1-13-23
Department 9
Tentative Rulings

1. JEFF SHURTZ v. BOARD OF FORESTRY AND FIRE PROTECTION 21CV0076

Petitioner filed his Petition for Writ of Administrative Mandate and Request for Stay Order on November 1, 2021. The parties stipulated to a hearing date of January 13th at 8:30 a.m. On October 4th a Request for Dismissal was filed and dismissal was entered that same day by the clerk of the court. Given that the matter has been dismissed, the present hearing date is vacated.

TENTATIVE RULING #1: THE HEARING IS VACATED. NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; *SEE ALSO* LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999). NOTICE TO ALL PARTIES OF A REQUEST FOR ORAL ARGUMENT AND THE GROUNDS UPON WHICH ARGUMENT IS BEING REQUESTED MUST BE MADE BY TELEPHONE OR IN PERSON BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; El Dorado County Local Rule 8.05.07. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM, PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

2. PEOPLE v. JOHN JOSEPH MACEIUNAS 22CV0482

On March 15, 2022, the People filed a petition for forfeiture of cash seized by the El Dorado County Sheriff's Department. According to the petition, $27,000 in U.S. Currency was seized by the El Dorado County Sheriff's Office. Said funds are currently in the hands of the El Dorado County District Attorney's Office. The property became subject to forfeiture pursuant to Health and Safety Code Section 11470(f), because it is a thing of value furnished or intended to be furnished by a person in exchange for a controlled substance, the proceeds were traceable to such an exchange, and the money was used or intended to be used to facilitate a violation of various provisions of the Health and Safety Code. The People pray for judgment declaring that the money is forfeited to the State of California.

The petition was properly served, and Respondent filed a claim opposing forfeiture on May 12, 2022. The matter came before the court for hearing on May 20th but was continued to July 1st. On July 1st the parties again requested a continuance to give them time to work toward a potential resolution. The hearing was continued to the present date.

Where a verified claim is filed as to property seized by the state, the forfeiture proceeding is to be set for hearing and the proceeding shall have priority over other civil cases. Health & Safety Code § 11488.5(c)(1). The hearing is to be held in front of a jury unless waived by the consent of all parties. Health & Safety Code § 11488.5(c)(2).

The parties are ordered to appear.

TENTATIVE RULING #2: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JANUARY 13, 2023, IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

1-13-23
Department 9
Tentative Rulings

3. VERONICA ZAPATA UROSA v. MARSHALL MEDICAL CENTER 22CV0705

Counsel Michelle Jenni, filed her Notice of Motion and Motion to be Relieved as Counsel and her supporting declaration on November 16th. The motion was served on Plaintiff on December 1st. Counsel has shown good cause for her withdrawal as the attorney of record for Plaintiff given the breakdown in communication. The motion is granted.

TENTATIVE RULING #3: THE MOTION TO BE RELIEVED AS COUNSEL IS GRANTED. WITHDRAWAL WILL BE EFFECTIVE AS OF THE DATE OF FILING PROOF OF SERVICE OF THE FORMAL, SIGNED ORDER, UPON THE CLIENT. NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; *SEE ALSO* LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999). NOTICE TO ALL PARTIES OF A REQUEST FOR ORAL ARGUMENT AND THE GROUNDS UPON WHICH ARGUMENT IS BEING REQUESTED MUST BE MADE BY TELEPHONE OR IN PERSON BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; El Dorado County Local Rule 8.05.07. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

1-13-23
Department 9
Tentative Rulings

4. RODNEY BROWN v. COUNTY OF EL DORADO, ET AL PC20200569

Counsel for Plaintiff, Geral H. Scher, filed his Notice of Motion and Motion to be Relieved as Counsel and her supporting declaration on November 7th. The motion was personally served on Plaintiff on November 14th. Counsel has shown good cause for his withdrawal as the attorney of record for Plaintiff due to the irreparable breakdown of the attorney-client relationship. The motion is granted.

TENTATIVE RULING #4: THE MOTION TO BE RELIEVED AS COUNSEL IS GRANTED. WITHDRAWAL WILL BE EFFECTIVE AS OF THE DATE OF FILING PROOF OF SERVICE OF THE FORMAL, SIGNED ORDER, UPON THE CLIENT. NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; *SEE ALSO* LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999). NOTICE TO ALL PARTIES OF A REQUEST FOR ORAL ARGUMENT AND THE GROUNDS UPON WHICH ARGUMENT IS BEING REQUESTED MUST BE MADE BY TELEPHONE OR IN PERSON BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; El Dorado County Local Rule 8.05.07. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

5. PEOPLE OF THE STATE OF CA v. WILLIAM PAT HARRIS PC20200368

The People filed a Petition for Forfeiture on August 3, 2020, seeking the forfeiture of $285,347.90 seized by the El Dorado County Sherriff's Department. The funds are currently in the possession of the El Dorado County District Attorney's Office. According to the petition, funds became subject to forfeiture pursuant to Health and Safety Code Section 11470(f), because the money constitutes a thing of value furnished or intended to be furnished by a person in exchange for a controlled substance, the proceeds were traceable to such an exchange, and the money was used or intended to be used to facilitate a violation of various provisions of the Health and Safety Code. The People pray for judgment declaring the money be forfeited to the State of California.

The petition was properly served, and Claimant filed a claim opposing forfeiture in response. A hearing was originally scheduled for January 14, 2022, but due to several continuances it is now set for the present date. This matter is related to PC20200369 which is also scheduled for hearing on a petition for forfeiture.

Where a verified claim is filed as to property seized by the state, the forfeiture proceeding is to be set for hearing and the proceeding shall have priority over other civil cases. Health & Safety Code § 11488.5(c)(1). The hearing is to be held in front of a jury unless waived by the consent of all parties. Health & Safety Code § 11488.5(c)(2).

The parties are ordered to appear.

