

Tentative Rulings for August 11, 2016
Departments 402, 403, 501, 502, 503

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).)

14CECG02854 *Patel v. Meeks* (Dept. 501)

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

14CECG03917 *Barr v. Cook* is continued to Thursday, August 18, 2016 at 3:30p.m. in Dept. 403.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(2)

Tentative Ruling

Re: ***In re Mattix Salmon***
Superior Court Case No. 16CECG02135

Hearing Date: August 11, 2016 (Dept. 402)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. Order signed. Hearing off calendar.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 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: JYH on 8/10/16 .
(Judge's initials) (Date)

Tentative Ruling

Re: **Zenith Insurance Company v. Mendes**
Case No. 15 CE CG 01406

Hearing Date: August 11th, 2016 (Dept. 402)

Motion: Plaintiff's Motion for Leave to File First Amended Complaint

Tentative Ruling:

To grant the plaintiff's motion for leave to file a first amended complaint. (Code Civ. Proc. § 437, subd. (a).) However, the court orders plaintiff to correct the first amended complaint to match the proposed allegations as listed in paragraph 9 of plaintiff's counsel's declaration. The first amended complaint shall be filed and served within 10 days of the date of service of this order. All new allegations shall be in **boldface**.

Explanation:

"The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code." (Code Civ. Proc., § 473(a).)

" 'Code of Civil Procedure section 473, which gives the courts power to permit amendments in furtherance of justice, has received a very liberal interpretation by the courts of this state.... In spite of this policy of liberality, a court may deny a good amendment in proper form where there is unwarranted delay in presenting it.... On the other hand, where there is no prejudice to the adverse party, it may be an abuse of discretion to deny leave to amend.'" (*Rickley v. Goodfriend* (2013) 212 Cal.App.4th 1136, 1159.)

Here, plaintiff Zenith Insurance Company seeks to amend the complaint to add more detailed allegations regarding the cause of the fire and the nature of the property damage. While it appears that Zenith has known about the additional facts for some time, there is not likely to be any prejudice to the defendant if the amendment is permitted, since the case is not yet set for trial and the amendment will not add any new claims or damages. Indeed, defendant does not oppose the suggested amendment, so it appears that defendant will not suffer any prejudice if the court grants leave to amend.

(28)

Tentative Ruling

Re: **Monifi v. Mitroo, et al.**

Case No. 13CECG03806

Hearing Date: August 11, 2016 (Dept. 402)

Motion: By Defendant Siew-Ming Lee, M.D. for Summary Judgment or, in the alternative, for Summary Adjudication.

Tentative Ruling:

To grant the motion unless Plaintiff can provide good cause or other sufficient excuse for the late filed opposition.

Explanation:

In the Court's order of June 8, 2016, setting aside the dismissal of the entire action, Plaintiff was ordered to file an opposition to the present Motion for Summary Judgment and/or Adjudication by July 15, 2016. The Opposition was not filed until July 21, 2016.

Where a party has filed a late opposition, a court has discretion to refuse to consider papers served and filed beyond the deadline without a prior court order finding good cause for late submission. (*Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614, 623 (disapproved on other grounds as stated in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031 fn.6).) In *Hobson*, the appellate court upheld a trial court's refusal to consider opposition papers filed after a court-imposed deadline. (*Id.*) A Court must issue an order finding good cause to allow late filed submissions. (Code Civ.Proc. §437c, subd.(b)(2).)

Here, Plaintiff has provided no evidence of good cause for the late filing. Plaintiff is ordered to present good cause or some other sufficient excuse before the Court will consider the opposition papers.

The Court notes that if it were to find good cause or some other sufficient applicable reason for the late-filed papers, then it will provide the moving party a continuance to address the substance of the late filed opposition. (*G.E. Hetrick & Assoc., Inc. v. Summit Construction & Maintenance Co.* (1992) 11 Cal.App.4th 318, 325 & fn.4.)

