**Tentative Rulings for April 28, 2022**
**Department 502**

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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).)**

**19CECG00014** ***Ayers v. Lewis*** **(Department. 502)**

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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.**

**17CECG02635** ***Gordon Panzak vs. City of Fowler*** **is continued to Thursday, May 19, 2022 at 3:30 P.M. in Department 502**

**20CECG03640** ***Kristina Woody v. Patrick Clear*** **is continued to Thursday, May 19, 2022 at 3:30 p.m. in Department 502**

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**(Tentative Rulings begin at the next page)**

# Tentative Rulings for Department 502

Begin at the next page

(36)

**Tentative Ruling**

Re: ***Espindola, et al. v. Brooks, et al.***
Superior Court Case No. 19CECG04138

Hearing Date: April 28, 2022 (Dept. 502)

Motion: Defendants Norcal Gold, Inc. and Soledad Hernandez's Demurrer to the First Amended Complaint

**Tentative Ruling:**

To overrule defendants' demurrer to the seventh and eighth causes of action. Defendants are granted 10 days' leave to file their answer to the first amended complaint ("FAC"). The time in which the answer can be filed will run from service by the clerk of the minute order.

**Explanation:**

Demurrer to the Seventh Cause of Action—Professional Negligence:

The elements of a claim for professional negligence are as follows: (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession; (2) a breach of that duty; and (3) a proximate causal connection between the negligent conduct and the resulting injury. (*Weimer v. Nationstar Mortgage, LLC* (2020) 47 Cal.App.5th 341, 354; *Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 754.)

Here, plaintiffs allege that defendants owed a duty to act reasonably in connection with the real estate transaction and to disclose information material to their decision to purchase the subject property. Defendants breached that duty by: "failing to confirm [Adams and Brooks'] ownership rights to the [subject] property, failing to disclose to [p]laintiffs that [Adams and Brooks] did not own the [subject] property, failing to identify [Adams and Brooks] as signing the Purchase Agreement in their representative capacities, failing to exercise reasonable care and diligence in their monitoring and supervising of their real estate agents and transactions, failing to question and investigate red flags presented by [Adams and Brooks], and failing to advise [p]laintiffs to investigate red flags presented by [Adams and Brooks]." (FAC, ¶ 49-50 [brackets added].) The FAC further alleges that as a result of defendants' breach, plaintiffs suffered damages, i.e., loss of opportunity to purchase subject property and damages related to entering into an unconventional loan. (FAC, ¶ 18, 43.)

Defendants contend that plaintiffs have failed to allege sufficient facts to show that they owed such duties to plaintiff and that any resulting breach caused the alleged damages. Specifically, defendants argue that they owe no contractual duty to plaintiffs because they, as real estate brokers, are not parties to the Purchase Agreement. Further, that real estate agents do not have a duty to inspect public records concerning the title or use of the property. (Civil Code, § 2079.3.)

While defendants are correct in their assertion that without more, a real estate broker is generally not personally liable on a contract executed in the names of the buyers and sellers[1], the duties and liabilities of such brokers can arise from multiple overlapping and interrelated areas of law, including agency law, which is implicated by the facts of the FAC. (*R.J. Kuhl Corp. v. Sullivan* (1993) 13 Cal.App.4th 1589, 1599.) Here, it is alleged that defendants are the real estate broker and real estate salesperson, respectively, acting on behalf of both sellers and plaintiffs. (FAC, ¶ 8.) The California Residential Purchase Agreement and Joint Escrow Instructions, signed by both plaintiffs and defendant Hernandez on behalf of RE/MAX Gold attached as Exhibit A to the FAC confirms that RE/MAX Gold is the agent for both the buyer and seller. (FAC, Exh. A ¶ 2.) It is further alleged that defendant NCG is a corporation doing business as RE/MAX Gold. (FAC, ¶ 7.) Thus, the FAC has sufficiently alleged facts to establish an agency relationship between plaintiffs and defendants.

It is well-known that real estate brokers and licensees have respective, but distinct obligations to their principals and to third parties. (*Saffie v. Schmeling* (2014) 224 Cal.App.4th 563, 568-569.) The statute cited by defendants, which expressly excludes a duty to inspect public records or permits pertaining to the title or use of the property, is applicable only in the absence of an agency relationship between buyer plaintiffs and broker defendants, which is not the case here. (Civil Code, § 2079.3; § 2079, subd. (a).) Notably, defendants do not challenge the pleading's sufficiency of facts relating to the alleged agency relationship, and instead, are silent on the issue of a duty arising from such relationship. Thus, the court finds the defendants' arguments—that the plaintiffs failed to state sufficient facts imposing a duty on defendants, to be unpersuasive.

