

**Tentative Rulings for May 4, 2022**  
**Department 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).)

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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.

21CECG00531	<i>Henry Nutt v. ASFC, LLC</i> is continued to Thursday, May 5, 2022, at 3:30 p.m. in Department 503
20CECG03553	<i>Mercado v. California Department of Social Services</i> is continued to Thursday, May 5, 2022, at 3:30 p.m. in Department 503
20CECG02061	<i>The Servants and Handmaids of the Sacred Heart of Jesus v. Joel Swanbom</i> is continued to Wednesday, May 25, 2022, at 3:30 p.m. in Department 503

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## **Tentative Rulings for Department 503**

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**Tentative Ruling**

Re: **Carrillo v. Kourosh Sarkhosh, M.D.**  
Superior Court Case No. 20CECG03429

Hearing Date: May 4, 2022 (Dept. 503)

Motion: Defendant's Demurrer to Second Amended Complaint

**Tentative Ruling:**

To overrule the special demurrers. (Code Civ. Proc., § 430.10, subd. (f).) To sustain the general demurrer to the first cause of action, with leave to amend. (Code Civ. Proc., § 430.10, subd. (e).) All new allegations shall be placed in **boldface** type. Any amended complaint shall be filed within 10 days of service of the order by the clerk. To overrule the general demurrer to the second cause of action. (Code Civ. Proc., § 430.10, subd. (e).) To grant judicial notice of items nos. 1 and 2 of defendant's request, but to deny item nos. 3 and 4.

**Explanation:**

"In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." (Code Civ. Proc., § 452.) However, the purpose of a complaint "is to present and define the issues, to form the foundation of, and to limit, the proof to be submitted; and to advise the court and the adverse party as to what is relied on as a cause of action." (*Roth v. Cottrell* (1952) 112 Cal.App.2d 621, 624.) Accordingly, conclusory allegations are insufficient. (*Freeman v. San Diego Ass'n of Realtors* (1999) 77 Cal.App.4th 171, 189.) And "statutory causes of action must be pleaded with particularity . . . ." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790.)

*First Cause of Action: Harassment in Violation of Civil Code Section 51.9*

Civil Code section 51.9 provides, in relevant part:

(a) A person is liable in a cause of action for sexual harassment under this section when the plaintiff proves all of the following elements:

(1) There is a business, service, or professional relationship between the plaintiff and defendant or the defendant holds himself or herself out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a third party. Such a relationship may exist between a plaintiff and a person, including, but not limited to any of the following persons:

(A) Physician, psychotherapist, or dentist. . . .

[¶] . . . [¶]

(2) The defendant has made sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and pervasive or severe.

(3) The plaintiff has suffered or will suffer economic loss or disadvantage or personal injury, including, but not limited to, emotional distress or the violation of a statutory or constitutional right, as a result of the conduct described in paragraph (2).

Plaintiff alleges that defendant's prescribing of controlled substances led to the existence of a professional relationship. (SAC, ¶ 6.) The court previously noted that the first amended complaint alleged no other facts describing the nature of the professional relationship or its formation. (See *C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1106-1107 [although allegations of a fiduciary relationship are not required, the existence of a professional relationship is an element for potential liability].) In sustaining the demurrer to the first amended complaint, the court noted that plaintiff did not allege whether the substances were actually "controlled"<sup>1</sup> when they were prescribed, or their frequency, and also that there were no facts alleged of diagnosis, treatment, or payment. The second amended complaint still lacks these details.

While plaintiff adds an allegation that defendant admitted in deposition that plaintiff became his patient once he prescribed her that medication, plaintiff must still allege *facts* establishing the creation of a physician-patient relationship.

Otherwise, the second amended complaint is sufficient as to the remaining elements of the cause of action. Plaintiff alleges that she told defendant she was ill and needed treatment, and defendant volunteered to become her doctor and prescribed medication for plaintiff. (SAC, ¶ 7.) These allegations provide factual support for the allegation that a professional relationship was formed. Plaintiff alleges facts that defendant made unwanted sexual advances after the formation of the professional relationship, including that defendant "demanded that Plaintiff engage in sex with him in order to continue treating her and prescribing medication." (*Ibid.*) Plaintiff alleges that she "has suffered or will suffer economic loss or disadvantage or personal injury, including, but not limited to, emotional distress or the violation of a statutory or constitutional right, as a result of the conduct by [defendant]." (SAC, ¶ 8.) These facts are sufficient to allege sexual harassment.

The court notes that inability of the plaintiff to easily terminate the relationship is not a requirement found in Civil Code section 51.9. As authority for this element, defendant quotes from *C.R. v. Tenet Healthcare Corp.*, *supra*, 169 Cal.App.4th at p. 1105, but the C.R. court was quoting an old version of section 51.9. This requirement is not in the current statute.

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<sup>1</sup> "A complaint must allege the ultimate facts necessary to the statement of an actionable claim. It is both improper and insufficient for a plaintiff to simply plead the evidence by which he hopes to prove such ultimate facts." (*Careau & Co. v. Security Pac. Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1390, emphasis in original.)