Tentative Rulings for Department 403

(20)

Tentative Ruling

Re: **Marcum v. St. Agnes Medical Center et al.**, Superior Court
Case No. 15CECG01327

Hearing Date: **August 11, 2016 (Dept. 403)**

Motion: Demurrer and Motion to Strike re Second Amended
Complaint

Tentative Ruling:

To overrule the demurrer to the second cause of action. (Code Civ. Proc. § 430.10(e), (f).) The demurrer is moot as to the sixth cause of action, which was stricken by this court on 7/6/16.

To grant the motion to strike the prayers for attorneys' fees and punitive damages. (Code Civ. Proc. § 436.) The motion is moot as to the sixth cause of action, which was stricken by this court on 7/6/16.

Explanation:

The demurrer to the second cause of action for elder abuse is overruled because Leisure Care's memorandum fails to adequately address whether the SAC alleges sufficient facts to rise to the level of neglect.

The Elder Abuse Act defines abuse as “[p]hysical abuse, *neglect*, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering” (Welf. & Inst.Code, § 15610.07, subd. (a), italics added); or “[t]he deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering” (*id.*, § 15610.07, subd. (b)). The Act defines neglect as “[t]he negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.” (*Id.*, § 15610.57, subd. (a)(1).) “Neglect includes, but is not limited to, all of the following: [¶] (1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter. [¶] (2) Failure to provide medical care for physical and mental health needs.... [¶] (3) Failure to protect from health and safety hazards. [¶] (4) Failure to prevent malnutrition or dehydration.” (*Id.*, § 15610.57, subd. (b).) In short, neglect as a form of abuse under the Elder Abuse Act refers “to the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their

professional standing, to carry out their custodial obligations." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 34, 82 Cal.Rptr.2d 610, 971 P.2d 986 (*Delaney*).) (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 404, emphasis added.)

Leisure Care contends that plaintiff fails to allege dependent adult abuse or neglect. However, it never actually addresses any of the allegations of the TAC. The papers filed in support of a demurrer must include a memorandum, and the memorandum "must contain 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." (Cal. Rules of Court, Rule 3.1113(b); see *Quantum Cooking Concepts, Inc. v. LV Assocs., Inc.* (2011) 197 Cal.App.4th 927 [trial court not required to "comb the record and the law for factual and legal support that a party has failed to identify or provide".]) Leisure Care merely cites the applicable legal principles, and offers its conclusions: that plaintiff has not alleged the Leisure Care had any duty to do most of the acts alleged [without identifying or discussing any of "the acts alleged"]; that the acts alleged are not failure of care, but disagreement with the care provided; and fails to allege causation. The SAC contains a long section of "ALLEGATIONS SPECIFIC TO FAIRWINDS/LEISURE CARE LLC," which largely are not addressed with regards to the issue of whether the SAC alleges acts of neglect.

The demurrer should be overruled because, even if the SAC failed to allege conduct rising to the level of recklessness, that would not be an independent ground to sustain the demurrer. Recklessness must be established only to recover the heightened remedies under Welf. & Instit. Code § 15657. Pursuant to section 15657, those remedies are *in addition* to what could be recovered if where the defendant is liable for neglect or abuse: "Where it is proven by clear and convincing evidence **that a defendant is liable** for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, **and that** the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law ..." (Emphasis added.) A demurrer is not the proper motion to attack an improper remedy. (*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1561-1562.)

However, Leisure Care also moves to strike the prayers for punitive damages and attorneys' fees. A motion to strike is the proper motion to attack an improper remedy. While some of the arguments made in the motion to strike fail to adequately address the allegations of the SAC, the court agrees that the SAC fails to allege facts sufficient to give rise to corporate liability.

In order to obtain the heightened remedies of attorneys' fees and punitive damages, plaintiff must allege facts showing that an officer, director, or managing agent was involved in the abuse, authorized the abuse, ratified the abuse, or hired the person who did the abuse with advance knowledge of the person's unfitness and hired him or her with a conscious disregard of the rights and safety of others. (Welfare & Institutions Code § 15657(c), Cal. Civ. § 3294(b).)