TENTATIVE RULING #5: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JANUARY 13, 2023, IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

6. PEOPLE OF THE STATE OF CA v. RUDOLPH VALENCIA PC20200369

The People filed a Petition for Forfeiture on August 3, 2020, seeking the forfeiture of $729,247.58 seized by the El Dorado County Sherriff's Department. The funds are currently in the possession of the El Dorado County District Attorney's Office. According to the petition, funds became subject to forfeiture pursuant to Health and Safety Code Section 11470(f), because the money constitutes a thing of value furnished or intended to be furnished by a person in exchange for a controlled substance, the proceeds were traceable to such an exchange, and the money was used or intended to be used to facilitate a violation of various provisions of the Health and Safety Code. The People pray for judgment declaring the money be forfeited to the State of California.

The petition was properly served, and Claimant filed a claim opposing forfeiture in response. A hearing was originally scheduled for October of 2020, but due to several continuances it is now set for the present date. This matter is related to PC20200368 which is also scheduled for hearing on a petition for forfeiture.

Where a verified claim is filed as to property seized by the state, the forfeiture proceeding is to be set for hearing and the proceeding shall have priority over other civil cases. Health & Safety Code § 11488.5(c)(1). The hearing is to be held in front of a jury unless waived by the consent of all parties. Health & Safety Code § 11488.5(c)(2).

The parties are ordered to appear.

TENTATIVE RULING #6: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JANUARY 13, 2023, IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

1-13-23
Department 9
Tentative Rulings

7. CALIFORNIA SPORTFISHING PROTECTION ALLIANCE V. LAHNON REGIONAL 22CV0841

Plaintiffs filed their Verified Petition for Writ of Administrative Mandate on June 15, 2022. On October 26, 2022, the parties filed a stipulation and joint request for extension of time to prepare the administrative record to December 19, 2022. The court executed the stipulation and the time to prepare the administrative record was extended to December 19, 2022.

On December 13, 2022, the parties filed a second stipulation and joint request for extension of time. They indicate that the record is taking longer to prepare than anticipated and ask that they extend the time to prepare the administrative record from December 19, 2022 to February 17, 2023. The court executed the request for extension on December 13th.

No appearance is required. A review hearing is set for February 24, 2023 at 8:30 a.m. in Department 9 to assess the status of the preparation of the record.

TENTATIVE RULING #7: NO APPEARANCE IS REQUIRED. A REVIEW HEARING IS SET FOR FEBRUARY 24, 2023 AT 8:30 A.M. IN DEPARTMENT 9 TO ASSESS THE STATUS OF THE PREPARATION OF THE RECORD. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

1-13-23
Department 9
Tentative Rulings

8. CACH LLC v. DAVID SILVA **PCL20110950**

TENTATIVE RULING #8: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JANUARY 13, 2023, IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

9. CITY OF ROCKLIN v. LEGACY FAMILY ADVENTURES PC20190309

Plaintiff's Motion to Enforce Compliance with Deposition Subpoena for Production of Business Records – Roland Candee

On September 22, 2022, Plaintiff filed and served a Notice of Motion and Motion to Enforce Compliance with Deposition Subpoena for Production of Business Records to Roland Candee. Along with the motion, Plaintiff filed and served its Memorandum of Points and Authorities, Declaration of Sean J. Filippini, a Separate Statement and a Proposed Order.

In opposition to the motion, Non-Party Ronald Candee (hereinafter "Mr. Candee") filed and served his Opposition to Motion to Compel Production of Business Records, Declaration of Daniel A. King, Declaration of the Honorable Roland L. Candee (Ret.), and Response to Separate Statement on October 24th.

Plaintiff filed a reply supporting its motion and a declaration of Christopher M. Kolkey on October 28th. Thereafter, Plaintiff filed an Amended Notice of Motion and Motion to Enforce Compliance with Deposition Subpoena for Production of Business Records to Roland Candee, and for Monetary Sanctions and a Supplemental Declaration of Christopher M. Kolkey. Another Supplemental Declaration of Christopher M. Kolkey was filed and served on December 5th.

Mr. Candee filed a supplemental declaration of his own on December 20th.

Discovery Responses

According to Plaintiff, Candee invested in a company called Legacy Family Adventures – Rocklin, LLC ("LFA"). LFA is a defendant to this suit; so too is its owner David Busch ("Busch"). LFA entered into a contract with Plaintiff for the design, construction and operation of Quarry Park Adventures. Plaintiff quotes Mr. Candee as stating he has documentation of "well over a hundred conversations about the Rocklin project."

On August 16, 2022, Plaintiff issued a deposition subpoena for the production of business records by Mr. Candee. Mr. Candee's responses were due to be served no later than September 5, 2022. On September 3rd, Mr. Candee served objections only. Plaintiff argues the Requests for Production are each directly relevant to the case and fall well within the bounds of discoverable material. Plaintiff asserts that Mr. Candee is subject to the business records subpoena as there is no difference between that and a records and testimony subpoena. Even if there were a difference and personal records cannot be sought with a business records subpoena, Plaintiff surmises that as a significant investor in LFA, Mr. Candee was in fact engaged in a business venture. Further, Plaintiff argues there is no valid claim to privilege which would preclude the disclosure of the records.

Mr. Candee argues the requests are overly burdensome and would cost him thousands of dollars to forensically recover and review decades of documents. Further, according to Mr. Candee, many of the materials in response to the demands are outside the scope of discovery

as they are not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff, as Mr. Candee argues, has not shown good cause for the production of documents from a non-party, has not taken reasonable steps to avoid placing a burden on the non-party for recovery of electronically stored information ("ESI") and has not made a good faith effort to meet and confer on the issue. Further, even if some records are discoverable, Mr. Candee argues Plaintiff used the wrong mechanism to obtain them as a business records subpoena applies only to businesses documents, not personal documents as sought by Plaintiff's subpoena.

Mr. Candee maintains the documents to be produced contain private financial information and information about the exercise of Mr. Candee's religion, both of which Mr. Candee argues are confidential. He also states that he was, at one time, a client of the Weintraub firm, thus many of the records are covered by the attorney-client privilege and attorney work product doctrine. Mr. Candee states that his documents contain his "thoughts, mental impressions, and evaluations of the claims, contentions, and strategies in this case," turning them over would allow Plaintiff to "…improperly take advantage of the industry and efforts of their adversary…" Opp. to Mtn. to Compel, 3:18-26.

