 822, 824, 231.) "Section 580, and related sections 585, 586, 425.10 and 425.11, aim to ensure that a defendant who declines to contest an action does not thereby subject himself to open-ended liability. Reasoning that a default judgment that exceeds the demand would effectively deny a fair hearing to the defaulting party, the Courts of Appeal have consistently read the code to mean that a default judgment greater than the amount specifically demanded is void as beyond the court's jurisdiction." (*Id.* at p. 826, internal citations omitted.)

The amount demanded in the complaint is determined both from the prayer and from the damage allegations of the complaint. (*National Diversified Services, Inc. v. Bernstein* (1985) 168 Cal.App.3d 410, 417-418.) Also, due process requires formal notice in the complaint of the amount demanded, and is not satisfied by "constructive notice" from other sources such as discovery or pretrial procedures. (*Stein v. York* (2010) 181 Cal. App.4th 320, 326.)

"The statutes are very specific in their requirements for a judgment following a default. "The relief granted to the plaintiff, if there be no answer, *cannot* exceed, that which he shall have *demand*ed in his complaint ... (Code Civ. Proc., § 580). In cases where no answer has been filed and a default has been entered, but the clerk may not enter a default judgment, the plaintiff may apply to the court "for the relief demanded in the complaint" ... (Code Civ. Proc., § 585(2) [now § 582, subd. (b)].) Manifestly "demanded" means *claimed, asserted a right to or prayed for.*' 'As against a defaulting or disclaiming defendant, the relief must be consistent with *the case made*

upon the complaint and embraced within *the issues*. (Code Civ. Proc., sec. 580.)' 'A default admits *the material allegations of the complaint*, and no more ... the relief given to the plaintiff cannot exceed that which the law awards as *the legal conclusion from the facts alleged* [citing section 580].'" (*Jackson v. Bank of America* (1986) 188 Cal.App.3d 375, 387–388, emphasis in original, some internal citations omitted.)

Here, the first amended complaint alleges that defendant owes plaintiff \$33,336.79 for breach of the collections agreement, and \$311,509.94 for breach of the subrogation agreement. (FAC, ¶¶ 21, 27.) Plaintiff also seeks prejudgment interest on the amounts owed. (*Id.* at ¶¶ 22, 28.) In addition, plaintiff seeks damages for breach of the implied covenant of good faith and fair dealing and conversion, but these amounts are based on the same breaches of contract listed in the first two causes of action. (*Id.* at ¶¶ 29-36.) Likewise, the injunctive and declaratory relief claims simply restate the same damages listed in the other claims. (*Id.* at ¶¶ 37-46.)

However, the application for default judgment seeks \$970,470.82 in damages, plus \$270,399.96 in prejudgment interest. (Jeffcoach decl., ¶ 6.) This is about three times the amount of principal damages sought in the FAC. It appears that the additional amounts are based on other claimed breaches of contract that are described in Michael Firth's declaration. (Frith decl., ¶¶ 25-28.) However, since these damages are not alleged anywhere in the FAC, plaintiff cannot recover them in its request for default judgment. Plaintiff's default judgment is limited by the amount of damages actually demanded in the operative complaint. (*Greenup v. Rodman, supra*, 42 Cal.3d at pp. 824, 826.)

Therefore, the court cannot grant the requested default judgment, as it far exceeds the damages alleged in the FAC. Instead, the court intends to deny the application for default judgment without prejudice. Plaintiff must either file a second amended complaint with the new damages properly alleged, or in the alternative seek a default judgment that matches the damages alleged in the FAC.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

Issued By: A.M. Simpson on 8/8/16.  
(Judge's initials) (Date)