

**Tentative Rulings for June 8, 2023**  
**Department 502**

**For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)**

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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).) *The above rule also applies to cases listed in this "must appear" section.*

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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.

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(Tentative Rulings begin at the next page)

## **Tentative Rulings for Department 502**

Begin at the next page

(29)

**Tentative Ruling**

Re: ***In re: Mallory Dow***  
Superior Court Case No. 23CECG00455

Hearing Date: June 8, 2023 (Dept. 502)

Motion: Petition to Approve Compromise of Disputed Claim of Minor

**Tentative Ruling:**

To grant upon submission of properly filled in proposed orders. No appearances necessary.

**Explanation:**

The proposed orders are mostly blank. Petitioner to file amended proposed orders prior to the hearing, and alert the department clerk once filed.

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:**     **KCK**     **on**     **06/06/23**    .  
(Judge's initials) (Date)

(37)

**Tentative Ruling**

Re: ***Daniel Jenkins v. State of California Department of Justice***  
Superior Court Case No. 22CECG02260

Hearing Date: June 8, 2023 (Dept. 502)

Motion: Defendant California Highway Patrol's Demurrer to the  
Complaint

**Tentative Ruling:**

To sustain the demurrer to both causes of action. Plaintiff is granted 10 days' leave to file the First Amended Complaint, which will run from service by the clerk of the minute order. New allegations/language must be set in **boldface** type.

**Explanation:**

*Demurrer Generally*

The function of a demurrer is to test the sufficiency of a plaintiff's pleading by raising questions of law. (*Plumlee v. Poag* (1984) 150 Cal.App.3d 541, 545.) The test is whether plaintiff has succeeded in stating a cause of action; the court does not concern itself with the issue of plaintiff's possible difficulty or inability in proving the allegations of his complaint. (*Highlanders, Inc. v. Olsan* (1978) 77 Cal.App.3d 690, 697.) In assessing the sufficiency of the complaint against the demurrer, we treat the demurrer as admitting all material facts properly pleaded, bearing in mind the appellate courts' well established policy of liberality in reviewing a demurrer sustained without leave to amend, liberally construing the allegations with a view to attaining substantial justice among the parties. (*Glaire v. LaLanne-Paris Health Spa, Inc.* (1974) 12 Cal.3d 915, 918.)

*Aiding and Abetting*

The complaint asserts two Fair Employment and Housing ("FEHA") based causes of action against defendant California Highway Patrol ("CHP"). Plaintiff concedes that CHP was not an employer or prospective employer, but argues that CHP should be liable based on aiding and abetting the Department of Justice ("DOJ") in its alleged discriminatory conduct. Here, plaintiff asserts Dr. Zielinski of the California Highway Patrol Professional Training Section was contacted by the California Department of Human Resources following orders from the State Personnel Board to obtain an independent medical examination of plaintiff. Plaintiff alleges that Dr. Zielinski's examination aided and abetted the DOJ in its discriminatory conduct.

The court in *Smith v. BP Lubricants USA Inc.* noted,

"FEHA does not provide a definition of 'aiding and abetting,'" [Citation.], but it has been interpreted as "closely allied" with conspiracy. [Citation.] "The common basis for liability for both

conspiracy and aiding and abetting ... is concerted wrongful action." [Citation.] Aiding and abetting thus 'involves two separate persons, one helping the other.' [Citation.] It is 'unlawful, for example, for third parties such as customers or suppliers to induce or coerce prohibited discrimination or harassment.' [Citation.]"

(*Smith v. BP Lubricants USA Inc.* (2021) 64 Cal.App.5th 138, 146, internal citations omitted.)

In *Smith*, the appellate court determined that the defendants were liable under FEHA for aiding and abetting defendant employer's alleged harassment and discrimination only if "(1) [defendant employer] subjected [plaintiff] to discrimination and harassment, (2) [the defendants] knew that [defendant employer's] conduct violated FEHA, and (3) [the defendants] gave [defendant employer] 'substantial assistance or encouragement' to violate FEHA." (*Id.*, 146.)

Here, the complaint alleges that California Department of Human Resources contacted Dr. Zielinski following the State Personnel Board orders. The complaint does not explain how the California Department of Human Resources contacting CHP for an independent medical examination amounts to CHP aiding and abetting the DOJ when its doctor conducted the ordered independent medical examination. It is unclear from the complaint how this would be CHP providing substantial assistance or encouragement to the DOJ with its alleged discriminatory conduct. Plaintiff would need to connect the dots from the California Department of Human Resources to the DOJ. Plaintiff has not done so in this complaint.

Additionally, it is not clear from the complaint that Dr. Zielinski knew of any discriminatory conduct. The complaint establishes that Dr. Zielinski was contacted to conduct an independent medical examination. That does not inherently mean he knew of any discriminatory conduct occurred with regards to the examination conducted by Dr. Hamel with the DOJ.

Plaintiff has insufficiently alleged any aiding or abetting on the part of CHP where the California Department of Human Resources contacted Dr. Zielinski for an independent medical examination.

### *Litigation Privilege*

The litigation privilege allows for publications made in a judicial or quasi-judicial proceeding to be privileged. (Civ. Code, § 47, subd. (b); *Mireskandari v. Gallagher* (2020) 59 Cal.App.5th 346, 365.) The privilege applies to communications 1) made in judicial or quasi-judicial proceedings, 2) by litigants or other participants, 3) to achieve the objects of litigation, that 4) are connected of have a logical relation to the action. (*Mireskandari v. Gallagher, supra*, 59 Cal.App.5th 346, 366.)

