TENTATIVE RULINGS

FOR: November 8, 2017

The Court may exercise its discretion to **disregard** a late filed paper in law and motion matters. (Cal. Rules of Court, rule 3.1300(d).)

Unlawful Detainer Cases – Pursuant to the restrictions in Code of Civil Procedure section 1161.2, no tentative rulings are posted for unlawful detainer cases and appearances are required.

Court Reporting Services – The Court does not provide official court reporters in proceedings for which such services are not legally mandated. These proceedings include civil law and motion hearings. If counsel want their civil law and motion hearing reported, they must arrange for a private court reporter to be present. Go to http://napacountybar.org/court-reporting-services/ for information about local private court reporters. Attorneys or parties must confer with each other to avoid having more than one court reporter present for the same hearing.

PROBATE CALENDAR – Hon. Diane Price, Dept. F (Criminal Courts Bldg.-1111 Third St.)

In the Matter of Keenan Lake **17PR000112**

PETITION FOR ORDER AUTHORIZING COMPROMISE OF MINOR'S CLAIM

APPEARANCE REQUIRED

In The Matter of The Frank Galopin Special Needs Trust **26-59306**

PETITION TO APPROVE FIFTH ACCOUNT AND REPORT OF TRUSTEE FROM 6/1/2016 THROUGH 5/31/2017, TO MAINTAIN BOND, TO CONFIRM TRUSTEE'S FEES, AND TO APPROVE ATTORNEY'S FEES

TENTATIVE RULING: The Petition is GRANTED. The matter is set for a sixth accounting on November 8, 2018 at 8:30 a.m. in Dept. F. All accounting documents must be filed at least 30 days prior to the hearing. The clerk is directed to send notice to the parties.

CIVIL LAW & MOTION CALENDAR – Hon. Diane Price, Dept. F (Criminal Courts Bldg.-1111 Third St.)

Dennis H. Bethke and Fonda V. Bethke as Trustees of the Bethke Family Trust v. Specialized Loan Servicing, LLC, et al. **16CV001190**

DEMURRER TO THE SECOND AMENDED COMPLAINT

TENTATIVE RULING:

The notice of motion, again, does not provide notice of the Court's tentative ruling system as required by Local Rule 2.9. Defendants' counsel is directed to contact the opposing party forthwith and advise the opposing party of Local Rule 2.9 and the Court's tentative ruling procedure. If defendants' counsel is unable to contact the opposing party prior to the hearing, defendants' counsel shall be available at the hearing, in person or by telephone, in the event opposing party appears without following the procedures set forth in Local Rule 2.9.

Defendants Specialized Loan Servicing, LLC, the Law Offices of Les Zieve, and the Bank of New York Mellon FKA the Bank of New York's (as trustee for certificate holders of the CWALT, Inc., Alternative Loan Trust 2006-OA10 Mortgage Pass-Through Certificates, Series 2006-OA10) request for judicial notice of the recorded documents and court filings from the various bankruptcy cases is GRANTED.

Defendants' demurrer to the first cause of action for violation of Civil Code section 2923.55, second cause of action for violation of Civil Code section 2923.6, and third cause of action for violation of Civil Code section 2923.7 on the ground of failure to state sufficient facts is SUSTAINED WITHOUT LEAVE TO AMEND. These claims fall under the Homeowner Bill of Rights ("HBOR"). The HBOR provides for damages for a material violation not corrected by the time of the recording of the trustee's deed upon sale, and a showing of actual economic damages after the recording of the trustee's deed upon sale. (See Civ. Code, § 2924.12, subd. (b), emphasis added ["After a trustee's deed upon sale has been recorded, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall be liable to a borrower for *actual economic damages* pursuant to Section 3281, resulting from a *material violation* of Section 2923.55, 2923.6, [and] 2923.7, . . . by that mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent where the violation was not corrected and remedied prior to the recordation of the trustee's deed upon sale."].) Here, the trustee's deed upon sale was recorded. (RJN, Exs. 31-32.) Each of the HBOR causes of action fail because plaintiffs do not allege how the violation was material and do not allege they suffered actual economic damages. Plaintiffs state they made a sufficient showing of materiality and actual economic damages since defendants had an obligation to consider plaintiffs' financial situation, but sold plaintiffs' home. No citation to the second amended complaint is provided, and the Court has not located such allegations.

