

**Tentative Rulings for May 5, 2022**  
**Department 503**

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There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

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The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

20CECG03461      *Marie Tyler v. CSG Holdings CA, LLC* is continued to Thursday,  
June 2, 2022 at 3:30 p.m. in Department 503

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(Tentative Rulings begin at the next page)

## **Tentative Rulings for Department 503**

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**Tentative Ruling**

Re: **Nutt v. ASFC, LLC**  
Superior Court Case No. 21CECG00531

Hearing Date: May 5, 2022 (Dept. 503)

Motion: By Plaintiffs to Compel Further Responses from Defendant ASFC, LLC, dba Sierra Vista Healthcare, to Request for Production of Documents, Set Two

**Tentative Ruling:**

To continue the hearing to Thursday, June 23, 2022, at 3:30 p.m. in Department 503.

Within seven (7) days from the date of service of this order, plaintiffs shall provide written notice to Jason Adiuba, LVN, that his personnel file is the subject of this proceeding (Request for Production No. 69) and that he is being afforded an opportunity to object. If Mr. Adiuba objects, he must file a written objection with the court no later than Monday, June 6, 2022.

To find the motion moot as it relates to the personnel file of Gregory Chernenkoff, NP (Request for Production No. 70), provided that plaintiffs or defendant file with the court, no later than Monday, June 6, 2022, a declaration confirming service of defendant's verification to Request for Production No. 70.

**Explanation:**

*Request for Production No. 69 (Personnel File of Jason Adiuba, LVN)*

Although the scope of discovery is broad, it is not absolute. (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 541; *Tien v. Superior Court* (2006) 139 Cal.App.4th 528, 536; Code Civ. Proc., § 2017.010.) An individual's Constitutional right of privacy stands as protection against a serious invasion of the individual's reasonable expectation of privacy. (*Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 370; see also *Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 723.)

It is well settled that Mr. Adiuba possesses a reasonable expectation of privacy in his personnel file. (See *Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1251 [nonparties' employment records impart an "obvious privacy interest"]; *Schnabel v. Superior Court*, *supra*, 5 Cal.4th at p. 723 [nonparty employee tax records protected]; see also Code Civ. Proc., § 1985.6 [requiring advance notice and a specific warning to employees whose employment records have been subpoenaed].) Nevertheless, plaintiffs' motion fails to state whether Mr. Adiuba was notified that the contents of his personnel file are being sought. Furthermore, the California Supreme Court has required in analogous contexts that reasonable steps be taken to notify an individual subject to disclosure of private information the nature of the proceedings and afford "a fair opportunity to assert his interests by objecting to disclosure, by seeking an appropriate



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**Tentative Ruling**

Re: **Mercado v. Washington Unified School District**  
Superior Court Case No. 21CECG01671

Hearing Date: May 5, 2022 (Dept. 503)

Motion: Defendant Washington Unified School District's Demurrer and Motion to Strike the Complaint

**Tentative Ruling:**

To continue the motion to Thursday, June 2, 2022, at 3:30 p.m. in Department 503, in order to allow the parties to meet and confer in person or by telephone, as required. If this resolves the issues, defendant shall call the court to take the motion off calendar. If it does not resolve the issues, defense counsel shall file a declaration, on or before May 26, 2022, stating the efforts made.

**Explanation:**

Defendant did not satisfy its requirement to meet and confer prior to filing the demurrer and motion to strike. Code of Civil Procedure sections 430.41 and 435.5 make it very clear that meet and confer must be conducted "in person or by telephone." (Code Civ. Proc., § 430.41, subd. (a); Code Civ. Proc., 435.5, subd. (a).) Sending written communication first, as defense counsel did here, can be helpful to the process, but this does not shift the burden for meeting and conferring to the plaintiff.

The parties must engage in good faith meet and confer, in person or by telephone, as set forth in the statute. The court's normal practice is to take such motions off calendar, subject to being re-calendared once the parties have met and conferred. Presently, however, given the current extreme congestion in the court's calendar, rather than take the motion off calendar, the court will instead continue the hearing to allow the parties to meet and confer, and only if efforts are unsuccessful will it rule on the merits.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

Issued By: KAG on 5/4/2022.  
(Judge's initials) (Date)

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**Tentative Ruling**

Re: ***Mercado et al. v. California Department of Social Services  
IHSS Social Worker Linda Chute et al.***  
Superior Court Case No. 20CECG03552

Hearing Date: May 5, 2022 (Dept. 503)

Motions: Motion to Dismiss the Second Amended Complaint by  
Defendants Brandi Marie Smith and Raquel Morelos

Motion to Strike the Second Amended Complaint by  
Defendants Brandi Marie Smith and Raquel Morelos

Demurrer to the Second Amended Complaint by Defendant  
California Department of Social Services

**Tentative Ruling:**

To deny the motion to dismiss and the motion to strike.