Plaintiff responds by noting that during the meet and confer process, Mr. Candee raised only his objection on the basis that the subpoena was a business records subpoena. There was no discussion of overbreadth or undue burden. Plaintiff reached out to counsel for Mr. Candee after receiving their opposition and offered the following concessions: (1) the production of PDF files (and only native files for Word and Excel documents); (2) limit the scope of the requests insofar as the Texas parks were concerned; and (3) only seek documents concerning the Texas parks, Quarry Park Adventures, and the lawsuit. Mr. Candee still refused to comply. Plaintiff maintains it was justified in bringing the present motion and asks that Mr. Candee's request for sanctions be denied. Further, Plaintiff requests sanctions in the amount of $7,378 pursuant to Civil Procedure Section 2025.480(j).

Mr. Candee in his supplemental declaration provides in detail why he feels Plaintiff's case is without merit. He notes that he had expected Plaintiff to drop the motion to compel when he received a deposition notice with the exact same document requests.

Generally speaking, "…a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." Cal. Civ. Pro. § 2017.010. The overriding philosophy of the Discovery Act is that discovery should be liberally construed in order to take the 'game' element out of trial preparation by enabling the parties to obtain evidence necessary to evaluate and resolve their dispute before a trial is necessary. Greyhound Corp. v. Sup. Ct. 56 al. 2d 355 at 391 (1961). Thus, "[a]ny doubt about discovery is to be resolved in favor of disclosure." Advanced Modular Sputtering, Inc. v. Sup. Ct., 132 Cal. App. 4th 826 (2005). Where discovery is sought from a non-party, there is the additional safehold

that good cause must be shown to justify the production of any document, ESI, or tangible thing. Cal. Civ. Pro. § 2025.450.

The basis of the present action is whether not Defendants fraudulently induced Plaintiffs into a contractual agreement to establish a family adventure park. Mr. Candee has made known that he has journals which recount conversations directly relevant to this issue. In fact, he has referenced his journals to bolster his argument that Plaintiff's case is unfounded. It is not surprising, that Plaintiff now seeks to obtain those journals and any other relevant records Mr. Candee may have. Compelling Mr. Candee to produce the records which he purports to be directly relevant to the litigation, as well as any other discoverable information he may have, is in line with the intention of the Civil Discovery Act to take the gamesmanship out of litigation. With the exception of the first request, Plaintiff's production requests are each tailored to issues regarding Quarry Park Adventures, Busch entities operated in Texas, and the present lawsuit; each request seeks clearly discoverable information and Plaintiff has good cause to request their disclosure.

Regarding request number one, Plaintiff concedes, and the court agrees, that the request may be considered overbroad in that it seeks communications between Mr. Candee and Mr. Busch. With that, Plaintiff has indicated its willingness to limit that request to communications relating to (1) Quarry Park Adventures from January 1, 2016 to present; (2) Busch's Texas entities in Pflugerville and White Settlement from January 1, 2013 to present; and (3) the lawsuit itself. Plaintiff's proposed limitations appear to remedy the overbreadth of the first request and therefore the court finds request number 1, with the stated limitations, to be permissible.

Privileged communications are limited to a well-established set of statutory provisions. Cal. Ev. Code § 900 et. seq. "Except as otherwise provided by statute: ¶ (a) No person has a privilege to refuse to be a witness. ¶(b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing. ¶(c) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object, or other thing." Cal. Ev. Code § 911. For the privileges that do exist, they are to be strictly construed to avoid the improper suppression of otherwise relevant information. Sullivan v. Sup. Ct., 29 Cal. App. 3d 64, 71 (1972).

Here, Mr. Candee asserts three main privileges: religious privilege and attorney-client privilege. While there is a clergy-penitent privilege, it applies only to penitential communications to a member of the clergy. Cal. Ev. Code § 1030 et. seq. Mr. Candee is not and has never purported to be, acting in the capacity as a member of the clergy who in that capacity is in receipt of communications made in confidence, in the presence of no third person, with the duty to keep those communications privileged. According to Mr. Candee, he is the leader of a prayer and support group which involves "dozens of other parishioners." His journals contain notes regarding the "religious practice, prayers and other confidential information." Notes

regarding religious practices and prayers alone are not covered by the clergy-penitent privilege. Mr. Candee's blanket assertion that "other confidential information" is included is inadequate for the court to find that any privilege exists without any facts to support such a finding.

Turning to the claim of attorney-client privilege, a client, whether or not a party to the action, has the right to assert a claim of attorney-client privilege. Mylan Laboratories, Inc. v. Soon-Shiong, 76 Cal. App. 4th 71 (1999). The necessary element is an attorney-client relationship. A "client" is one who "directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity…" Cal. Ev. Code § 951. The "client" need not be a party to litigation or under the threat of litigation for the privilege to arise. Roberts v. City of Palmdale, 5 Cal. 4th 363, 371 (1993). "The party claiming the attorney-client privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e. a communication made in the course of an attorney-client relationship. [Citations omitted]" Costco Wholesale Corp. v. Sup. Ct., 47 Cal. 4th 725 (2009).

Plaintiff relies on *Smith v. Laguna Sur Villas Community Assn*., 79 Cal. App. 4th 639 (2000) for the proposition that the attorney-client privilege does not extend to a shareholder and *Zimmerman v. Sup. Ct.,* 220 Cal. App. 4th 389 (2013) to establish that the attorney-client privilege does not extend to an independent witness. Plaintiff is correct. However, Mr. Candee is not claiming privilege simply as a shareholder or as a witness; he alleges to have established an attorney-client relationship with the Weintraub firm to discuss his own interests regarding the state of his investment. Thus, the question is, has Mr. Candee sufficiently established that he was a client of the Wientraub firm separate and apart from his status as a passive investor and witness.