In addition, the first claim fails because plaintiffs do not allege defendants never *attempted* to contact them. Plaintiffs instead allege they never *received* letters from defendants. (See SAC, ¶¶ 32-33.) With regard to the second cause of action, defendants contend plaintiffs have not alleged *when* they submitted a complete application for a first lien loan modification. Plaintiffs do not respond to this contention in their opposition and therefore concede their claim

is deficient. As to the third cause of action, defendants aver plaintiffs fail to allege when they requested a foreclosure prevention alternative and when they requested a single point of contact. Plaintiffs respond that they "requested foreclosure prevention alternatives from Defendants when they first began to experience financial difficulty, however [they] were not provided alternatives nor a SPOC." (Opp. at p. 6:5-7.) Plaintiffs, however, have not alleged when they requested a single point of contact. (SAC, ¶ 43.)

Defendants' demurrer to the fourth cause of action for negligence on the ground of failure to state sufficient facts is SUSTAINED WITHOUT LEAVE TO AMEND. The Court previously held the borrower-lender relationship does not create a duty of care. The Court also held plaintiffs failed to allege facts showing defendants owed plaintiffs any duty of care. Plaintiffs added legal conclusions as to whether a lender can owe a borrower a duty of care. (See SAC, ¶¶ 48-52.) But plaintiffs' claim remains deficient for lack of allegations showing a duty of care is owed. The claim further fails because breach of the purported duty, causation, and damages are not alleged.

Defendants' demurrer to the fifth cause of action for unfair business practices on the ground of failure to state sufficient facts is SUSTAINED WITHOUT LEAVE TO AMEND. This claim is premised on the other causes of action, which are inadequately pled.

The Case Management Conference is continued to December 20, 2017, at 8:30 a.m. in Dept. F.

CIVIL LAW & MOTION CALENDAR – Hon. J. Michael Byrne, Dept. G (Criminal Courts Bldg.-1111 Third St.)

McCorkle Eastside Neighborhood Group, et al. v. City of St. Helena, et al. **17CV000205**

FIRST AMENDED VERIFIED PETITION FOR WRIT OF MANDATE

TENTATIVE RULING: Petitioners' Request for Judicial Notice is DENIED. "[E]xtra-record evidence is generally not admissible to show that an agency 'has not proceeded in a manner required by law' in making a quasi-legislative decision." (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 565.)

The Petition is DENIED. Petitioners have not shown that Respondents City of St. Helena and City Council of St. Helena (the City) abused their discretion by approving the demolition permit and design review for the 632 McCorkle Avenue 8 Unit Housing Project (Project) and denying Petitioners' appeal of their decision. (Code Civ. Proc., § 1094.5; Pub. Res. Code § 21168.) Petitioners alleged five separate causes of action in their Petition; the Court will address each in turn below.

First Cause of Action - Violation of CEQA (Public Resources Code § 21151(c)) – Petitioners allege that Respondents denied Petitioners their right to appeal the City Planning Department's determination regarding CEQA exemption to the agency's elected decision-making body, the City Council, because the City Council took the advice of the City Attorney

and refused to consider CEQA issues raised by Petitioners. However, the scope of appeal was limited to the approval of the demolition permit and design review. The St. Helena Municipal Code (Muni Code) section 17.44.040 provides that permitted uses in the High Density Residential District (which is the district the Project was located in) are subject to design review pursuant to Chapter 17.164 of the Muni Code. The Project proposed an 8-unit multi-family workforce housing project that would replace an existing single family home and associated structures on the ½ acre parcel that were in a state of disrepair. The proposed Project is a permitted use under Muni Code section 17.44.020, and therefore Respondents' review of the Project, at both the permit and appeal stages, would be limited to a design review. "CEQA does not enlarge an agency's authority beyond the scope of a particular ordinance," and the "interpretation of the meaning and scope of the local ordinance is, in the first instance, committed to the local agency." (*Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1015.) Petitioners had their appeal considered as required. (See 4 AR, Tabs 60-62; 3 AR, Tabs 38-40; 1 AR, Tab 12.)

Petitioners also claim the City Attorney's role in the administrative process for the Project was improper, citing to *Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 (*Nightlife Partners*) in support of their Petition. However, in *Nightlife Partners*, the court found a possible deprivation of due process because the same public attorney had represented the local government in federal litigation against the plaintiff, and then subsequently advised an administrative agency who denied plaintiff's permit in another matter. (*Id.* at p. 84-85.) *Nightlife Partners* is not applicable here because the City Attorney did not act as an advocate, but instead acted in an advisory capacity. (See also *Witt Home Ranch, Inc. v. County of Sonoma* (2008) 165 Cal.App.4th 543, 569 [the mere fact that a county's attorney reached conclusions and provided advice to the county and its Board prior to a hearing did not convert her from adviser to an advocate].)