Defendants also argue that plaintiffs fail to identify the meaning of the term "red flags" in the operative complaint, and the source of duty that would require defendants to investigate such red flags. While these allegations are somewhat vague and conclusory, objections that a complaint is ambiguous or uncertain must be raised by special demurrer, which defendants have not done. (*Johnson v. Mead* (1987) 191 Cal.App.3d 156, 160.) A "demurrer shall distinctly specify the grounds upon which any of the objections to the complaint… are taken. Unless it does so, it may be disregarded." (Code Civ. Proc., § 430.60.) Since the demurrer does not specify that grounds include an objection based on uncertainty of the pleadings, the argument is disregarded.

Further, defendants argue that plaintiffs have not stated sufficient facts to show that defendants have proximately caused their damages. Specifically, since the damages sought are for specific performance—for the sale of the subject property, defendants having no ownership interest could not have caused such damages. Additionally, any damages relating to the entering into an unconventional loan, could not be caused by defendants, who had no duty to advise plaintiffs on how to fund the purchase.

The fact that defendants have no ownership interest misses the point that plaintiffs allege that defendants' failure to inspect and inform plaintiff—of material facts surrounding the transaction, proximately caused plaintiffs' damages resulting from the

[1] *Coughlin v. Blair* (1953) 41 Cal.2d 587, 595.

loss of the opportunity to purchase the subject property. (FAC, ¶ 18, 51, 43.) Additionally, plaintiffs have alleged sufficient facts to show that they obtained the unconventional loan due to their reliance on defendants' representation that the sellers desired a short escrow. (FAC, ¶ 43.) Thus, the plaintiffs have alleged sufficient facts to establish that defendants at least proximately caused their damages.

Thus, the court intends to overrule the demurrer to the seventh cause of action.

Demurrer to the Eighth Cause of Action—Fraud:

To sufficiently plead a cause of action for fraud, a plaintiff must separately plead each and every one of its elements: (1) a misrepresentation of a material fact by defendants; (2) the defendants' knowledge that the representation was false when made; (3) the defendant's intent to defraud for the purpose of inducing reliance; (4) the plaintiff's justifiable detrimental reliance thereon; and resulting damages to the plaintiff. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173; *Seeger v. Odell* (1941) 18 Cal.2d 409, 414; *Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, 200; *Civ. Code*, § 1709, 1710.)

California law places a heightened pleading standard on fraud claims. "Every element of the cause of action for fraud must be alleged in the proper manner and the facts constituting the fraud must be alleged with sufficient specificity to allow defendant to understand fully the nature of the charge made." (*Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 Cal.App.3d 104, 109; *Lazar v. Superior Court* (1996) 12 Cal.App.4th 631, 645.) The plaintiff's burden in asserting a fraud claim against a corporation is to "allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (*Tarmann v. State Farm Mutual Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157.)

Here, plaintiffs allege: (1) defendants represented to plaintiffs that Adams and Brooks were the legal owners of, had the authority to sell, and agreed to timely sell the subject property (FAC, ¶ 53.); (2) defendants knew the representations were false at the time they were made (FAC, ¶ 54.); (3) defendants made the material representations with the intent to deceive plaintiffs and induce plaintiffs to pay a higher price than the fair market value of the property, in an effort to obtain a commission on the sale (FAC, ¶ 55.); (4) the plaintiffs' relied on defendants' representations (FAC, ¶ 56.); and (5) plaintiffs have incurred damages relating to the loss of equity and obtaining an unconventional loan (FAC, ¶ 18, 43.) Moreover, plaintiffs have properly identified that the misrepresentation was made by defendant Hernandez, a licensed real estate salesperson affiliated with defendant NCG, on or around late November, early December, 2018. (FAC, ¶ 7, 8, 11.)

Defendants argue that the pleadings are uncertain, confusing and do not meet the requisite heightened standard for a cause of action for fraud. It is unclear what portion of the FAC defendants are claiming to be uncertain; however, as explained above, any argument as to the uncertainty of the pleadings is disregarded.

Defendants contend that the pleadings are conflicting because "[p]laintiffs allege [r]ealtor [d]efendants knew these representations were false, while simultaneously pleading facts alleging that [r]ealtor [d]efendants concealed that [Adams and Brooks]

were signing the Purchase Agreement in a representative capacity." (Memo., 6:25-27 [brackets added].) However, these factual allegations are not in conflict with one another. The FAC alleges that defendants knowingly falsely represented to plaintiffs that Adams and Brooks were the legal owners of, had the authority to sell, and agreed to timely sell the subject property (FAC, ¶ 53, 54.) First, the allegation that defendants concealed Adams and Brooks' representative status supports the allegation that defendants knew Adams and Brooks were not the legal owners of the subject property. Second, the same allegation of concealment has no bearing on the allegation relating to defendants' knowledge that Adams and Brooks did not have the authority to sell the property or that Adams and Brooks did not agree to timely sell the subject property.