Tentative Rulings for Department 501

(24)

Tentative Ruling

Re: **Rose v. Healthcomp, Inc.**
Court Case No. 15CECG00163

Hearing Date: **August 11, 2016 (Dept. 501)**

Motion: Defendant's Motion for Summary Judgment

Tentative Ruling:

To grant. To overrule all evidentiary objections. Defendant is directed to submit to this court, within 5 days of service of the minute order, a proposed judgment consistent with the court's summary judgment order.

Explanation:

Evidentiary Objections:

All of plaintiff's evidentiary objections are overruled. Evidence Code section 623 does not provide a basis for an evidentiary objection; it is merely a rule of law as to the impact of contradictory testimony: namely, a conflicting declaration should be disregarded, not stricken/disallowed. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21; *Archdale v. American Intern. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 473.) Furthermore, Mr. Casey's former testimony does not contradict anything he is now saying. The former deposition testimony related to his personal knowledge of specific items of information, and does not contradict his current statement as to the general needs of the Plan Administrator (i.e., Harris Farms, Inc., hereafter "Harris"). It does not appear, from the short excerpts of his former testimony, that he was then claiming his own personal complete lack of knowledge of the general details the Administrator needs to know ("Plan expenditures, benefit utilization and potential large claims").

Plaintiff's other objections are based on arguing 1) the declarants are each making legal conclusions in their various statements, and 2) they fail to establish a foundation for their knowledge to speak. Both bases are without merit. Each declarant establishes his experience with the company for which he works, and the particulars to which he testifies, and the "legal conclusions" are simply statements of fact and factual descriptions within the realm of each man's job duties.

Defendant's objections are likewise overruled in their entirety, as they are not in proper form, and the objections to the facts (rather than to the evidence) are not proper evidentiary objections. All but two of the over 150 objections were simply included in their response to plaintiff's Additional Disputed Material Facts document (i.e., plaintiff's Separate Statement), rather being filed as separate, written objections in the proper format, as required by Rule of Court 3.1354. Written objections are (*inter alia*)

to be filed separately from other papers, and must quote the objectionable material, clearly stating the grounds for the objections. Making an objection on the Separate Statement, and especially making it as to the fact itself instead of to the evidence supporting the fact, is insufficient as the fact is never evidence in and of itself. (*Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218, 1224, *fn* 2—Even an undisputed fact is not evidence, and is not considered a judicial admission; *Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 747.) And the requirement of quoting and citing to the objected-to evidence is especially necessary where there are so many objections: it is impossible to know where in plaintiff's 5-inch summary of evidence the court is supposed to look in order to rule on each of the objections.

Analysis:

Defendant brings this motion for summary judgment. To prevail, it has the burden of proving *either* that there is a complete defense *or* that plaintiff cannot establish one or more elements of each of her causes of action. (Code Civ. Proc. § 437c, subd. (p)(2); *Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.) Here, defendant based its motion on the sole argument that there is a complete defense, namely that plaintiff's state-law-based claims are preempted by the Employee Retirement Income Security Act ("ERISA") under 29 U.S.C.A. section 1144, subdivision (a). Plaintiff incorrectly assumes defendant had the burden of showing it is entitled to judgment as to all theories of liability she has asserted. Defendant did not base this motion on arguing that plaintiff cannot establish one or more elements of her causes of action, but rather on the alternate basis of arguing it has a complete defense with federal preemption.

The ultimate burden of persuasion rests on defendant, as the moving party. Its initial burden of production was to show by a preponderance of the evidence that it is more likely than not that this defense can be established. (*Aguilar v. Atlantic Richfield* (2001) 25 Cal.4th 826, 850.) If a defendant carries the initial burden of production, the burden of production shifts to plaintiff to show that a triable issue of material fact exists. Plaintiff does this if she can show, by a preponderance of the evidence, that it is more likely than not that the defense at issue on this motion cannot be established. (*Aguilar, supra*, 25 Cal.4th at p. 852.)