Second Cause of Action - Violation of CEQA (Public Resources Code § 21000, et seq.) – Petitioners allege the City violated CEQA by failing to prepare an Environmental Impact Report and relying on Categorical Exemption 32. An agency's "exemption determination will be affirmed if supported by substantial evidence that the project fell within the exempt category of projects." (*Magan v. County of Kings* (2002) 105 Cal.App.4th 468, 474 (*Magan*).) The City determined that the Project falls within CEQA Guidelines Section 15332's categorical exemption for in-fill projects because the Project was: (a) consistent with the applicable general plan and zoning designation, (b) within the City, surrounded by urban uses, and smaller than five acres, (c) not a habitat for endangered, rare, or threatened species, (d) not going to result in any significant effects relating to traffic, noise, air quality, or water quality, and (e) adequately served by all required utilities and public services. (See 1 AR, Tab 12, 387-390.)

Because there is substantial evidence in the record to support the exemption determination, "the burden then shifts to the challenging party to produce evidence showing that one of the exceptions to the exemption applies." (*San Francisco Beautiful v. City and County of San Francisco* (2014) 226 Cal.App.4th 1012, 1023.) Petitioners do not meet their burden. Petitioners claim the soil contains hazardous materials, but cite only the speculative hearing testimony of a Dr. Paul Skinner. (Opening Brief, p. 9, 17-18.) There is no foundation provided for Dr. Skinner's alleged expertise or the basis for his knowledge in regards to the soils at the Project. The record shows that the contamination of the soil at the Project site can be remedied by a clean-up costing approximately $100,000. (3 AR, 1002-1013, 1092-1095; 3 AR, Tab 40,

1510-1511.) Smaller removal actions costing under $1,000,000 qualify for Class 30 exemptions. (CEQA Guidelines § 15330.) Petitioners do not explain how a clean-up that would qualify for a Class 30 exemption would somehow preclude a Class 32 exemption.

Petitioners further claim the Project will have several other significant immitigable impacts on the environment, including traffic, noise, air quality, parking, lack of infrastructure, and cumulative impacts, without any citation to supporting evidence (Opening Brief, p. 14-16.) "Opinions which state nothing more than 'it is reasonable to assume' that something 'potentially … may occur' do not constitute substantial evidence necessary to invoke an exception to a categorical exemption." (*Magan, supra,* 105 Cal.App.4th at p. 477 (internal quotations and citation omitted).)

Third Cause of Action - Violation of CEQA (Govt. Code § 65457(a)) - Petitioners have stated that they are no longer proceeding on this claim.

Fourth Cause of Action - Violation of State Planning and Zoning Laws (Govt. Code §§ 65300, 65860) – Petitioners allege that the Project is inconsistent with General Plan Policies 8.5.2, 8.5.7, and 7.5.9 and Housing Element Implementing Action HE4.J. "[A]n agency's findings that the project is consistent with its general plan can be reversed only if it is based on evidence from which no reasonable person could have reached the same conclusion… [and] [t]he party challenging a city's determination of general plan consistency has the burden to show why, based on all of the evidence in the record, the determination was unreasonable." (*Highway 68 Coalition v. County of Monterey* (2017) 14 Cal.App.5th 883.) Petitioners have not shown that hazardous materials will be transported in trucks (outside of common construction products), rendering Policy 8.5.2 inapplicable. Policy 7.5.9 applies to historical homes and resources, and there are none adjacent to the Project site. Regarding Policy 8.5.7, the City Council found that McCorkle Avenue is a public right of way, contains City utilities, is maintained by the City, and is not deficient as to width or grade. In addition, the Project would provide typical street frontage improvements, fire truck turnaround and storm water collection and treatment on site. Finally, the Project will provide one handicap van parking space and ADA accessible ground floor units, consistent with Implementing Action HE4.J. These findings were reasonable and supported by substantial evidence. Respondents detailed during both the permitting/approval and appeal how the Project was consistent with General Plan Policies and Implementing Actions. (See 1 AR, Tab 12, 387-390; 3 AR, Tab 23, 1122-1126.)

Fifth Cause of Action - Violation of State and City Planning and Zoning Law (Use By Right in High Density Residential; Govt. Code §§ 65583, 65583.2) – Petitioners' allegations that Respondents violated Government Code sections 65583 and 65583.2 are not supported by any evidence, as it appears they do not apply, and the City has affirmatively alleged in its Answer that it never invoked or relied upon these sections in considering and approving the Project.

