

These are the tentative rulings for civil law and motion matters set for Tuesday, November 29, 2016, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Monday, November 28, 2016. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

**NOTE: Effective July 1, 2014, all telephone appearances will be governed by Local Rule 20.8. More information is available at the court's website, [www.placer.courts.ca.gov](http://www.placer.courts.ca.gov).**

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EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

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**1. M-CV-0063551 Schnaitmann-Huffhines, Stacie vs. Secondwind Engineering**

Plaintiff's motion to compel the deposition of defendant Recil E. (Reece) McClure's deposition is granted. Defendant Recil E. McClure shall appear for his deposition on a date, time, and location as noticed by plaintiff. Plaintiff's request for monetary sanctions is also granted and defendant Recil E. McClure shall pay monetary sanctions in the amount of \$2,400.

**2. M-CV-0065199 Walsh, Peter vs. Caliber Home Loans, Inc., et al**

The motion for reconsideration is dropped from the calendar as no moving papers were filed with the court.

**3. S-CV-0032447 Westwood Montserrat, Ltd. vs. AGK Sierra de Montserrat**

The motion to compel further responses to the requests for production of documents is continued to December 1, 2016 at 8:30 a.m. in Department 40.

**4. S-CV-0035361 Precision Medical Products, Inc. vs. Van Der Boom, Gant**

The demurrer and motion to strike are **continued to December 13, 2016 at 8:30 a.m. in Department 40. The court apologizes to the parties for any inconvenience.**

**5. S-CV-0036383 Weiss, Craig vs. Carmax Superstores California, LLC, et al**

The motion for leave to file a first amended complaint and motion for summary judgment are continued to December 20, 2016 at 8:30 a.m. in Department 42 to be heard by the Honorable Charles D. Wachob.

**6. S-CV-0036797 Merle Alba Const.Serv.,Inc. vs. Walsh, Robert A., dba, et al**

The appearances of the parties are required for the hearing on plaintiff counsel's motion to be relieved as counsel. The court file does not reflect that plaintiff was served with a copy of the ex parte order short setting the current motion.

**7. S-CV-0037165 Swope, Melodie, et al vs. John Mourier Construction, Inc.**

The motion to file a complaint-in-intervention is dropped from the calendar at the request of the moving party.

**8. S-CV-0037189 National Collegiate Student Loan vs. Von Harringa, Lindy L.**

Plaintiff's motion for order vacating judgment and re-enter judgment nunc pro tunc is granted in part. The judgment entered on May 6, 2016 is void pursuant to CCP§473(d) as it was entered after defendant had filed for bankruptcy. However, plaintiff has not made a sufficient showing in support of its request for entry of a judgment nunc pro tunc. The judgment, entered on May 6, 2016, is vacated.

**9. S-CV-0037333 Gewalt, John H., et al vs. Wells Fargo Bank, N.A., et al**

This tentative ruling is issued by the Honorable Charles D. Wachob. If oral argument is requested, it shall be heard at 8:30 a.m. in Department 42:

Defendant Wells Fargo's Motion to Strike the Second Amended Complaint (SAC)

Preliminary Matters

As an initial matter, the court takes judicial notice of the original complaint, first amended complaint, and May 31, 2016 minutes pursuant to Evidence Code section 452.

Ruling on Motion

The motion to strike is granted in part and denied in part. A party may file a motion to strike the whole pleading or a portion of a pleading. (*Code of Civil Procedure section 435(b)(1).*) A motion to strike may be granted to strike irrelevant, false, or improper matters in a pleading; or to strike a pleading not drawn in conformity with the laws of the state or an order of the court. (*Code of Civil Procedure section 436(a), (b).*) The grounds for a motion to strike must appear on the face of the pleading or from judicially noticeable matters. (*Code of Civil Procedure section 437(a).*) Defendant seeks

to strike all seven causes of action, along with the allegations for punitive damages, as irrelevant and improperly pleaded.

A review of the SAC shows plaintiffs improperly included additional causes of action and references to punitive damages without first receiving leave to amend. Plaintiffs' original complaint and first amended complaint (FAC) included three causes of action: (1) negligence; (2) violations under Civil Code section 2923.7; and (3) UCL violations. The court determined at the May 31, 2016 hearing that these three causes of action were deficiently pleaded, affording plaintiffs leave to amend *these three claims*. Instead, plaintiffs filed a SAC that greatly expanded the scope of this claims and eliminating the first cause of action for negligence. "[A] litigant does not have a positive right to amend his pleading after a demurrer thereto has been sustained. 'His leave to amend afterward is always of grace, not of right. [Citation.]' [Citation.]" (*Gautier v. General Tel. Co.* (1965) 234 Cal.App.2d 302, 310.) "At that point 'the plaintiff's right to amend as a matter of course is gone.'" (*Loser v. E.R. Bacon Co.* (1962) 201 Cal.App.2d 387, 389.) Moreover, a plaintiff may not amend a complaint to add a new cause of action without obtaining permission to do so, except when the new cause of action is within the scope of the order granting leave to amend. (*Harris v. Wachovia Mortg., FSB* (2010) 185 Cal.App.4th 1018, 1023.) Plaintiffs inclusion of the first cause of action to quash judgment; third cause of action to quiet title; fourth cause of action for fraud; sixth cause of action for equitable estoppel; and seventh cause of action for an accounting fall well beyond the scope of the leave to amend that was granted to plaintiffs. In light of their inclusion of these improper claims, defendant's motion to strike is granted without leave to amend as to the first, third, fourth, sixth, and seventh causes of action along with the allegations for punitive damages.