Plaintiff's arguments about the procedural defects of defendant's motion are not well taken. The notice clearly specified the only issue being raised by the motion for summary judgment, that being defendant's affirmative defense of federal preemption. All 19 material facts cited by defendant were directed to that issue. Defendant adequately complied with Rule of Court 3.1350.

Plaintiff does not dispute that Harris' self-funded employee health care plan is covered by the Employee Retirement Income Security Act ("ERISA"). At issue with this motion is whether the state-law-based causes of action asserted by plaintiff are preempted by ERISA under the doctrine of conflict preemption. Conflict preemption is an affirmative defense to a claim, and provides that state remedies which are not permitted by federal law or which exceed federal remedies are not allowed. (ERISA § 514, subd. (a); 29 U.S.C. § 1144, subd. (a); *Metropolitan Life Ins. Co. v. Taylor* (1987) 481

U.S. 58, 63—defensive preemption does not appear on the face of well-pleaded complaint.)

Conflict preemption will defeat a state law claim if it “relates to” an ERISA plan under section 514(a)’s express preemption language. (*Darcangelo v. Verizon Communications, Inc.* (4th Cir. 2002) 292 F.3d 181, 187.) Courts have found that Congress used the phrase “relate to” in its broadest sense, and thus the U.S. Supreme Court has found that a state law cause of action “relates to” an ERISA plan if it has a “connection with or reference to such a plan.” (*Shaw v. Delta Air Lines, Inc.* (1983) 463 U.S. 85, 97, 98.) It is settled law that Section 1144(a) preempts not only state laws dealing with matters specifically covered by ERISA, but also any state law that purports to regulate, directly or indirectly, the terms and conditions” of ERISA plans. (ERISA § 514, subd. (c)(2), 29 U.S.C. § 1144, subd. (c)(2).)

In determining whether a state law has a “forbidden connection,” courts are instructed look to ERISA’s objectives as a guide to the scope of the state law, as well as the nature of the effect of the state law on ERISA. (*California Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc.* (1997) 519 U.S. 316, 316-317.) Courts employ a “relationship test” to determine whether a state law claim bears on an ERISA-regulated relationship, such as the relationship between plan and plan member, plan and employer, or employer and employee. (*Providence Health Plan v. McDowell* (9th Cir. 2004) 385 F.3d 1168, 1172; *General American Life Ins. Co. v. Castonguay* (9th Cir. 1993) 984 F.2d 1518, 1521—key is recognizing that the statute “comprehensively regulates” these relationships.)

The determinative factors courts consider in determining whether the state law and claim at issue “relates to” an employee plan or affects it in too “tenuous, remote or peripheral” a manner are: 1) whether the claims arise out of the administration of the plan; 2) whether the claims require interpretation of ERISA or determination of rights under the plan; 3) whether the controversy is among plan principals (fiduciary, beneficiaries, service providers, etc.) or involves outsiders who have only incidental connections to the plan; and 4) whether the state law regulates an area “traditionally within the state’s domain.” (*Golden Gate Restaurant Ass’n v. City and County of San Francisco* (9th Cir. 2008) 546 F.3d 639, 647.)

Defendant met its burden of production on this motion, and showed by a preponderance of the evidence that it is more likely than not that its defense of preemption can be established. Plaintiff failed to raise a triable issue of material fact on this issue.

Plaintiff relies solely on the case of on *Dishman v. UNUM Life Ins. Co. of America* (9th Cir. 2001) 269 F.3d 974, 983-984 (“*Dishman*”) to argue that her claims do not impermissibly “relate to” Harris Farm, Inc.’s ERISA plan. In *Dishman*, the administrator’s investigators obtained plaintiff’s private health information (“PHI”) through tortious means, and the appellate court concluded that federal preemption did not apply. The investigators elicited information about plaintiff by: falsely claiming to be a bank loan officer; misrepresenting to the beneficiary’s neighbors and acquaintances that he had volunteered to coach a basketball team; and impersonating the beneficiary himself

and obtaining personal credit card information and travel itineraries. They also falsely identified themselves when caught photographing plaintiff's residence and repeatedly called his residence and either hung up or dunned the person answering for information about him. (*Dishman* at p. 979-980.) The court determined that this conduct was so outrageous that it necessarily could not be understood to have been *related to* the administration of the plan.