To overrule the general demurrer on the ground of failure to state compliance with the Government Claims Act as to plaintiff Marissa Mercado, as successor-in-interest to the Estate of Maria Cumplido, and sustain as to plaintiff Marissa Mercado, an individual, and plaintiff Vanessa Mercado, with leave to amend.

To overrule the general demurrer to the ninth cause of action on the ground of immunity as to plaintiff Marissa Mercado, as successor-in-interest to the Estate of Maria Cumplido, and sustain as to plaintiff Marissa Mercado, an individual, and plaintiff Vanessa Mercado, with leave to amend.

To overrule the general demurrer on the ground of failure to state a claim based on no vicarious liability of defendants Linda Chute and Rachael Desiderio.

To overrule the general demurrer to the first, fifth and seventh causes of action. To sustain the general demurrer to the second cause of action, with leave to amend.

Any amended complaint shall be filed within 20 days of service of the order by the clerk. All new allegations shall be placed in **boldface** type.

**Explanation:**

On December 8, 2020, plaintiffs Marissa Mercado, individually and as the successor-in-interest to the Estate of Maria Cumplido, and Vanessa Mercado filed a complaint for damages against California Department of Social Services ("DSS") In Home Support Services ("IHSS") social worker Linda Chute; DSS IHSS care provider Rachael Desiderio; DSS; Brandi Marie Smith; Raquel Morelos; and David Castro, alleging eight causes of action. On July 12, 2021, plaintiffs filed a first amended complaint, alleging

nine causes of action against the same defendants. On October 19, 2021, the court sustained a general demurrer to the first amended complaint as to the first through seventh, and ninth causes of action, with leave to amend, and a special demurrer as to the entire pleading for uncertainty, with leave to amend. On November 9, 2021, plaintiffs filed the operative second amended complaint, which continues to allege the same nine causes of action:

1. Elder Abuse by plaintiff Marissa Mercado, as successor-in-interest to the Estate of Maria Cumplido, against all defendants;
2. Financial Elder Abuse by plaintiff Marissa Mercado, as successor-in-interest to the Estate of Maria Cumplido, against all defendants;
3. Age Discrimination under the Fair Employment and Housing Act ("FEHA") by plaintiff Marissa Mercado, as successor-in-interest to the Estate of Maria Cumplido, against defendants Brandi Marie Smith and Raquel Morelos;
4. Disability Discrimination under FEHA by plaintiff Marissa Mercado, as successor-in-interest to the Estate of Maria Cumplido, against defendants Brandi Marie Smith and Raquel Morelos;
5. Violation of the Unruh Civil Rights Act by plaintiff Marissa Mercado, as successor-in-interest to the Estate of Maria Cumplido, against all defendants;
6. Breach of Warranty of Habitability by plaintiff Marissa Mercado, as successor-in-interest to the Estate of Maria Cumplido, against defendants Brandi Marie Smith and Raquel Morelos;
7. Unfair Business Practices by plaintiff Marissa Mercado, as successor-in-interest to the Estate of Maria Cumplido, against all defendants;
8. Intentional Misrepresentation by all plaintiffs against defendant Rachael Desiderio; and
9. Negligence by all plaintiffs against all defendants.

Defendants Brandi Marie Smith and Raquel Morelos jointly and concurrently move to strike and dismiss the second amended complaint. Defendant DSS challenges the second amended complaint by way of general demurrer for failure to state facts to support a cause of action as to the first, second, fifth, and seventh causes of action, and based on arguments that DSS is immune to common law causes of action, DSS is not vicariously liable for the acts of non-state employees, and plaintiffs failed to plead compliance with the Government Claims Act.

#### Motion to Dismiss/Motion to Strike

Defendants Brandi Marie Smith and Raquel Morelos move to dismiss or strike the second amended complaint based on plaintiffs' failure to timely file and serve the amended complaint pursuant to this court's October 19, 2021 order. They move to dismiss under Code of Civil Procedure section 581 and to strike under Code of Civil Procedure section 435 and California Rules of Court, rule 3.110.

Defendants Smith and Morelos contend that the second amended complaint had a file and serve deadline of November 8, 2021, but was not filed until November 9, 2021. However, defendants Smith and Morelos fail to recognize that Code of Civil

Procedure section 1013, subdivision (a) adds five days to any notice served by mail. The motion to dismiss is thus denied.<sup>1</sup> The motion to strike as it pertains to an untimely filing is also denied.