Mr. Candee states that he repeatedly sought legal advice from the firm regarding his personal interest in LFA and the outcome of the present suit. He has directly paid them for their services in connection with the suit. Mr. Candee is of the belief that he, Mr. Busch, and LFA were joint clients of the Weintraub firm. Plaintiff notes the clear conflict of interest in this arrangement and the court agrees. Mr. Candee has not provided any documentation of a conflict-of-interest waiver signed by the parties that would allow for such representation, nor has he provided copies of an engagement letter, documentation of any payments made to the firm or a declaration of any Weintraub attorneys indicating that there was in fact in an attorney-client relationship. The mere fact that Mr. Candee has had discussions with the Weintraub firm regarding the ongoing litigation is irrelevant given that he has also had repeated and extensive communications with Plaintiff's counsel regarding the merits of the case, potential mediation, and strategy. Never in those communications does he refer to the Weintraub firm as his attorneys. Nor does he ask Plaintiff to direct communications to the Weintraub firm instead of himself. In fact, when the subpoena was sent to Mr. Candee he did not refer Plaintiff to the Weintraub firm; he obtained separate counsel of his own.

Moreover, despite Mr. Candee's assertion that he consulted with the Weintraub firm in his capacity as a client seeking legal advice, in his October 25, 2019, declaration, he claims to actually have acted as a consultant to the firm, not a client. It is unclear how Mr. Candee can be at once a client and a professional consultant to the same firm. Communications in his capacity as a consultant *may* fall under the attorney work-product doctrine and would be privileged in that regard. *See* Cal. Civ. Pro. § 2018.030; *See also* Citizens for Ceres v. Sup. Ct. 217 Cal. App. 4th 889 (2013). However, without a privilege log this is simply conjecture.

In fact, without a privilege log the court is left to simply assume what documents may or may not be in existence and whether or not they may or may not be privileged. While Mr. Candee's claims of an attorney-client relationship are not particularly convincing in light of all of the circumstances, it is not outside the realm of possibility that documents do exist wherein Mr. Candee had discussions with the Weintraub firm either in his capacity as a professional consultant or as a client receiving legal advice. Thus, Mr. Candee is ordered to produce all documents responsive to the requests for which he does not assert a claim of privilege. Those documents alleged to be privileged shall be listed in a privilege log that complies with Civil Procedure Section 2031.240. The parties are to meet and confer in good faith over disagreements, if any, regarding the privileged nature of any of the listed documents.

In addition to his privilege objection, Mr. Candee objects to the requests on the basis that they seek ESI which would be unduly burdensome and costly to produce. Pursuant to Civil Code Section 2020.220(a), a deposition subpoena may require the production of electronically stored information and may specify the form or forms in which the ESI is to be produced. Cal. Civ. Pro. § 2020.410(a) & § 1985.8(b). The person responding to the subpoena may object based on the form in which the documents are to be produced (Cal. Civ. Pro. § 1985.8(b)) as well as on a claim of undue burden or expense. Cal. Civ. Pro. § 1985.8(e). Where such an objection is being made, the burden of proof rests with the objecting party to show that the "…information is from a source that is not reasonably accessible because of undue burden or expense." Cal. Civ. Pro. § 1985.8(e).

What constitutes an undue burden or expense is a heavily fact specific determination that rests with the discretion of the court. John Park v. Law Offices of Tracey Buck-Walsh, 73 Cal. App. 5th 179 (2021). Where the objecting party has successfully shown an undue burden or expense in relation to producing the ESI the court is to protect the non-party from incurring such burden or expense. Cal. Civ. Pro. § 1985.8(l). In doing so, the court may, upon a finding of good cause, order the discovery of the ESI subject to certain conditions and the allocation of expenses as ordered by the court. Cal. Civ. Pro. § 1985.8(f) & (g).

Mr. Candee relies heavily on his argument that ESI would be burdensome and costly for him to recover but he doesn't provide any factual basis for that assertion. He does not state which, if any, documents are being stored electronically and if they are stored electronically, that they are stored on anything more than a simple home computer. He states that extraction

of the electronically stored information while preserving the metadata would require the involvement of technological experts which would cost tens of thousands of dollars. But he also goes on to state, "I rarely even use electronic mail and generally maintain my personal notes in old-fashioned written form." Decl. Candee, 4:3-4:4. It is unclear how, if he rarely uses electronics for mail or note keeping, it would cost thousands of dollars for him to produce what little electronic information he does have.

As Mr. Candee cites, "…the court must limit the frequency or extent of discovery if it finds the likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues." Park v. Law Offices of Tracey Buck-Walsh, 73 Cal. App. 5th 179, 188-190 (2021). Here, Plaintiff has shown that the documents requested are directly relevant to the claims it is making in the present suit. In fact, some of the documents requested are so important that Mr. Candee himself relied on them repeatedly in his attempts to interject himself into this matter. Filippini Decl., ¶ 2, Ex. C ("It is my opinion that my personal prayer journals physically document well over a hundred conversations about the Rocklin project that I would have had with Dave over the years, including references to may specific meetings."). Mr. Candee, on the other hand, has not provided a reliable estimate of cost or a satisfactory explanation as to why retrieval of the documents would be unduly burdensome. His counsel notes the time and expense of an ediscovery expert, but it appears no such expert has been consulted with to estimate how much it would cost to retrieve documents on a computer which Mr. Candee concedes he rarely uses. In Mr. King's email of October 25th he concedes "…we cannot yet know the full answer to how much it will cost…" noting the overbreadth objections made to the requests that needed to be resolved. At that time, Mr. King asked that Mr. Candee be allowed to produce electronic documents in paper or PDF format. Plaintiff has agreed to allow for the production of PDFs, with Word and Excel documents to be produced in their native format. It appears this offer was agreed too as Mr. Kolkey notes in his November 3rd email, "the only remaining issues would be privilege and when the documents would be produced."