Defendants further request the court to judicially notice a Power of Attorney, to argue that the facts implicated by the Power of Attorney contradicts with facts alleged in the FAC—specifically that Brooks did, in fact, have the authority to sell the underlying principal, Maxine S. Brooks' portion of the subject property. Defendants' request for judicial notice of the Power of Attorney (Exhibit 2) is denied. (Evid. Code, § 451, 452.) A power of attorney is a written instrument, executed by a natural person having the capacity to contract, which grants authority to the attorney-in-fact. (Prob. Code, § 4022.) Nowhere in the statute does it provide that a contract may or must be judicially noticed. Although defendants rely on case law to argue that the Power of Attorney is subject to judicial notice, as the document is inconsistent with the allegations in the FAC[2], no such contradiction or inconsistency can be found.

Again, the FAC alleges that defendants misrepresented to plaintiffs that Adam and Brooks were the legal owners of the subject property. (FAC, ¶ 53.) Here, the power of attorney does conflict with the allegation that Adam and Brooks were not the legal owners. The FAC also alleges that defendants misrepresented that Adams and Brooks had the authority to sell the subject property, (FAC, ¶ 53.) and that the Purchase Agreement was prepared by defendants and executed by Adams and Brooks on December 5, 2018. (FAC, ¶ 12, 34, Exh. A.) Notwithstanding the fact that the FAC alleges that Ms. Brooks passed away on November 15, 2018 and only owned *a portion* of the subject property (FAC, ¶ 34), the fact that a power of attorney for Ms. Brooks was executed in 2014, has no bearing on whether or not Adams and Brooks had the authority to sell the subject property in late November/early December 2018. (Prob. Code, § 4152, subd. (a)(4) [Unless otherwise stated, the authority of an attorney-in-fact under a power of attorney is terminated by the death of the principal.].)

Defendants appear to also make various arguments that they did not know or they could not have known of the falsities of the representations they are alleged to have made; however, these arguments are inappropriately made on demurrer. For the purpose of testing the sufficiency of the cause of action, the demurrer admits the truth of all material facts properly pleaded. (*Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal.4th 963, 966-967.)

Defendants also argue that they had no duty to investigate or advise plaintiffs of the title of the subject property; thus, any reliance plaintiffs have pled could not be

[2] Evidence Code, section 452, subdivision (h); *Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal.App.3d 122, 130.

justifiable. First, as previously explained, plaintiffs have pled that a fiduciary relationship between plaintiffs and defendants existed. Specifically, that defendants were agents of plaintiffs. (FAC, Exh. A ¶ 2.) Second, defendants provide no authority establishing that a real estate broker and salesperson, in an agency relationship with the plaintiff, has no such described duty. Third, whether or not defendants had such duty to investigate and advise, it is justifiable that as an ordinary buyer plaintiff would rely on the information provided to him by his real estate agent. Thus, plaintiffs have sufficiently pled facts to state a claim for fraud, and the court intends to overrule defendants' demurrer to the eighth cause of action.

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: RTM on 4/26/2022.**
(Judge's Initials) (Date)

(34)

**Tentative Ruling**

Re: ***Rincon v. Fresno Unified School District***
Superior Court Case No. 20CECG01939

Hearing Date: April 28, 2022 (Dept. 502)

Motion: Defendant's Motion for Summary Judgment, or Summary Adjudication

**Tentative Ruling:**

To grant summary judgment in favor of Fresno Unified School District. (Code Civ. Proc. § 437c(c).) Prevailing party to submit to this court, within 10 days of service of the minute order, a proposed judgment consistent with the court's summary judgment order.

**Explanation:**

The ultimate burden of persuasion on summary judgment/adjudication rests on the moving party. The initial burden of production is to show, by a preponderance of the evidence, that it is more likely than not that there is no triable issue of material fact. (*Aguilar v. Atlantic Richfield* (2001) 25 Cal.4th 826, 850.) In determining whether any triable issues of material fact exist, the court must strictly construe the moving papers and liberally construe the declarations of the party opposing summary judgment. Any doubts as to whether a triable issue of material fact exist are to be resolved in favor of the party opposing summary judgment. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.)