As it pertains to the second cause of action for unlawful and attempted foreclosure and fifth cause of action for UCL violations, these still fall within the scope of the leave to amend afforded to plaintiffs and are not subject to the current motion. The request to strike the second and fifth causes of action is denied.

#### Defendant Wells Fargo's Demurrer to the Second Amended Complaint (SAC)

##### Preliminary Matters

Initially, the court will not address defendant's challenges to the first, third, fourth, sixth, and seventh causes of action in light of the ruling on defendant's motion to strike.

##### Ruling on Request for Judicial Notice

Defendant's request for judicial notice is granted pursuant to Evidence Code section 452.

##### Ruling on Demurrer

The demurrer is sustained as to the second and fifth causes of action without leave to amend. A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Picton v. Anderson Union High School* (1996) 50 Cal.App.4th 726, 733.) All properly pleaded facts are assumed to be true as well as those that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153.) A review of the second cause of action shows that it is still pleaded in a deficient fashion. First, the allegations are conclusory in nature. Second, plaintiffs' allegations are an improper attempt to preemptively challenge the foreclosure proceedings. (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 814-815.) To the extent plaintiffs are attempting to allege defendant was required to provide them a loan modification, such a cause of action under Civil Code section 2923.6 cannot stand as this section does not place a duty on a lender to agree to a loan modification. (*Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 222.) Finally, plaintiffs' remedy for a private right of action under Civil Code section 2923.5 are limited to a postponement of foreclosure, not permanently enjoining defendant's ability to foreclose on the property. (*Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 214, 217-225.)

The UCL claim also fails. "The UCL does not proscribe specific activities, but broadly prohibits any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. ...By proscribing 'any unlawful business practice,' section 17200 'borrows' violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." (*Puentes v. Wells Fargo Home Mortg., Inc.* (2008) 160 Cal.App.4th 638, 643-644.) The fifth cause of action is conclusory in nature and relies predominantly upon the allegations within the second cause of action, which are deficient as previously discussed.

The final area to address is whether plaintiffs should be afforded leave to amend. Plaintiff bears the burden of demonstrating how the pleading may be amended to cure the defects therein. (*Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302.) A demurrer will be sustained without leave to amend absent a showing by plaintiff that a reasonable possibility exists that the defects can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The SAC is plaintiffs' third attempt to state a viable claim against defendant. Despite being afforded multiple opportunities to amend their deficiencies, plaintiffs failed to do so. The SAC remains wholly deficient in its allegations and plaintiffs fail to make a sufficient showing that further leave will result in a viable complaint. For these reasons, the demurrer to the second and fifth causes of action is sustained without leave to amend.

#### OSC re Sanction Hearings as to Plaintiffs John Gewalt and Jeanne Gewalt

The appearances of the plaintiffs are required.

#### Case Management Conference Hearing

The appearances of the parties are required.

**10. S-CV-0037421            McDaniel, Leigh Trustee vs. Eastland, Therese**

The demurrer to the cross-complaint is continued to February 7, 2017 at 8:30 a.m. in Department 40 pursuant to the stipulation and order entered on November 28, 2016.

**11. S-CV-0037529            JD2, Inc. vs Olympus Precast Co. et al**

Cross-complainants' unopposed motion for leave to file an amended cross-complaint is granted.

Cross-complainants shall file and serve their second amended cross-complaint on or before December 9, 2016.

**12. S-CV-0037617            Corea II, Rene vs Kidder, John William et al**  
**S-CV-0037829            Corea II, Rene vs. Allstate Insurance Company**

Plaintiff's motion to consolidate cases is granted. Corea v. Kidder, SCV-37617, and Corea v. Allstate Insurance Co, SCV-37829, are consolidated for all purposes. SCV-37617 is designated as the lead case.

**13. S-CV-0037663            Acquafresca, Karen et al vs. Encompass Insurance Company**

The demurrer and motion to strike the first amended complaint are continued to December 6, 2016 at 8:30 a.m. in Department 40. The court apologizes to the parties for any inconvenience.

**14. S-CV-0038329            May, Jeanette Paulene vs. Creekside Town Center, et. al.**

Intervenor Gallagher Bassett Services' motion for leave to file a complaint-in-intervention is granted.

The clerk shall file the proposed complaint-in-intervention, lodged on October 25, 2016, forthwith.

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**15. T-CV-0001942          Dror, Yossi vs. Gansert, Alexis George   Gansert, Gary et al**

Plaintiff's motion for new trial is dropped from the calendar in light of plaintiff's notice of withdrawal of the motion filed on November 18, 2016.

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