It appears the parties have agreed to the production of ESI in PDF, Word or Excel format and the court does not see any reason why doing so would be either unduly burdensome or costly, especially given that Mr. Candee rarely uses electronic communications and notes. The cost shifting provisions of Section 1985.8 are triggered when there is a showing of undue burden or expense, however, as noted above, the court has no real information as to the expected burden or expense. That said, the court does seek to ensure that compliance with the subpoena is not unduly burdensome on Mr. Candee as he not a party to the action. Accordingly, Plaintiff is to pay the cost of an ediscovery expert for the retrieval of ESI if one is determined to be necessary.

Finally, much of the disagreement between the parties centers around whether or not Mr. Candee and his documents are subject to a business records subpoena. According to the

Declaration of Daniel A. King, and Mr. Candee, Plaintiff has subpoenaed Mr. Candee to testify in a deposition with a demand for production of documents which makes the same requests as those in the business records subpoena. Thus, the issue of whether or not the business records subpoena is the correct mechanism for obtaining the requested documents is moot. The documents are to be provided regardless of the court's determination on this issue.

Sanctions

Plaintiff is seeking sanctions in the amount of $7,378 pursuant to Civil Procedure Section 2025.480(j). This accounts for 20.8 hours of work spent drafting, researching, and revising the motion and reply papers as well as the meet and confer letters.

Likewise, Mr. Candee seeks to recover his costs and fees associated with responding to the present motion which he asserts would have been avoided had Plaintiff engaged in good faith meet and confer efforts. Mr. Candee requests $7,410.

"The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel an answer or production, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." Cal. Civ. Pro. § 2025.480.

In requesting sanctions, Mr. Candee surmises that many of the issues could have likely been resolved if the parties had engaged in reasonable meet and confer efforts. The parties since had four months to continue meet and confer efforts and many of the issues were in fact resolved, but not all. Given the multitude of issues in this motion it appears that neither party has been entirely successful or unsuccessful in their arguments. Therefore, the court finds the imposition of sanctions on either party to be improper. Both parties' requests for sanctions are denied.

Plaintiff's Motion to Compel Production of Documents by Defendants Legacy Family Adventures – Rocklin and Busch

On October 7, 2022, Plaintiff filed and served its Notice of Motion and Motion to Compel Production of Documents from Legacy Family Adventures – Rocklin, LLC and David Busch, and for Monetary Sanctions. Concurrently therewith, Plaintiff filed and served its Memorandum of Points and Authorities, Declaration of Christopher M. Kolkey, Declaration of Todd Haley and a proposed Order. An amended Memorandum of Points and Authorities was filed and served on October 10th.

Legacy Family Adventures-Rocklin, LLC ("LFA") and David Busch ("Busch") (collectively referred to herein as "Defendants") filed and served their documents in opposition to the motion on October 24, 2022. Plaintiff filed its Reply on October 31st. Thereafter, on November 1st, Defendants filed a Supplemental Declaration of Robert C. Weems re Motion to Compel

Production of Documents and Motion to Vacate or Continue Trial. Plaintiff objects to the supplemental declaration as an improper sur-reply.

Consideration of a sur-reply is within the discretion of the court. Guimei v. General Electric Co., 172 Cal. App. 4th 689, 703 (2009). Given the extensive time between the filing of the sur-reply, and the present hearing date, and given that Plaintiff filed not only its objection to, but a response to the sur-reply, the court finds it proper to consider it and Plaintiff's response to it.

According to Plaintiff, document requests were sent to Defendants on March 5, 2019. The propounded discovery consisted of Requests for Production of Documents to LFA, Set One, and Requests for Production of Documents to Busch, Set One. Though documents were produced in response to the requests, Plaintiff claims to have learned of significant gaps in the document production. When Busch was deposed on the matter, an "egregious failure to make any meaningful effort" came to light according to Plaintiff. Plaintiff enumerates a multitude of ways in which Defendants failed to conduct a diligent search and reasonable inquiry as they are required to do. Plaintiff seeks sanctions in the amount of $5,582.50.

Defendants argue the motion is improper and unnecessary as Plaintiff's arguments are based on the flawed assumptions that Defendants remains in possession of all documents that are in the possession of others, that Defendants have a duty to contact every third party and obtain copies of all such documents and that Defendants remain in possession of any documents other than those kept by David Busch or Mark Wagner. The declaration of Mr. Busch served with Defendants' opposition outlines the extensive measures Defendants underwent to locate documents. Defendants have already produced the majority of the documents in their possession, the remainder were, at the time of filing, were being prepared for disclosure. Defendants request sanctions according to proof as they feel Plaintiff has brought this motion unnecessarily and in bad faith.

Plaintiff's reply maintains that the opposition confirms that there are documents outstanding and that the motion must be granted. The opposition does not provide any details regarding the volume of documents to be produced or the date they will be produced. At the very least, Plaintiff asserts, this motion should be granted to provide a date certain for the production of the remaining documents. Plaintiff responds to the accusation this motion is unnecessary by pointing to the fact that it sent four separate letters attempting to meet and confer and asking for the production of additional documents, but no response was ever received. Finally, Plaintiff addresses Defendants' revelation that a number of emails that were stored on the previous email servers for LFA have since been destroyed. Plaintiff seeks an order requiring LFA to provide detailed information about its efforts to gather the since deleted emails so Plaintiff may conduct its own investigation.

"A party to whom a demand for inspection, copying, testing, or sampling has been directed *shall respond separately to each item or category of item* by any of the following:" (1) a

statement that the party will comply, (2) a statement that the party lacks the ability to comply, or (3) an objection to the demand or request made. Cal. Civ. Pro. §2031.210 (emphasis added). Where a party fails to provide timely responses the party to whom the discovery was directed waives "any objection…including one based on privilege or on the protection of work product…" Cal Civ. Pro. §2031.300(a).

A statement that the party will comply shall include a statement "that all documents or things in the demanded category that are in the possession, custody, or control of that party and to which no objection is being made will be included in the production." Cal. Civ. Pro. § 2031.220. A statement of inability to comply shall "affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that demand. This statement shall also specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party. The statement shall set forth the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of item." Cal. Civ. Pro. § 2031.230.

In the matter at hand, it appears there is no actual dispute as to the production of the documents; the dispute lies in their untimeliness and whether or not Defendants should be sanctioned for their lack of diligent search efforts at the time of their initial responses and thereafter their lack of responsiveness to the multiple meet and confer efforts sent to them by Plaintiff.