Defendants Smith and Morelos also argue that certain defendants are improperly named, and therefore subject to being stricken. They dispute factual allegations in the second amended complaint regarding the ownership of the property. They argue that the second amended complaint is inconsistent in both alleging that defendant Morelos held the 50 percent interest in the property at the time of John Morelos' death and that defendant Smith had been transferred the same interest owned by John Morelos prior to his death.

Pleadings are to be construed liberally with a view to substantial justice between the parties. (Code Civ. Proc., § 452.) The allegations in the complaint are considered in context and presumed to be true. (*Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.)

There is no inconsistency as pled. John Morelos, who owned 50 percent of the property in which Maria Cumplido resided, allegedly transferred his interest to defendant Smith on March 19, 2020. (SAC, ¶ 7.) Prior to that period, he held his interest, while he was married to defendant Morelos. (SAC, ¶ 6.) Plaintiffs allege on information and belief that defendant Smith was a responsible landlord subsequent to the transfer, and that defendant Morelos was a responsible landlord based on John Morelos' interest. (SAC, ¶¶ 27-28.) While defendant Morelos argues that she held no interest, and that only John Morelos and his sister Diana Castro held the interest without her involvement because she was neither an owner nor a landlord, such facts do not appear in the second amended complaint. Neither are there facts surrounding the probate of the Estate of John Morelos. Such facts would only seek to dispute the present allegations that defendant Morelos and defendant Smith, at varying points, were either owners or landlords during relevant time periods. The purpose of a motion to strike is not to challenge the allegations of the complaint with evidence outside of the complaint. (Code Civ. Proc., § 437, subd. (a).)<sup>2</sup>

The motion to strike based on the purported naming of irrelevant defendants is denied.

### Demurrer

In ruling on a demurrer, the court assumes the truth of the facts alleged in the complaint and the reasonable inferences that may be drawn from those facts. (*Miklosy*

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<sup>1</sup> Although defendants Smith and Morelos further argue under Code of Civil Procedure section 1010.6, subdivision (a) that the proof of service is presumptively invalid because they never expressly authorized electronic service, they overlook Code of Civil Procedure section 1010.6, subdivision (e), which states that "[a] party represented by counsel, who has appeared in an action or proceeding, shall accept electronic service of a notice or document that may be served by mail ...." (Emphasis added.)

<sup>2</sup> Defendants Smith and Morelos' request for judicial notice of the court's docket is granted, but only to the extent that it demonstrates a probate matter was filed. (*Steed v. Dept. of Consumer Affairs* (2012) 204 Cal.App.4th 112, 120-121.)



v. *Regents of Univ. of Cal.* (2008) 44 Cal.4th 876, 883.) The court may also consider matters subject to judicial notice. (*Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 29.) On demurrer, the court must determine if the factual allegations of the complaint are adequate to state a cause of action under any legal theory. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103.) The courts of this state have long since departed from holding a plaintiff strictly to the form of the action he has pleaded and instead have adopted the more flexible approach of examining the facts alleged to determine if a demurrer should be sustained. (*Ibid.*)

Defendant DSS demurs to the second amended complaint based on several distinct arguments: failure to plead compliance with the Government Claims Act, immunity from common law claims, no vicarious liability, and generally failure to state a claim.

### *Compliance with the Government Claims Act*

Defendant DSS argues that any lawsuit alleging monetary damages against a public agency must be preceded by a claim filed with the Department of General Services in accordance with the Government Claims Act. (*Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 205; Gov. Code, § 900 et seq.) Compliance with the claim requirement is a condition precedent to suing a public entity. (*Rubenstein v. Doe No. 1* (2017) 3 Cal.5th 903, 906.) Complaints that do not allege facts demonstrating either that a claim was timely presented or that compliance with the claims statute is excused are subject to a general demurrer for failure to state facts sufficient to constitute a cause of action. (*Ibid.*)

Here, defendant DSS argues that each plaintiff has not pled compliance with the Government Claims Act. The second amended complaint alleges that “[o]n or about May 20, 2020, Plaintiff filed a government claim with the California Department of General Services[.]” which was rejected on June 25, 2020. (SAC, ¶ 13.) As the second amended complaint is unclear as to which plaintiff it refers, it is unclear whether each plaintiff satisfied the Government Claims Act as it pertains to causes of action seeking monetary damages.