Courts usually follow a three-prong analysis: identifying the issues as framed by the pleadings; determining whether the moving party has established facts negating the opposing party's claims and justifying judgment in the movant's favor; and determining whether the opposition demonstrates the existence of a triable issue of material fact. (*Lease & Rental Management Corp. v. Arrowhead Central Credit Union* (2005) 126 Cal.App.4th 1052, 1057-1058.)

Only if the moving party meets its initial burden does it shift to the opposing party, who is then subject to its own burden of production to make a *prima facie* showing that a triable issue of material fact exists. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850.) If the moving party fails to meet the burden of production, the opposing party has no evidentiary burden to even oppose the motion. (*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 467.) The defendant establishes a right to summary judgment by showing the plaintiff "lacks the evidence to sustain one or more elements of the cause of action." (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 756.)

The complaint alleges a single cause of action against Defendant Fresno Unified School District: Dangerous Condition of Public Property Pursuant to Government Code Section 835, et seq. The second cause of action for negligence is alleged only against "Non-Government Defendants, Does 51 through 75.

Government Code section 835 provides:

> Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
>
> (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
>
> (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Defendant contends plaintiff cannot establish that the football field contains the dangerous condition alleged: a large pothole, or one-foot wide, six-inch deep pothole. Nor can he establish defendant's actual or constructive notice of the "dangerous" condition.

*Dangerous Condition*

"'Dangerous condition' means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov. Code § 830.) "The existence of a dangerous condition ordinarily is a question of fact, but the issue may be resolved as a matter of law if reasonable minds can come to only one conclusion.

Plaintiff alleges he broke his ankle after stepping into a one-foot wide, six-inch deep pothole in the Fresno High School football field while participating in a physical education class. (UMF 2.) Plaintiff procured photographs of the condition of the football field six and ten days following the date of the incident that are presented by defendant as evidence in support of this motion. Defendant asserts that the court's examination of these photographs, paired with the fact that no holes were observed by P.E. teacher Coach Pempek and Vice Principal Salazar who were at the scene of the incident, is sufficient to demonstrate there is no dangerous condition of the field. (*Caloroso v. Hathaway* (2004) 122 Cal. App.4th 922; *Kasparian v. AvalonBay Communities, Inc.* (2007) 156 Cal.App.4th 11.)

Two photographs specifically are referenced in Plaintiff's deposition testimony as depicting the hole in which plaintiff fell constituting the dangerous condition. (UMF 17: Berger Decl., Exh. 2, Plaintiff Depo. at 27:17-29:3, 31:6-15, 35:1-14 and Exhibits "D" and "E" attached thereto.) This fact is undisputed by plaintiff. The photographs are of poor quality for examination to determine whether what is depicted in the photograph is a dangerous condition on the football field. Exhibit "D" is black and white and Exhibit "E" is heavily

pixelated. Both may depict a depression on the ground within an area of dirt or dead grass. Defendant identified 31 photographs in UMF 23 as evidence received in responses to discovery in support of the allegations of the complaint. (Berger Decl., Exh. 6, Exh. C attached thereto.) There does not appear to be an objection to the photographs taken on behalf of plaintiff and referred to in portions of the deposition of Plaintiff cited as evidence in support of the football field having multiple holes. (AMF 4, 5, 7 and 8.) This exhibit contains better quality photographs of the same photographs attached as Exhibits "D" and "E." The better quality photographs do not depict a "pothole," "large hole," or six-inch deep, one-foot wide hole as is described as the dangerous condition on the football field in plaintiff's complaint and deposition testimony. At best they depict a depression in an area of dead or dormant grass on the field.

No holes were observed by P.E. teacher Coach Pempek or Vice Principal Salazar who were at the scene of the incident on January 28, 2020. (UMF 8: Pempek Decl. at ¶ 5 and Salazar Decl. at ¶ 4.)

The evidence presented effectively shifts the burden to prove the existence of a triable issue of material fact to Plaintiff. Plaintiff did not dispute that he fell into a one-foot wide, six-inch deep pothole in the football field on January 28, 2020. (UMF 2.) Plaintiff did not dispute that the photographs he was shown in deposition and attached as Exhibits "D" and "E" thereto depict the alleged pothole. (UMF 17.)

Plaintiff disputes that neither of defendants' employees saw a hole by referencing Plaintiff's deposition testimony at page 49, lines 22 through 23[3].