Regarding the documents to be produced, the documents appear to be clearly discoverable and Defendants have already agreed to their production. Thus, if they have not already been produced, Defendants are ordered to produce all remaining documents responsive to Requests for Production of Documents, Set One served on LFA and on Busch no later than February 9, 2023.

Plaintiff's request for a declaration detailing the efforts taken to obtain the additional discovery is denied. Plaintiff points to this new revelation that emails on the servers formerly used by LFA have since been deleted. Plaintiff's request for a detailed declaration stating the efforts made by Mr. Busch to obtain those emails is outside the scope of a motion to compel. Plaintiff may move for leave to take a second deposition or send interrogatories in this regard. Mr. Busch declares that he did review the emails he had access to at the time for responsiveness. Plaintiff seeks information such as how Mr. Busch chose which emails to extract and for those emails to extract, how he sifted through them for responsiveness. However, the emails that Mr. Busch did produce were done so as a part of his initial discovery responses which were served prior to his deposition. These questions proffered by Plaintiff are better asked during the deposition or through interrogatories, not by way of a motion to compel.

"The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process…pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct…If a monetary sanction is authorized by any provision of this title, the court *shall* impose that sanction unless it finds that one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." Cal. Civ. Pro. 2023.030(a)(emphasis added) & 2023.020. Misuse of the discovery process includes, but is not limited to, failing to respond or submit to an authorized method of discovery, making an evasive response to discovery, or failing to confer in a reasonable good faith attempt to informally resolve any discovery dispute. Cal. Civ. Pro. § 2023.010. Requests for production of documents have longstanding been authorized forms of discovery. Cal. Civ. Pro. § 2031.210. A party requesting sanctions for reasonable expenses that were incurred as a result of discovery abuse must already be liable for those expenses before the court can award the costs as sanctions. *See* Tucker v. Pacific Bell Mobile Servs., 186 Cal. App. 4th 1548 (2010) (anticipated costs for future deposition could not be included in award of sanctions).

Notwithstanding the foregoing, "… in addition to any other sanctions imposed …a court *shall* impose a two hundred-and-fifty-dollar ($250) sanction, payable to the requesting party…" if the court finds that the noncompliant party did not respond in good faith to a request for production of documents or failed to make a reasonable good faith attempt to informally resolve a discovery dispute. Cal. Civ. Pro. § 2023.050(a).

Given that thousands of documents remain unproduced as of November 2022, it is evident that Defendants failed to make a reasonable search and diligent inquiry during their initial search for responsive documents. That said, they admittedly have made several supplemental disclosures and, as of their last filing, intended to disclose additional documents. What is more concerning is their failure to respond to meet and confer letters sent on August 25, 2020, September 6, 2022, September 23, 2022 and October 3, 2022. Had the parties engaged in meaningful meet and confer efforts to establish a date certain for the production of the remaining documents, it appears this motion may have been avoided altogether. That said, Plaintiff is awarded sanctions in the amount of $4,677.50. This accounts for the 6.5 hours of time spent preparing the moving papers, as well as the estimated 5 hours of time spent on the reply papers at a billing rate of $385 plus the $250 sanctions under Civil Procedure Section 2023.050(a). Plaintiff has not yet incurred any additional fees associated for preparing for and attending a hearing on this matter. This amount may, in the court's discretion, be subject to increase if Plaintiff incurs additional costs and fees associated with preparing for and attending a hearing on this matter, should one be held.

TENTATIVE RULING #9: MR. CANDEE IS ORDERED TO PRODUCE ALL NON-PRIVILEGED DOCUMENTS RESPONSIVE TO THE DEPOSITION SUBPOENA SERVED ON AUGUST 16, 2022 NO LATER THAN JANUARY 27, 2023. REQUEST NUMBER ONE IS TO BE LIMITED TO ALL COMMUNICATIONS BETWEEN MR. CANDEE AND DAVID BUSCH REGARDING (A) QUARRY PARK ADVENTURES FROM JANUARY 1, 2016 TO PRESENT; (B) BUSCH'S TEXAS ENTITIES IN

PFLUGERVILLE AND WHITE SETTLEMENT FROM JANUARY 1, 2013 TO PRESENT; AND (C) THE LAWSUIT ITSELF. ELECTRONICALLY STORED INOFORMATION IS TO BE PRODUCED IN PDF FORMAT EXCEPT FOR WORD AND EXCEL DOCUMENTS WHICH ARE TO BE PRODUCED IN THEIR NATIVE FORMAT. FOR ANY AND ALL DOCUMENTS WITHHELD BY MR. CANDEE ON THE BASIS OF PRIVILEGE, MR. CANDEE IS TO PROVIDE A PRIVILEGE LOG COMPLIANT WITH CIVIL PROCEDURE SECTION 2031.240(C)(1). THE PARTIES ARE TO MEET AND CONFER IN GOOD FAITH OVER DISAGREEMENTS, IF ANY, REGARDING THE PRIVILEGED NATURE OF ANY OF THE LISTED DOCUMENTS. MR. CANDEE'S REQUEST FOR SANCTIONS IS DENIED. PLAINTIFF'S REQUEST FOR SANCTIONS ON MR. CANDEE IS DENIED.