In *Dishman*, the investigators clearly had no entitlement to Mr. Dishman's banking, credit, and travel information, no right to impersonate Mr. Dishman or others to obtain this and other information, and had no right to use harassing conduct with him. This was clearly outside normal conduct in administering a health care plan. Thus, the court found that making ERISA administrators liable for investigations "which would be objectionable or offensive to the reasonable man" simply could not be said to "interfere with nationally uniform plan administration in the manner or to the extent these laws did." (*Dishman* at p. 982, quoting from *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, 660, which held that an "unreasonably intrusive investigation [by a private investigator] may violate plaintiff's right to privacy.") And while the court acknowledged it was undeniable that "at some level Dishman's tort claim relates to the plan," the critical point was whether it had "only a tenuous, remote, or peripheral connection" with the ERISA plan. (*Dishman* at p. 984.)

The gravamen of plaintiff's action is that the defendant, as Third Party Administrator of Harris' self-funded health plan wrongfully accessed plaintiff's PHI and shared that information with her employer without her knowledge or permission. With citation primarily to defendant's "Policy and Procedure Manual," she maintains on this motion that federal and state privacy regulations and her constitutional rights required defendant to only disclose of summary health information (i.e., "de-identified" data), even to the Plan Administrator, unless plaintiff's written consent was first obtained. However, her evidence failed to establish this contention.

First, the Policy and Procedure Manual is not controlling as to the ERISA analysis, or to determining whether defendant violated plaintiff's privacy rights; instead, the Summary Plan Document ("SPD" or "Plan Document") is controlling. (*Bergt v. Retirement Plan for Pilots Employed by MarkAir, Inc.* (9th Cir. 2002) 293 F.3d 1139, 1143—SPD is the "statutorily established means of informing participants of the terms of the plan and its benefits and the employee's primary source of information regarding employment benefits" (internal quotes omitted).)

But even if, *arguendo*, the manual was considered to be controlling, this does not aid plaintiff in establishing her point. Several of the cited pages repeatedly state HIPAA regulations do not require health plans to obtain an individual's written consent or authorization prior to using, disclosing, or requesting PHI "for purposes of *treatment, payment or health care operations*," and that this was also consistent with Federal privacy regulations. (See, e.g., Exhibit G, Bates Stamp DEF003030, italics in the original, underlines added; see also *Id.* at DEF003035 [exception: employee authorization required for psychotherapy information], DEF003038-3039 [*if* defendant requests written authorization for underwriting, etc., it must authorize both disclosure and use], DEF003147.)

The term "health care operations" is defined at 45 C.F.R. § 164.501, and includes "[r]eviewing...health plan performance...underwriting, enrollment, premium rating, and other activities related to the creation, renewal, or replacement of a contract of health insurance or health benefits, and ceding, securing, or placing a contract for reinsurance of risk relating to claims for health care." This is consistent with the definition given in the Policy and Procedure Manual, which makes an express citation to section 164.501. (See Ex. G, Bates Stamp DEF003219.) Several cited pages do deal with written authorization and summary health information (see, e.g., *Id.* at 003036, 003083, 003097, 003216 and 003227), but these do not appear to contradict or override the other places in the manual, as cited above, which allow full disclosure to the Plan Administrator for purposes of "health care operations." At best, the manual establishes that defendant may only share summary (de-identified) health information with Harris in its role as plan sponsor. (See *Id.* at 003147.) However, that does not mean defendant could not share the information with Harris in its role as Plan Administrator.