### Second Cause of Action: Intentional Infliction of Emotional Distress

The elements of a cause of action for intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. (*Wilson v. Hynek* (2012) 207 Cal.App.4th 999, 1009.) To be "outrageous," the conduct must be "so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Ibid.*, internal citation and quotations omitted.) To survive demurrer, the plaintiff must allege with "great specificity the acts which he or she believes are so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Yau v. Santa Margarita Ford, Inc.* (2014) 229 Cal.App.4th 144, 160–161, internal citations, quotations, and brackets omitted.)

Plaintiff made no amendments directly to the second cause of action for intentional infliction of emotional distress. Instead, she appears to rely wholly on the preceding allegations of the second amended complaint to supply the facts needed for the intentional infliction of emotional distress claim. (See SAC, ¶ 16, incorporating by reference ¶¶ 1-15.)

Plaintiff has added additional factual allegations to the second amended complaint, including numerous sexually harassing statements made after the initiation of her alleged professional relationship with defendant. Plaintiff has addressed the concerns with the first amended complaint by adding further descriptions of defendant's conduct and statements. Defendant notes that plaintiff does not, however, describe her emotional distress in detail. The cases previously cited by the court for this proposition are inapplicable. *Bikina v. Mahadevan* (2015) 241 Cal.App.4th 70, and *Wong v. Jing* (2010) 189 Cal.App.4th 1354, involved anti-SLAPP motions where the court was addressing whether the plaintiff had submitted sufficient evidence to show probability of prevailing on the intentional infliction of emotional distress claim. This standard and burden of proof are not applicable in the context of a demurrer. Earlier cases required specific fact pleadings for various nonfraud torts (e.g., intentional infliction of emotional distress, interference with business relations, unfair competition, etc.). (See *Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 618.) The California Supreme Court has held that "fraud is the only remaining cause of action in which specific pleading is required to enable the court to determine on the basis of the pleadings alone whether a foundation existed for the charge." (*Quelimane Co., Inc. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 46-47.)

While defendant contends that the relationship was primarily a personal one, we are at the pleading stage and must accept as true the allegations of the complaint. Plaintiff alleges that a physician-patient relationship formed. She was depressed and emotionally vulnerable. She tried to terminate the personal aspect of the relationship, but defendant demanded that she have sex with him in order to continue treating her and prescribing medication. The allegations are sufficient to allege extreme and outrageous conduct. The court finds the allegations sufficient as to the second cause of action, but not as to the first cause of action, because specificity in pleading is required for the latter, but not the former.

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### Tentative Ruling

Re: **Yang v. Navarrete**  
Superior Court Case No. 21CECG02561

Hearing Date: May 4, 2022 (Dept. 503)

Motion: Petition to Compromise Minor's Claim

### Tentative Ruling:

To grant. Orders signed. No appearances necessary.

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: KAG on 5/2/2022.  
(Judge's initials) (Date)

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### Tentative Ruling

Re: **Enriquez et al. v. Soliz et al.**  
Superior Court Case No. 21CEG01001

Hearing Date: May 4, 2022 (Dept. 503)

Motion: Petition to Compromise Minor's Claim for Jaycen Enriquez

### Tentative Ruling:

To grant. Orders signed. No appearances necessary.

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:** KAG **on** 5/2/2022.  
(Judge's initials) (Date)



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### Tentative Ruling

Re: **Berber v. Cartridge**  
Superior Court Case No. 20CECG01945

Hearing Date: May 4, 2022 (Dept. 503)

Motion: Defendants' Motion for Leave to File a Cross-Complaint

### Tentative Ruling:

To grant, with defendants granted 10 days' leave to file the cross-complaint. The time in which the cross-complaint can be filed will run from service by the clerk of the minute order.

**Explanation:**

No party has filed opposition to this request, and it appears that defendants' claims against the proposed cross-defendant arise from the "same transaction, occurrence, or series of transactions or occurrences as the cause brought against him." (Code Civ. Proc., § 428.10, subd. (b).) Therefore, it is in the interests of justice to allow the filing of the proposed cross-complaint.

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: KAG on 5/2/2022.  
(Judge's initials) (Date)

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### Tentative Ruling

Re: ***Abdi v. National Interstate Insurance Company***  
Superior Court Case No. 20CECG02602

Hearing Date: May 04, 2022 (Dept. 503)

Motion: Defendant's Demurrer to the Complaint

### Tentative Ruling:

To sustain the demurrer to the first and only cause of action on the grounds of uncertainty and failure to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subds. (e), (f).) Plaintiff is granted 20 days' leave to file a first amended complaint. The time to file the first amended complaint will run from service by the clerk of the minute order. All new allegations must be set in **boldface** type.

**Explanation:**

Defendant demurs to the sole cause of action for negligence, contending that the complaint is uncertain and fails to state a cause of action. The complaint is indeed uncertain, as it is completely devoid of any facts to apprise defendant of the issues against it. It is unknown what injury plaintiff has suffered, when the injury occurred, and how defendants caused the injury. (Code Civ. Proc., §425.10, subd. (a)(1) [a complaint must contain “a statement of the facts constituting the cause of action”].)