IF THEY HAVE NOT ALREADY BEEN PRODUCED, DEFENDANTS ARE ORDERED TO PRODUCE ALL REMAINING DOCUMENTS RESPONSIVE TO REQUESTS FOR PRODUCTION OF DOCUMENTS, SET ONE SERVED ON LFA AND ON BUSCH NO LATER THAN FEBRUARY 9, 2023. PLAINTIFF'S REQUEST FOR A DECLARATION DETAILING THE EFFORTS TAKEN TO OBTAIN THE ADDITIONAL DISCOVERY IS DENIED. PLAINTIFF IS AWARDED SANCTIONS IN THE AMOUNT OF $4,677.50. THIS ACCOUNTS FOR THE 6.5 HOURS OF TIME SPENT PREPARING THE MOVING PAPERS, AS WELL AS THE ESTIMATED 5 HOURS OF TIME SPENT ON THE REPLY PAPERS AT A BILLING RATE OF $385 PLUS THE $250 SANCTIONS UNDER CIVIL PROCEDURE SECTION 2023.050(A). PLAINTIFF HAS NOT YET INCURRED ANY ADDITIONAL FEES ASSOCIATED FOR PREPARING FOR AND ATTENDING A HEARING ON THIS MATTER. THIS AMOUNT MAY, IN THE COURT'S DISCRETION, BE SUBJECT TO INCREASE IF PLAINTIFF INCURS ADDITIONAL COSTS AND FEES ASSOCIATED WITH PREPARING FOR AND ATTENDING A HEARING ON THIS MATTER, SHOULD ONE BE HELD.

NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; *SEE ALSO* LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999). NOTICE TO ALL PARTIES OF A REQUEST FOR ORAL ARGUMENT AND THE GROUNDS UPON WHICH ARGUMENT IS BEING REQUESTED MUST BE MADE BY TELEPHONE OR IN PERSON BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; El Dorado County Local Rule 8.05.07. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

10. PROTECTIVE INSURANCE COMPANY v. JJ EXPRESS FREIGHT 22CV0031

On September 12, 2022, Plaintiff filed its Notice of Motion and Plaintiff's Motion for Summary Judgment, Declaration in Support of Summary Judgment, Memorandum of Points and Authorities in Support of Motion for Summary Judgment, and Statement of Undisputed Facts and Reference to Supporting Evidence. At the time of this writing there is no opposition on file with the court.

Plaintiff is an insurance company who provided worker's compensation and employer liability insurance to defendant JJ Freight, Inc. Plaintiff now asserts it is owed $21,573.00 in backed payments and interest which has accrued since April 30, 2020, when Defendant stopped making its required payments. Plaintiff has brought this action on the basis of the following causes of action: (1) Book Account; (2) Account Stated; and (3) Goods Sold.

A motion for summary judgment shall be granted if there is no triable issue as to any material fact and the papers submitted show that the moving party is entitled to judgment as a matter of law. Cal. Civ. Pro. § 437c. The moving party bears the burden of making a prima facie case for summary judgment. White v. Smule, Inc., 75 Cal. App. 5th 346 (2022). Where the moving party has successfully done so, the burden then shifts to the opposing party to show that triable issues of material fact do exist. *Id.* Given that the moving party bears the initial burden of proof, "[w]here, as here, the motion for summary judgment is unopposed, the moving party may still not be granted summary judgment unless his papers clearly establish that there is no triable issue of fact, and he is entitled to judgment. Harman v. Mono General Hospital, 131 Cal. App. 3d 607, 613 (1982).

A party moving for summary judgment may rely on the affidavit of that party's expert if the expert's testimony would be admissible at trial. Fernandez v. Alexander, 31 Cal. App. 5th 770, 779 (2019). "When the moving party produces a competent expert declaration showing there is no triable issue of fact on an essential element of the opposing party's claims, the opposing party's burden is to produce a competent expert declaration to the contrary. [Citations]." *Id.*

A common count claim may be made on an express contract when "…the plaintiff owes no further performance under the contract and nothing remains to be done thereunder, except the payment of money by the defendant." Ferro v. Citizens Nat'l. Trust & Savings Bank of Los Angeles, 44 Cal. 2d 401 (1955). Here, Plaintiff has established that, pursuant to its contractual obligations with Defendant, Plaintiff fully performed its obligations by providing the subject insurance coverage. The only thing left to do is for Defendant to pay the balance owed for the services rendered to it by Plaintiff.

"The term 'book account,' means a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract…and shows the debits and credits in connection therewith, and against whom and in favor of whom the entries are made, is entered in the regular course of business as conducted

by such creditor…and is kept in a reasonably permanent form and manner and is…" kept in any one of enumerated reasonably permanent forms. Cal. Civ. Pro. § 337a. Where a book account is established, the prevailing party may recover attorneys' fees. If the party in debt is not a natural person, then the recoverable attorneys' fees may amount to $1,200 or 25% of the principal obligation under the contract, whichever is less. Cal. Civ. Pro. § 1717.5

In a showing of its book account claim, Plaintiff has provided its statement of account which shows entries that were made on Plaintiff's accounting system and kept in the regular course of business in a reasonably permanent form. Because Plaintiff has successfully proven its book account claim, attorney's fees in the amount of $1,200 are recoverable.

Considering the foregoing, Plaintiff's Motion for Summary Judgment is granted.

TENTATIVE RULING #10: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS GRANTED. NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; *SEE ALSO* LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999). NOTICE TO ALL PARTIES OF A REQUEST FOR ORAL ARGUMENT AND THE GROUNDS UPON WHICH ARGUMENT IS BEING REQUESTED MUST BE MADE BY TELEPHONE OR IN PERSON BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; El Dorado County Local Rule 8.05.07. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

1-13-23
Department 9
Tentative Rulings

11. CHRISTINE CAMBRIDGE ET. AL. v. MARSHALL MEDICAL CENTER 22CV1292

This matter is continued to January 20, 2023, at 8:31 a.m. in Department 9.

TENTATIVE RULING #11: THIS MATTER IS CONTINUED TO JANUARY 20, 2023, AT 8:31 A.M. IN DEPARTMENT 9. NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; *SEE ALSO* LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999). NOTICE TO ALL PARTIES OF A REQUEST FOR ORAL ARGUMENT AND THE GROUNDS UPON WHICH ARGUMENT IS BEING REQUESTED MUST BE MADE BY TELEPHONE OR IN PERSON BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; El Dorado County Local Rule 8.05.07. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

12. MCALPINE v. DANIEL NORMAN, MD, ET AL SC20160157

Plaintiff filed her complaint on September 13, 2016, asserting a single cause of action for professional negligence. Defendant Daniel A. Norman, M.D. (hereinafter "Defendant") now moves for summary judgment or, in the alternative, summary adjudication on the issues of standard of care and causation. Defendants moving papers were filed on September 2, 2022. Plaintiff's opposition papers were filed on November 2nd. Defendant's reply was then filed on November 10th. All documents were timely served, and the matter can be reached on its merits.