The second amended complaint identifies DSS as a defendant to the first, second, fifth, seventh, and ninth causes of action for, respectively, elder abuse, financial elder abuse, violation of the Unruh Civil Rights Act, Unfair Business Practices, and negligence. On each cause of action, with the exception of negligence, the only plaintiff seeking monetary damages is plaintiff Marissa Mercado, as successor-in-interest to the Estate of Maria Cumplido. As to the negligence cause of action, all plaintiffs seek monetary damages.

Defendant DSS submits a government claim form, dated May 20, 2020, with claimant information identifying plaintiff Marissa Mercado that is consistent with the allegation in the second amended complaint.<sup>3</sup> The facts identified were dereliction of duty for services not rendered but paid for that resulted in bodily injury and death. (DSS’ Request for Judicial Notice, Ex. A.) DSS argues that, because the claimant information

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<sup>3</sup> Defendant DSS’ request for judicial notice is granted as to Exhibit A.

identifies plaintiff Marissa Mercado, it had no notice of the claims of the Estate of Maria Cumplido. DSS apparently read plaintiff Marissa Mercado to have submitted a claim that resulted in her own death on the incident date of December 21, 2019 and therefore did not inquire further. The Department of General Services, following review of the claim, rejected the claim as complex in excess of scope of determination on a government claim.

It is not the purpose of the claims statutes to prevent surprise. (*Nguyen v. Los Angeles County Harbor/UCLA Medical Center* (1992) 8 Cal.App.4th 729, 734.) The purpose of these statutes is to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation. (*Ibid.*) However, when the possible liability reflected in a tort claim filed by one party is different in kind and nature from the possible liability to a second injured party, the second injured party may not rely on the tort claim filed by the first party. (*Pacific Tel. & Tel. Co. v. County of Riverside* (1980) 106 Cal.App.3d 183, 191.)

While the government claim that plaintiff Mercado Mercado submitted, as a representative of the Estate of Maria Cumplido, could have been more specific, the court finds that the claim provided the public entity sufficient information to investigate it. Although defendant DSS relies on *Nelson v. County of Los Angeles* (2003) 113 Cal.App.4th 783, for the principle that an individual who does not identify as a representative of an estate does not state a claim on behalf of the estate, the facts surrounding *Nelson* are distinguishable. There, the plaintiff made no mention of the estate's damage. (*Id.* at p. 797.) Rather, the plaintiff submitted her own claim, identifying the claim to be based on "loss of a son," indicating a personal claim rather than a claim on behalf of an estate. (*Ibid.*) Here, in contrast, the claim referred to bodily injury and death. As the incident date was identified as December 21, 2019, and the claim was signed by plaintiff Marissa Mercado on May 20, 2020, taken in context, the claim could not have been personal to plaintiff Marissa Mercado, but on behalf of an estate, as it related to the death of a person on or about December 21, 2019, who received care by Fresno County IHSS.

The demurrer as it pertains to the presentation of a claim as to the Estate of Maria Cumplido on the first, second, fifth, seventh, and ninth causes of action is overruled. The demurrer as it pertains to plaintiff Marissa Mercado, individually, and plaintiff Vanessa Mercado on the ninth cause of action is sustained, with leave to amend.

#### *Immunity from Common Law Claims*

Defendant DSS argues that, as a public entity, it is immune from common law claims and Government Code section 815 provides that liability of a public entity must be authorized by statute. On this ground, defendant DSS challenges only the ninth cause of action for negligence. Plaintiffs make no argument in opposition.

As set forth above, the court has found that the presentation of a government claim pursuant to the Government Claims Act on behalf of the Estate of Maria Cumplido is sufficiently alleged. Thus, to the extent that the claim supports negligence by way of death or injury to person or personal property, it is proper. (See Gov. Code, § 911.2.) The court overrules the demurrer as to the ninth cause of action as it pertains to plaintiff

Marissa Mercado, as successor-in-interest to the Estate of Maria Cumplido, and sustains it as to plaintiff Marissa Mercado, individually, and plaintiff Vanessa Mercado, with leave to amend.

### *Vicarious Liability*

Plaintiffs allege, in part, that defendant DSS is vicariously liable for the acts of defendants Chute and Desiderio. (SAC, ¶ 5.) Defendant DSS argues that it has no liability for defendants Chute and Desiderio because neither were employees of the State of California. In support of its argument, defendant DSS seeks to introduce evidence from LinkedIn to demonstrate that neither defendant Chute nor defendant Desiderio is employed by the State of California.