For this reason, the Plan Document itself clearly informed the employees that certain individuals employed by Harris ("certain members of the Employer's workforce") were permitted under HIPAA regulations "from time to time to have access to Protected Health Information" which would show "individually identifiable health information" and that this information would be used by them "only for purposes of Plan administrative functions" which included dealing with "health care operations," which was also clearly defined (also in accordance with section 165.601) to mean "activities on behalf of the Plan that are related to...underwriting, premium rating and other functions related obtaining or renewing an insurance contract, including stop-loss insurance....business planning, management and general administrative activities." (See Declaration of Mike Casey, Ex. A, p. 67.)

Thus, plaintiff's attempt to characterize defendant's disclosure of PHI to Harris as sharing it *with the employer* is unavailing. When defendant shared the PHI with employees designated under the Plan to receive such information, defendant was sharing it with Harris in its role as Plan Administrator, and not in its role as Employer. Plaintiff herself states as a fact that the Plan Administrator and the employer are considered separate and distinct entities for purposes of federal privacy regulations. (See plaintiff's Separate Statement, No. 49.) As noted above, the Plan Document clearly authorizes PHI to be shared with those designated individuals. Plaintiff provided no evidence of a single instance where the PHI was shared with someone who was not authorized under the Plan to receive the information for legitimate plan administration purposes.

Plaintiff also failed to establish that preemption was inapplicable because the Nurse Case Management Program was "a separate and optional addition to the Plan," and thus not governed by ERISA. The Plan Document clearly made this program a part of the Plan, as a cost containment tool for the Administrator. Even if it is regarded as true (as plaintiff argues) that the case management program is not necessary to the everyday administration of claims, that does not create a triable issue of material fact, as the salient point is that it is a cost management tool of the Plan, expressly set forth in

(28)

Tentative Ruling

Re: **Vasquez v. OR Express Logistics, et al.**

Case No. 15CECG03738

Hearing Date: August 11, 2016 (Dept. 501)

Motion: By Defendants Daimler Trucks North America, LLC to compel:
1) Responses by plaintiff Olivia Vasquez to First Set of Form Interrogatories
2) Responses by plaintiff Olivia Vasquez to First Set of Special Interrogatories
3) Responses by plaintiff Olivia Vasquez to First Set of Requests for Production
4) Responses by plaintiff Jesse Delgadillo to First Set of Form Interrogatories
And for sanctions in the amount of \$420 for each individual motion.

Tentative Ruling:

To grant the motions in their entirety. Responding parties are ordered to respond to the discovery requests within ten days of service of this order.

To award sanctions in the amount of \$960.00 in total all of the four motions.

Explanation:

When a party has not responded to Interrogatories all a moving party need show is that a set of interrogatories was properly served on the opposing party, that the time to respond has expired, and that no response of any kind has been served. (Cf. *Leach v. Superior Court* (1980) 111 Cal.App.3d 902, 905-06; CRC 3.1345 (no need for separate statement or meet and confer).

Here, the moving party has presented evidence to show that the interrogatories were properly served and that no responses have been served.

Likewise, when a party has not responded to Requests for Production, a responding party waived all objections, including privilege and work product. (CCP §2031.300.) There is no timeline on the motion and no need for a meet and confer. (CCP §2031.300.)

Tentative Rulings for Department 502

Tentative Rulings for Department 503

(24)

Tentative Ruling

Re: **Gateway Business Bank v. Leist**
Court Case No. 14CECG01830

Hearing Date: **August 11, 2016 (Dept. 503)**

Motion: Plaintiff's Motion to Deem Matters in Request for Admissions as Admitted and to Compel Discovery Responses as Against Defendants Donald L. Fulbright and Mary Fulbright, and for Monetary Sanctions

Tentative Ruling:

To grant and to award sanctions in the amount of \$735.00 against defendants Donald L. Fulbright and Mary Fulbright, payable within 20 days of the date of this order, with the time to run from the service of this minute order by the clerk. The matters specified in plaintiff's Requests for Admission, Sets One and Two, are deemed admitted by said defendants, unless they serve, before the hearing, proposed responses to the requests for admission that are in substantial compliance with Code of Civil Procedure Section 2033.220. Said defendants shall serve responses, without objections, to plaintiff's Form Interrogatories, Sets One and Two, and the Requests for Production of Documents, Sets One and Two, no later than 20 court days from the date of this order, with the time to run from the service of this minute order by the clerk.