Similarly, plaintiff has alleged no facts to establish any element to support his negligence claim. The elements of a negligence claim are: “a legal duty of care, breach of that duty, and proximate cause resulting in injury.” (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158.)

As a result, the demurrer is sustained, with leave to amend.

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: KAG on 5/3/2022.  
(Judge's initials) (Date)

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**Tentative Ruling**

Re: **Zybura v. Freitas**  
Superior Court Case No. 20CECG03201

Hearing Date: May 4, 2022 (Dept. 503)

Motion: Defendants' Demurrer to the Second Amended Complaint<sup>2</sup>

**Tentative Ruling:**

To sustain the demurrer to the first cause of action. To overrule the demurrer to the second cause of action. Plaintiffs are granted 10 days' leave to file a third amended complaint, which will run from service by the clerk of the minute order. New allegations/language must be set in **boldface** type.

**Explanation:**

Meet and Confer

The parties have not met and conferred as required by Code of Civil Procedure section 430.41, subdivision (a) and section 435.5, subdivision (a). Defense counsel's declaration filed April 26, 2022, and again on May 2, 2022, advises of two phone calls to plaintiffs' counsel's office on April 22, 2022, which were answered with a recording indicating no voicemail was set up and ending the call. There was no effort to contact plaintiffs' counsel by email to schedule a call or obtain a working phone number. Moving counsel's attempts to meet and confer are inadequate and do not demonstrate a good faith attempt to meet and confer before the filing of this demurrer.

Nonetheless, given the lack of opposition to the demurrer and the court's impacted calendars, the court addresses the demurrer on the merits.

Demurrer

Defendants have not filed a "demurrer" with each ground of demurrer stated in a separate paragraph and stating whether it applies to the entire complaint or to specific causes of action. (Cal. Rules of Court, rule 3.1320(a).) Defendants appear to use the notice of motion to state the grounds for the demurrer. The document reads:

... Defendant Keith Freitas joined by Defendant Sea Pine Ventures, Inc. will Demur to the First Amended Complaint of the Plaintiffs Edward Zybura, AZ

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<sup>2</sup> Defendants title the motion as a demurrer to the first amended complaint. However, in reality, this is a demurrer to a second amended complaint. The original complaint was filed on October 29, 2020. A first amended complaint was subsequently filed on November 6, 2020. After a demurrer to that complaint was taken off calendar for inadequate meet and confer, the parties stipulated to filing a further amended complaint. This document, filed July 8, 2021, was again titled the first amended complaint. It should have been titled the second amended complaint.

Enterprises, Inc., dba Organic Ag Products under the authority of CCP §430.30 and §430.40. The basis of the Demurrer will be at [sic] no cause of action for breach of written contract or breach of contract quasi contract has been validly alleged or stated.

(Notice of Demurrer, pp. 1:23-2:2, emphasis in original.)

The demurrer as worded in the notice is generally to the entire first amended complaint.<sup>3</sup> Where there are several causes of action in the complaint, a demurrer to the entire complaint may be overruled if any cause of action is properly stated. (*Warren v. Atchison, Topeka & Santa Fe Ry. Co.* (1971) 19 Cal.App.3d 24, 36.) Although there are causes of action properly stated in the amended complaint, the court will nonetheless rule on the merits of the two causes of action at issue in the demurrer.

### Breach of Contract

To adequately plead breach of contract, the plaintiff must allege: (1) the existence of a contract; (2) the plaintiff's performance or excuse for nonperformance; (3) breach; and (4) that the breach caused the plaintiff harm. (*Wall Street Network Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1178.) Where the action is based on a written contract, the contract terms must be set out verbatim in the body of the complaint or a copy of the written agreement must be attached and incorporated by reference. (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307.)

Plaintiffs allege the contract, attach it to the amended complaint, and further allege that they performed, defendants breached, and they have been damaged by the breach. The claim alleges sufficient facts. However, the written contract attached to the amended complaint does not appear to be complete. Plaintiffs have alleged that defendants drafted the agreement and did not provide them with a signed copy. (FAC ¶¶ 21-22.) The defect in attaching an incomplete copy of the agreement appears curable.

The demurrer to the first cause of action is sustained with leave to amend.

### Breach of Contract – Quasi Contract

"[A]n action based on an implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter." (*Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194, 203 ....) However, "restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason." (*McBride v. Boughton* [(2004)] 123 Cal.App.4th [379, 388] ....) Thus, a party to an express contract can assert a claim for restitution based on unjust enrichment by "alleg[ing] in that cause of action] that the express contract is void or was rescinded."

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<sup>3</sup> As previously explained, the operative pleading, filed July 8, 2021, is erroneously titled the "First Amended Complaint." It is, however, a second amended complaint which is at issue.

(*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 231.)

The demurrer to the second cause of action is overruled.

## Tentative Ruling

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