21 Q. Did he say anything about the hole?
22 A. No. He seen me lying next to the hole, I
23 believe.

The "he" referred to is Coach Pempek. Plaintiff's belief that Coach Pempek saw a hole next to plaintiff on the day of the incident does not contradict Coach Pempek's declaration that he did not observe a hole. Included in the pages of Coach Pempek's deposition testimony, but not cited by plaintiff in his opposition, Plaintiff's attorney asked directly:

4 Q. All right. Before Joe got on the -- I
5 believe it was a golf cart with Mr. Salazar, did you
6 notice any holes or any divots in the field around
7 him?
8 A. No, I didn't.

(Seeman Decl., Exh. A, Pempek Depo. at 20:4-8.)

Plaintiff asserts that Coach "Pempek testified that he was aware of dirt patches, holes, bald spots, and other hazardous conditions on the field during the winter months" to dispute that Coach Pempek was not aware of any potholes in the field between January 27, 2020 and February 7, 2020. (Plaintiff's Response to UMF 19.) The deposition testimony citation to support this dispute of UMF 19 describes "worn spots here and there, … based on use …," "the grass is not growing as well as it grows in other places,"

[3] The citation omits the question asked to plaintiff. The entire question and cited answer are included here.

"occasionally there might be a bald spot where there's not as much grass growing." (Pempek Depo. at 24:15-25:8.) There is no description of any holes or use of the phrase "hazardous conditions" by the witness. The deponent's testimony is consistent with what is depicted in the photographs alleged to show the "hole" in which plaintiff fell. The evidence cited does not dispute that Coach Pempek did not observe a hole on the football field. (UMF 8 and 19.)

Plaintiff offered no evidence to dispute that Mr. Salazar did not see the hole in which plaintiff allegedly fell. (UMF 8.) Plaintiff asserts that Mr. Salazar "does not dispute that the photographs [he was shown in deposition] accurately depict the Fresno High School football field." Mr. Salazar's deposition testimony acknowledges that the photographs are of the football field. (AMF 8: Seeman Decl. Exh. C, Salazar Depo. at 36: 1-11.) This does not create a question of whether there was a hole constituting a dangerous condition on that football field. If Mr. Salazar was asked directly if he saw a hole on the football field on the date of the incident that portion of the deposition was not included in plaintiff's evidence.

Defendant FUSD has presented evidence that no dangerous condition as alleged in the plaintiff's complaint existed on the football field at the time of the incident. (UMF 2, 8, 17, 19.) The evidence presented by plaintiff in support of his allegation that a dangerous condition of a large pothole existed on the football field on January 28, 2020 fails to demonstrate the existence of the dangerous condition described. Although plaintiff contends that the existence of a number of bare spots and dirt patches throughout the field make the football field a dangerous condition, this is not the dangerous condition described by plaintiff in his Complaint or deposition alleged to have caused his injury. In this instance, reasonable minds can come to but one conclusion: the existence of a large pothole alleged to be a dangerous condition on the football field causing plaintiff's injury is not supported by plaintiff's evidence.

Therefore, the motion for summary judgment as to all causes of action against Fresno Unified School District is granted.

*Evidentiary Objections*

Evidentiary objections should generally state: 1) the language *verbatim* to which objection is made; 2) the page and line number and document where such language appears; and 3) the legal ground for objection with the same specificity as would be required at trial. (*Schoendorf v. U.D. Registry, Inc.* (2002) 97 Cal.App.4th 227, 240, fn. 2.) Objections are made to the *evidence supporting the fact*, and not to the *facts* stated on the separate statement. Furthermore, objections must be submitted in the proper format required by Rule of Court 3.1354 (filed separately, quoting the objectionable material and clearly stating the grounds for objections).

Plaintiff's objections to UMF 8 and 19, described as Objection 4 and 10, respectively, in the Response to FUSD's Separate Statement, are unclear if they are objecting to the content of the Separate Statement (which is quoted verbatim) or the supporting evidence thereof (the citation of which is given). To the extent that the objections appear to be directed to the use of Coach Pempek and Mr. Salazar's declarations as evidence in support of the motion, those objections are overruled. Code

of Civil Procedure section 437c(e) grants the court the discretion to deny a motion for summary judgment if the only proof of a material fact offered in support of summary judgment is a declaration made by an individual who was the sole witness to that fact. That there was more than one witness to the fact of the absence of the pothole supports the decision to allow the declarations as evidence of the facts. Additionally, plaintiff had the opportunity to depose these witnesses and has not presented evidence that either witness's deposition testimony contradicted the previous declarations.

As to plaintiff's remaining evidentiary objections, the court declines to rule on them, as the evidence was not material to the disposition of the motion. (Code Civ. Proc., § 437c, subd. (q).)

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: RTM on 4/27/2022.**
(Judge's initials) (Date)