Explanation:

Requests for Admission:

Failure to timely respond to Requests for Admission results in a waiver of all objections to the requests. (Code Civ. Proc. Section 2033.280, Subd. (a).) The statutory language leaves no room for discretion. (*Tobin v. Oris* (1992) 3 Cal.App.4th 814, 828.) "The law governing the consequences for failing to respond to requests for admission may be the most unforgiving in civil procedure. There is no relief under section 473. The defaulting party is limited to the remedies available in [Code of Civil Procedure Section 2033.280]...." (*Demyer v. Costa Mesa Mobile Home Estates* (1995) 36 Cal.App.4th 393, 394-395, disapproved on other grounds in *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 983, fn. 12.)

But the court may relieve the party who fails to file a timely response if, before entry of the order deeming the requested matters admitted, the party in default 1) moves for relief from waiver and shows that the failure to serve a timely response was due to "mistake, inadvertence or excusable neglect;" and 2) serves a response in "substantial compliance" with Code of Civil Procedure Section 2033.220 (See Code Civ. Proc. Section 2033.280(a)-(c); See *Brigante v. Huang* (1993) 20 Cal.App.4th 1569, 1584, disapproved on other grounds in *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 983, fn. 12.)

"If the party manages to serve its responses before the hearing, the court has no discretion but to deny the motion . . . Everything, in short, depends on submitting responses prior to the hearing." (*Demyer v. Costa Mesa Mobile Homes Estates* (1995) 36 Cal. App. 4th 393, 395-396.)

Since defendants Donald L. Fulbright and Mary Fulbright did not comply with responding to the Requests for Admission, and there is no evidence that they have either requested relief from their failure to respond or submitted proper responses before the hearing, this motion will be granted.

Interrogatories and Document Production:

Defendants have had ample time to respond to the discovery propounded by plaintiff, and have not done so. Failing to respond to discovery within the 30-day time limit waives objections to the discovery, including claims of privilege and "work product" protection. (Code Civ. Proc. §§ 2030.290, subd. (a), 2031.300, subd. (a); see *Leach v. Sup.Ct. (Markum)* (1980) 111 Cal.App.3d 902, 905-906.)

Sanctions:

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), 2031.300, Subd. (c), and 2033.280, Subd. (c).) No facts were presented which warrant finding sanctions as unjust here. The sanction amount has been reduced from the amount requested: the court feels allowing three hours' time for preparation of this simple motion is sufficient, and because there was no opposition there was no need to prepare for and attend the hearing. In the event a hearing is needed, the court will consider increasing the sanctions awarded to include moving party's costs/fees for appearance.

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

Tentative Ruling

Issued By: A.M. Simpson on 8/10/16.
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: **Casillas v. Central California Faculty Medical Group,
Inc. dba University North Medical Specialty Center**
Superior Court Case No. 15 CECG 00549

Hearing Date: August 11, 2016 (**Dept. 503**)

Motion: By Plaintiff to compel further responses to Request for
Production of Documents aka Inspection Demands
Set One

Tentative Ruling:

To grant the motion as to Nos. 26 and 27. Defendant is ordered to produce documents responsive to these requests within 10 days of notice of the ruling. Defendant is ordered to honor its agreement to produce documents responsive to Nos. 10, 25, 31 and 32 within 10 days of notice of the ruling, if it has not done so already. No sanctions will be imposed.