PROBATE CALENDAR – Hon. Rodney Stone, Dept. I (Criminal Courts Bldg.-1111 Third St.)

In the Matter of Eudora May Hedges 2013 Revocable Trust **17PR000131**

PETITION TO RECOVER TRUST PROPERTY

APPEARANCE REQUIRED

Conservatorship of Shirley Harris **17PR000141**

AMENDED PETITION FOR APPOINTMENT OF PROBATE CONSERVATOR OF THE PERSON AND ESTATE

TENTATIVE RULING: Hearing on the Amended Petition is continued to November 21, 2017 at 8:30 a.m. in Dept. I to allow Petitioner to address the following issues:

1) the request for $6,500 in attorney's fees must be supported by a declaration that complies with California Rules of Court, rule 7.751;
2) the necessity of the powers sought in Attachment 1d needs to be explained, and the list needs to be updated to reflect the enumerated powers under Probate Code section 2591 (e.g. the power to employ attorneys, accountants, etc. was removed in 2007);
3) the bond should be set at $141,125 (the proposed bond amount in the amended petition failed to include the recovery bond amount - see Probate Code section 2320, subdivision (c)(4)); and
4) submission of updated proposed order and letters.

CIVIL LAW & MOTION CALENDAR – Hon. Rodney Stone, Dept. I (Criminal Courts Bldg.-1111 Third St.)

Adrienne Radakovic v. Christina Ligouri **17CV000381**

(1) DEFENDANT'S MOTION TO COMPEL FURTHER DEPOSITION TESTIMONY

TENTATIVE RULING:

Defendant Christina Ligouri's request for judicial notice of Lina Kannan's declaration and the May 24, 2017 Formal Probation Order for Edwin Woo is GRANTED IN PART AND DENIED IN PART. The request as to the declaration is granted to the extent it was filed in the Napa County Superior Court in Case No. 26-64442 on June 27, 2014. The request otherwise is denied since the contents of the declaration are not the proper subject of judicial notice. The request as to the probation order is granted.

Defendant's motion to compel plaintiff Adrienne Radakovic's further deposition testimony is MOOT. In its November 7, 2017 Order, the Court denied plaintiff's motion to quash and for a protective order regarding her continued deposition, and ordered plaintiff to

appear for her continued deposition within 10 calendar days of service of notice of entry of order. The order does not contain any topic restrictions. Thus, defendants are free to ask about the allegations in the pleading about the Kanaans or the confidentiality provision in the settlement agreement.

Although not a finding on the merits, the Court offers the following to assist the parties. The Court is not inclined to permit plaintiff to continue to use the confidentiality of the settlement agreement as both a shield and a sword. Either plaintiff is going to pursue her allegations about the Kanaans (defendant's purported involvement behind the scenes of that incident) and allow defendant to conduct discovery as to those allegations or the allegations should be withdrawn, stricken, or an issue sanction imposed. Plaintiff should obtain a stipulation with the Kanaans if she believes their consent is needed to maintain these allegations or consider withdrawing her allegations.

Defendant's request for monetary sanctions for bringing the motion is DENIED.

Plaintiff's request for monetary sanctions for opposing the motion is DENIED.

Defendant's motion for an issue sanction relating to the continued deposition is DENIED WITHOUT PREJUDICE as premature.

(2) DEFENDANT'S MOTION TO QUASH SUBOENAS FOR RECORDS

TENTATIVE RULING: Defendant Christina Ligouri's motion to quash subpoenas for records to Chelsea Cortese and James Cortese is continued to November 29, 2017, at 8:30 a.m. in Dept. I. In light of the November 7, 2017 Order granting in part defendant's motion for a protective order regarding the Nest security camera, the parties are ordered to meaningfully meet-and-confer. The order should be used as a guide to resolve this discovery dispute. The parties shall work with the Corteses and address any objections they may have to production. The parties shall either withdraw the motion or file a joint statement as to what issues remain by 4 p.m. on November 27, 2017.

Matthew Denny, et al. v. Norman Alumbaugh, et al. **26-65828**

REVIEW HEARING: PETITION TO APPROVE COMPROMISE OF PENDING ACTION - MINOR

TENTATIVE RULING: The Court will sign the proposed orders submitted on November 6, 2017. A review hearing is set for November 29, 2017 at 8:30 a.m. in Dept. I. If "Receipt and Acknowledgement of Order for the Deposit of Money Into Blocked Account" (form MC-356) is on file by November 27, 2017, the review hearing will be vacated.