Here, the issue is whether such privilege should apply after the quasi-judicial proceedings have issued an order. In this case, the order was specifically to obtain the independent medical examination. However, neither counsel cited to any authority for the privilege's applicability when the proceedings have resulted in an order. The court is reserving a ruling on this issue.

*Time Barred*

Here, plaintiff asserts he was provided with his right to sue letter from the Department of Fair Employment and Housing on February 4, 2022. He had appealed the medical disqualification and a decision was made by the State Personnel Board on February 2, 2017 to order the disqualification be set aside and for an independent medical evaluation. Dr. Zielinski's opinion was rendered in May of 2017. Plaintiff appealed again, but the appeal did not proceed. It is not clear why the appeal did not proceed and at what time it was terminated. Plaintiff also filed claims with the Equal Employment Opportunity Commission simultaneously with the second appeal. Plaintiff has alleged the right to sue letter was issued within one year of filing this lawsuit. The court is not sustaining the demurrer on this ground. However, the court is sustaining the demurrer based on a failure to allege aiding and abetting.

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: KCK on 06/06/23  
(Judge's initials) (Date)

(38)

**Tentative Ruling**

Re: ***Rosa Hernandez v. Jeronimo Lopez, JR.***  
Superior Court Case No. 21CECG03186

Hearing Date: June 8, 2023 (Dept. 502)

Motion: Default Prove-Up

**Tentative Ruling:**

To deny without prejudice. On its own motion, the court orders plaintiff to record a notice of the pendency of the action (*lis pendens*) in the office of the Fresno County Recorder, and orders the action stayed until proof of such recording is filed in this action. Evidence of the recordation shall be filed with the court, after which plaintiff may file an *ex parte* application for the stay to be lifted (submitted on papers only, with no need to reserve an *ex parte* hearing date).

Pertinent to the information noted in the final bullet point, below, plaintiff is given leave to amend the complaint, only for the purpose of stating an estimated dollar amount requested. Alternatively, she may file an *ex parte* application to set aside defendant's default (submitted on papers only, with no need to reserve an *ex parte* hearing date) so she may personally serve a statement of damages on defendant.

**Explanation:**

**Complaint**

The complaint for partition of real property must set forth: 1) a description of the subject property, including both its legal description and its street address; 2) all interests the plaintiff has or claims in the property; 3) all interests of record or actually known to the plaintiff, and all persons plaintiff "reasonably believes will be materially affected by the action, whether the names of such persons are known or unknown to the plaintiff" (i.e., this includes "persons unknown" to be served by publication); 4) the estate as to which partition is sought and a prayer for partition of the interests therein; and 5) where the plaintiff seeks sale of the property, an allegation of the facts justifying such relief in ordinary and concise language. (Code Civ. Proc., § 872.230.) The complaint here includes all the necessary allegations. No actual title report is attached to the complaint, so there is no documentary evidence presented showing there are no other interested persons (i.e., "interests of record") who should have been named as defendants. However, the complaint alleges there are no liens or encumbrances appearing in the record or otherwise known to plaintiff (Complaint, ¶ 17), which suffices.

- ***No showing that the required *lis pendens* was recorded***

However, one problem is that there is no allegation, or anything else in the court record or presented in the default packet, showing that plaintiff recorded the required

lis pendens immediately after filing the complaint, as required by Code of Civil Procedure section 872.250:

(a) Immediately upon filing the complaint, the plaintiff shall record a notice of the pendency of the action in the office of the county recorder of each county in which any real property described in the complaint is located.

[...]

(c) If the notice is not recorded, the court, upon its own motion or upon the motion of any party at any time, shall order the plaintiff or person seeking partition of the property, or another party on behalf of the plaintiff or other person, to record the notice and shall stay the action until the notice is recorded. The expense of recordation shall be allowed to the party incurring it.

(Code Civ. Proc., § 872.250, subds. (a) and (c).)

Therefore, the court on its own motion must require a lis pendens to be recorded, and will stay the action until this is done. If a lis pendens has already been recorded, plaintiff may call for a hearing to so inform the court, and no stay will be ordered.

### **Proposed Interlocutory Judgment**

- ***Monetary award and costs is not made until after the sale, and here such an award is not available without further action from plaintiff which would open the default***

Plaintiff requests a monetary award of \$1,703.47 as reimbursement for payment of real property taxes from 2014 to 2022, and \$1,009.00 as reimbursement for purchase of the Litigation Guarantee report. She also asks for her costs, including attorney fees. These cannot be included on the interlocutory judgment, since by statute this judgment is only to provide for finding whether plaintiff is entitled to partition, and if so, the respective interests of the parties in the land, and ordering the partition of the property, and the manner of partition. (Code Civ. Proc., § 872.720, subd. (a); *Harrington v. Goldsmith* (1902) 136 Cal. 168, 170 (costs cannot be included on the interlocutory judgment).)<sup>1</sup>

But more importantly, plaintiff is not entitled to any monetary award at all, because the complaint does not adequately put defendant on notice of the amount sought. When the complaint requests relief in the form of an accounting or a monetary award to the plaintiff for paying common expenses on the defendant's behalf, the default judgment is subject to Code of Civil Procedure section 585, and as with any default judgment, the court must not award more than the amount prayed for in the complaint. (*Finney v. Gomez* (2003) 111 Cal.App.4th 527, 535-536 (finding section 580 [now section 585] limits the monetary relief available on a default judgment in a partition action to the specific dollar amount requested in the complaint." Emphasis added).)

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<sup>1</sup> Also, with this current submission, insufficient evidence was presented to support the amount (\$5,000.00) of attorney's fees requested.



## **Request for Court Judgment (Form CIV-100)**

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.

Issued By: KCK on 06/06/23  
(Judge's initials) (Date)