Explanation:

It has been noted that with regard to inspection demands, the demanding party is often seeking documents he or she has never seen, and which may or may not exist, out of files with which he or she has no familiarity. Therefore, the demand is sufficient if the documents or things to be produced are of a category described with "reasonable particularity" in the demand. [CCP § 2031.030(c)(1)] By the same token, the categories must be "reasonably" particularized *from the standpoint of the party on whom the demand is made*. [See *Calcor Space Facility, Inc. v. Sup.Ct. (Thiem Industries, Inc.)* (1997) 53 Cal.App.4th 216, 222.] It is *not* reasonable to describe documents by categories which bear *no relationship to the manner in which the documents are kept*, and which require the responding party to determine (at risk of sanctions) which of its extensive records fit a demand that asks for everything in its possession relating to a specific topic. [See *Calcor Space Facility, Inc. v. Sup.Ct. (Thiem Industries, Inc.)*, supra, 53 Cal.App.4th at 222]

Here, Nos. 9, 10, 11, and 12 are ambiguous. The use of the phrase "referring or relating" is ambiguous. The terms "report" and "usage" are ambiguous as well. It is not clear what documents are requested. Does Plaintiff want written complaints about her/other co-workers internet use or the data from the servers regarding her log-in? Therefore, the motion will be denied as to these requests.

But, the motion will be granted as to Request Nos. 26 and 27. As Plaintiff argues, this appears to be "the heart" of her case. Defendant will be ordered to produce all documents in its possession that are responsive to the request regardless of time frame. Its offer to produce documents limited to April 2013 through January 4, 2014 appears to be too limited. Plaintiff was employed beginning in 2008. To the extent the documents

contain information covered by HIPPA, the Court will deem the information covered by the stipulated protective order filed with the Court on April 28, 2016.

Even highly relevant, nonprivileged information may be shielded from discovery if its disclosure would impair a person's "inalienable right of privacy" provided by Calif. Const. Art. 1, § 1. [*Britt v. Sup.Ct. (San Diego Unified Port Dist.)* (1978) 20 C3d 844, 855–856; *Pioneer Electronics (USA), Inc. v. Sup.Ct. (Olmstead)* (2007) 40 C4th 360, 370—right of privacy "protects the individual's reasonable expectation of privacy against a serious invasion"] The right to privacy is also guaranteed by the U.S. Constitution. [*Griswold v. State of Connecticut* (1965) 381 US 479, 484, 85 S.Ct. 1678, 1681; *Palay v. Sup.Ct. (County of Los Angeles)* (1993) 18 CA4th 919, 931]

However, unlike privilege, the protection afforded is qualified, not absolute. In each case, the court must *carefully balance* the right of privacy against the need for discovery. Disclosure may be ordered if a "compelling public interest" would be served thereby. [*Britt v. Sup.Ct. (San Diego Unified Port Dist.)*, *supra*, 20 C3d at 855–856, 143 CR at 702; *John B. v. Sup.Ct. (Bridget B.)* (2006) 38 C4th 1177, 1199, 45 CR3d 316, 332]

The motion will be denied as to Request Nos. 25, 31, 32, 42 and 43. These requests are too broad and invasive of the privacy of third parties. With regard to No. 25, it is worded in such a manner as to encompass documents consisting of patient records where Plaintiff was the RT. As for 31 and 32, again the requests are too broad and invasive as to the privacy rights of third parties. Plaintiff is suing for age discrimination not sexual or racial harassment or discrimination. In addition, any complaints by other employees may violate their right of privacy. In the end, Plaintiff has not met her burden of showing of a "compelling need" for this information. [*Life Technologies Corp. v. Sup.Ct. (Joyce)* (2011) 197 Cal.App.4th 640, 655] However, Defendant will be ordered to honor its agreement to produce what it believes to be documents responsive to Nos. 10, 25, 31 and 32.

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 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 8/10/16.
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: **YP, LLC v. Solley**
Superior Court Case No.: 16CECG00619

Hearing Date: August 11, 2016 (**Dept. 503**)

Motion: By Plaintiffs YP, LLC and YP Advertising & Publishing, LLC, to continue order to show cause hearing

Tentative Ruling:

To grant, with the order to show cause hearing currently set for September 1, 2016, at 10:01 a.m. in Dept. 401, to be continued to September 8, 2016, at 10:01 a.m. in Dept. 401.

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** 8/10/16.
(Judge's initials) (Date)