Defendant DSS' request for judicial notice of printouts of the LinkedIn pages of defendant Chute (Exhibit B to the request), and defendant Desiderio (Exhibit C to the request) is denied. (Evid. Code, § 450 et seq.) According to the allegations of the second amended complaint, defendants Chute and Desiderio were employed by defendant DSS at all relevant times. (SAC, ¶¶ 3, 4.) The demurrer for failure to state a claim based on the argument that defendant DSS has no vicarious liability is overruled.

### *Failure to State a Claim*

#### *First Cause of Action – Elder Abuse*

Defendant DSS argues that the first cause of action fails to state a claim because the second amended complaint fails to state facts identifying neglect on the part of DSS. Specifically, defendant DSS argues that the complaint does not allege that it had responsibility to attend to Maria Cumplido's needs, or care in general. On a claim of neglect under the Elder Abuse Act, there must be a caretaking or custodial relationship. (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 155.) Nothing in the second amended complaint identifies a caretaking or custodial relationship between Maria Cumplido and defendant DSS.

In opposition, plaintiffs argue that they have pled sufficient facts against defendant DSS in the first cause of action based on vicarious liability. As set forth above, vicarious liability has been sufficiently pled. The court thus overrules the demurrer for failure to state a claim as to the first cause of action.

#### *Second Cause of Action – Financial Elder Abuse*

Defendant DSS next argues that the second cause of action for financial elder abuse fails to state a claim. Financial abuse of an elder occurs when a person or entity, among other actions, takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both. (Welf. & Inst. Code, § 15610.30, subd. (a)(1).) Defendant DSS argues that the second amended complaint fails to state facts to suggest that IHSS funds, which were allegedly misappropriated to constitute financial elder abuse, belonged to Maria Cumplido. The court finds that the second amended complaint does not sufficiently establish what real or personal property belonging to Maria Cumplido is at issue. The

statement that Maria Cumplido was entitled to "IHSS benefits" does not clearly identify as real or personal property. To the extent plaintiffs argue that the benefits constitute a property interest because they were an entitlement to Maria Cumplido, such allegations are not present in the complaint.

The court sustains the demurrer for failure to state a claim as to the second cause of action, with leave to amend.

#### *Fifth Cause of Action – Violation of the Unruh Civil Rights Act*

In a half-page argument, citing *Brennon B. v. Super. Ct.* (2020) 57 Cal.App.5th 367,<sup>4</sup> defendant DSS challenges the fifth cause of action for violation of the Unruh Civil Rights Act on the ground that public entities are excluded. However, at issue in *Brennon B.* was a question of whether a public school could be a business establishment within the meaning of the Unruh Civil Rights Act. (*Id.* at pp. 390-397.) *Brennon B.* concluded that the California Supreme Court has never considered whether a state entity fulfilling a state constitutional mandate is a business establishment for purposes of the Unruh Civil Rights Act. (*Id.* at p. 388.) The court recognized that, in the areas of inquiry of public accommodation laws, most are directed at private, rather than state conduct. (*Ibid.*) And many decisions test factors such as overall function, extent of commercial transactions, attributes and activities, and sale of access/participation. (*Id.* at p. 389 [referencing prior California Supreme Court decisions].)

None of these factors were discussed in defendant DSS' moving papers. The court finds that DSS has failed to support its contention and overrules the demurrer for failure to state a claim as to the fifth cause of action.

#### *Seventh Cause of Action – Unfair Business Practices*

Finally, defendant DSS challenges the seventh cause of action for unfair business practices. Citing *Community Memorial Hospital v. County of Ventura* (1996) 50 Cal.App.4th 199, DSS argues that it is not a person within the meaning of the Unfair Practices Act. However, *Community Memorial* does not stand for the proposition that DSS is not a person within the meaning of the Unfair Practices Act or the unfair competition statute merely because a county is a subdivision of a state. *Community Memorial* concluded that, where no impairment of sovereign powers would result, the Legislature may properly be held to have intended the Unfair Practices Act and unfair competition statute to apply to government bodies even though it used general statutory language. (*Id.* at p. 209.) Thereafter, the court in *Community Memorial* evaluated whether applying the Unfair Practices Act to the operations of the county hospital would infringe on its sovereign powers. (*Ibid.*)

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<sup>4</sup> Defendant DSS also cites an unpublished Ninth Circuit Court of Appeals decision, *Romstad v. Contra Costa County* (9th Cir. 2002) 41 Fed.Appx. 43, which held that a district court did not err in finding that a county department of social services was not a business establishment for purposes of the Unruh Civil Rights Act. The court finds the authority unpersuasive. The unpublished decision sets forth no authority for the statement.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Issued By:** KAG **on** 5/4/2022.  
                    (Judge's initials)                         (Date)