The matter stems from two colonoscopies conducted by Defendant on September 14th and 15th of 2015. After her colonoscopy on the 15th, Plaintiff underwent a polypectomy of two polyps in the colon. On September 19th, after undergoing the procedures, Plaintiff presented to the emergency medical department complaining of sharp and constant abdominal pains. She was diagnosed with a colon perforation. Plaintiff claims that her perforated colon and the resulting treatment she received for it, were directly caused by the negligent acts of Defendant.

Defendant surmises that the standard of care for a physician must be established by expert testimony. Defendant proffers to the court his retained expert, Dr. Cello, who opines that Defendant's actions did not fall below the applicable standard of care. Dr. Cello notes Defendant's use of electrocautery and his examination of the colon after the polypectomy which showed no perforation of the colon. Defendant argues that because he has established his compliance with the standard of care through expert testimony, Plaintiff cannot establish the contrary and therefore Defendant is entitled to summary judgment.

Defendant further argues that Plaintiff cannot show a causal connection between his actions and her resulting harm. Defendant once again relies on the opinions of Dr. Cello. Dr. Cello is of the belief, to a reasonable degree of medical probability, that Plaintiff's injury developed over a few days after the procedure and was caused by the electrocautery used during the polypectomy.

Plaintiff points to the fact that Defendant concedes he used electrocautery during the procedure and now, through Dr. Cello, he concedes that the electrocautery caused Plaintiff's perforated colon. Even if the use of the electrocautery was within the applicable standard of care, Plaintiff states that Defendant was negligent in the time, or lack thereof, spent checking for perforations. Finally, Plaintiff relies on the decision of the Third District Court of Appeal on this very case. The District Court found summary judgment to be improper when based only on conclusory statements without factual explanation. While Defendant has provided an updated declaration from Dr. Cello, Plaintiff argues the declaration suffers from the same issues as the one brought up on appeal. Dr. Cello, according to Plaintiff, does not sufficiently explain his ultimate conclusions. Plaintiff maintains that she does not need expert testimony to refute Defendant's motion because Defendant has not met his burden of proof.

1-13-23
Department 9
Tentative Rulings

Summary Judgment Standard

A motion for summary judgment shall be granted if there is no triable issue as to any material fact and the papers submitted show that the moving party is entitled to judgment as a matter of law. Cal. Civ. Pro. § 437c. A defendant moving for summary judgment need only show that one or more elements of the cause of action cannot be established. Aguilar v. Atlantic Richfield Co., (2001) 25 Cal.4th 826, 849. This can be done in one of two ways, either by affirmatively presenting evidence that would require a trier of fact *not* to find any underlying material fact more likely than not; or by simply pointing out "that the plaintiff does not possess and cannot reasonably obtain, evidence that *would* allow such a trier of fact to find any underlying material fact more likely than not." *Id.* at 845; Brantly v. Pisaro, 42 Cal. App. 4th 1591, 1601 (1996). Because of the drastic nature of a motion for summary judgment, the moving party's evidence is to be strictly construed, while the opposing party's evidence is to be liberally construed. A-H Plating, Inc. v. American National Fire Ins. Co., 57 Cal. App. 4th 427, 433-434 (1997).

The moving party bears the burden of making a prima facie case for summary judgment. White v. Smule, Inc., 75 Cal. App. 5th 346 (2022). In other words, the party moving for summary judgment must show that it is entitled to judgment as a matter of law on any theory of liability reasonably embraced within the allegations of the complaint. Doe v. Good Samaritan Hospital, 23 Cal. App. 5th 653, 661 (2018). Given the moving party's burden of proof, even a motion for summary judgment which is left unopposed may still be denied if the moving party fails to meet its burden. Harman v. Mono General Hospital, 131 Cal. App. 3d 607, 613 (1982). Nevertheless, where the defendant makes the required showing, the burden shifts to plaintiff to make a prima facie showing that there exists a triable issue of material fact. Zoran Corp. v. Chen, 185 Cal. App. 4th 799, 805 (2010).

A party moving for summary judgment may rely on the affidavit of that party's expert if the expert's testimony would be admissible at trial. Fernandez v. Alexander, 31 Cal. App. 5th 770, 779 (2019). "When the moving party produces a competent expert declaration showing there is no triable issue of fact on an essential element of the opposing party's claims, the opposing party's burden is to produce a competent expert declaration to the contrary. [Citations]." *Id.* However, the "moving party's burden…cannot be satisfied by an expert declaration consisting of ultimate facts and conclusions that are unsupported by factual detail and reasoned explanation, even if it is admitted unopposed." Doe v. Good Samaritan Hospital, 23 Cal. App. 5th 653, 661 (2018).

In his declaration Dr. Cello recounts the procedure conducted by Defendant. "Dr. Norman removed the polyps by utilizing an electrocautery. During the withdrawal of the scope, Dr. Norman examined the colon and there was no evidence of a perforation." Dec'l of John Cello, M.D., 4:25-27. He states that this is "within the standard of care." *Id.* at 4:7-8. However, he does not provide any information regarding what conduct is to be required under the particular circumstances. What would a physician who possesses and exercises a reasonable degree of knowledge and skill have done when performing a polypectomy? Were the actions taken by Defendant the same or similar to those that would have been taken by other members

of his profession in similar circumstances? Without this additional information Dr. Cello's declaration is once again, merely conclusory.

Defendant's Motion for Summary Judgment/Adjudication is denied.

TENTATIVE RULING #12: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT/ADJUDICATION IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; *SEE ALSO* LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999). NOTICE TO ALL PARTIES OF A REQUEST FOR ORAL ARGUMENT AND THE GROUNDS UPON WHICH ARGUMENT IS BEING REQUESTED MUST BE MADE BY TELEPHONE OR IN PERSON BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; El Dorado County Local Rule 8.05.07. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.