

**Tentative Rulings and Resolution Review Hearings
December 18, 2017
Department 8**

NOTE: This Court does not follow the procedures described in Rules of Court, Rule 3.1308(a). Tentative rulings appear on the calendar outside the court department on the date of the hearing, pursuant to California Rule of Court, Rule 3.1308(b)(1). As a courtesy to counsel, the court also posts tentative rulings no less than 12 hours in advance of the time set for hearing. The rulings are posted on the court’s website (www.shasta.courts.ca.gov) and are available by clicking on the “Tentative Rulings” link. A party is not required to give notice to the Court or other parties of intent to appear to present argument.

Law and Motion – 8:30 a.m.

GIBBONS VS. HAWKLEY, ET AL

Case Number: 185590

Tentative Ruling on Motion to Compel Defendant Hawkley’s Attendance at Deposition: This personal injury action arises from a 2014 motor vehicle accident. In addition to the instant motion, plaintiff has filed a motion for terminating, issue, or other appropriate sanctions and a request for a trial continuance in the alternative. The mandatory settlement conference is currently scheduled for December 18, 2017 and trial for January 23, 2018.

Under CCP § 2025.450(a), if, after service of a deposition notice, a party who has not served a valid objection under Section 2025.410 fails to appear for his deposition, the party giving notice may move to compel the deponent’s attendance and testimony. Here, plaintiff noticed Defendant Hawkley’s deposition to occur on October 18, 2017. Defendant timely objected on October 12, 2017 on grounds that his counsel was not available on October 18, 2017. However, defendant’s objection is contradicted by his counsel’s October 17, 2017 letter wherein defense counsel stated that he could not produce his client for deposition or give a date certain for the deposition because he had not been able to locate his client. While defense counsel states in opposition that defendant has now been located and is willing to be deposed, when plaintiff previously proposed taking defendant’s deposition at any point between October 18, 2017 and November 1, 2017, defense counsel was unable to commit to or provide any available deposition dates.

The approaching discovery cut off and plaintiff’s right to prepare his case for trial warrants plaintiff filing this motion. Plaintiff made reasonable and good faith efforts to find a mutually agreeable date after the initially noticed October 18, 2017 date but before leaving on an extended vacation in early November. Further, defense counsel acknowledges ongoing difficulty in receiving communications from defendant and coordinating his deposition in light of defendant’s naval duties. However, defendant has never moved for a stay under state or federal law based on his military status and there is no admissible evidence that he is actually in the military. Thus, without an order compelling defendant’s attendance at deposition, there is no guarantee that defendant will not continue to delay his deposition, thereby precluding plaintiff from obtaining deposition testimony from a named party and percipient witness before the approaching discovery cut off.

Defendant’s limited availability is insufficient to excuse his attendance at deposition, particularly in light of the approaching discovery cut-off, defendant’s unwillingness to stipulate to a trial continuance, plaintiff counsel’s flexibility as to date and location, and the fact that plaintiff’s counsel estimates that the deposition will only take one to two hours. The Motion to Compel Defendant Hawkley’s Attendance at Deposition is **GRANTED**. Defendant Hawkley is ordered to attend his deposition on a mutually agreeable date within the next 30 days.

Tentative Ruling on Motion for Sanctions: This personal injury action arises from a 2014 motor vehicle accident. On October 11, 2017, the Court granted plaintiff’s motion to compel Defendant Hawkley’s responses

to Form Interrogatories, Set One and Request for Production of Documents, Set One. On November 1, 2017, plaintiff filed a motion to compel Defendant Hawkley's attendance at deposition and filed the instant motion on November 3, 2017. The mandatory settlement conference is currently scheduled for December 18, 2017 and trial for January 23, 2018, having been continued by stipulation of the parties.

Plaintiff is seeking terminating, issue, and/or monetary sanctions against all defendants and in the alternative, a trial continuance and monetary sanctions. He has not filed a separate motion to continue trial. There are a number of procedural defects in plaintiff's moving papers, including a late-filed separate statement, which was not filed until December 8, 2017, and is required by CRC 3.1345(a) to be filed and served with a motion for issue or evidentiary sanctions, as well as a failure to serve a separate statement of damages on Defendant Hawkley, as required by CCP § 425.11 in a personal injury action before default may be taken.

Under CCP § 2023.030, the court may impose whatever sanctions are just, including but not limited to monetary sanctions, issue sanctions, evidence sanctions, and terminating sanctions, against anyone engaging in conduct that is a misuse of the discovery process. Failure to obey a discovery order constitutes misuse of the discovery process. CCP § 2023.010(g). Under CCP § 2023.030(b), the court may order that designated facts "shall be taken as established" by the party adversely affected by the discovery misuse and may also prohibit the party who committed such misuse from supporting or opposing designated claims or defenses. Terminating sanctions may include striking a party's pleadings or entering default judgment against that party. CCP § 2023.030(d). Numerous cases hold that severe sanctions for failure to comply with a court order are only allowed where the failure was willful. *See R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 CA4th 486, 495; *Vallbona v. Springer* (1996) 43 CA4th 1525, 1545; *Biles v. Exxon Mobil Corp.* (2004) 124 CA4th 1315, 1327. A separate statement of damages claimed by plaintiff in a personal injury action must be served on defendant before entry of default, including where defendant's answer is stricken as a discovery sanction. CCP § 425.11; *Van Sickle v. Gilbert* (2011) 196 CA4th 1495, 1521. In addition to or in lieu of any other sanction, the court may order the party engaging in discovery misuse and/or counsel to pay the reasonable expenses, including attorney fees, incurred as a result of the failure to obey. CCP § 2023.030(a).

The main purpose of sanctions in discovery cases is to enable the party seeking information to obtain it. *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 CA4th 256, 262. A secondary purpose is to compensate the party seeking information for costs and fees incurred in enforcing discovery. *Deyo v. Kilbourne* (1978) 84 CA3d 771, 796. Sanctions are not meant to punish the disobedient party and should not give the requesting party more than they would have obtained if the discovery had been complied with. *Caryl Richards, Inc. v. Sup.Ct. (Klug)* (1961) 188 CA2d 300, 303; *Rutledge v. Hewlett-Packard Co.* (2015) 238 CA4th 1164, 1194. Sanctions should be incremental, starting with monetary sanctions and ending with terminating sanctions, the latter reserved for when a party persists in disobeying the court's orders. *Deyo v. Kilbourne*, supra, 84 CA3d at 796; *Lopez v. Watchtower Bible & Tract Soc. of New York, Inc.* (2016) 246 CA4th 566, 604; *see Thomas v. Luong* (1986) 187 CA3d 76, 81-82 (striking defendant's answer and entering his default may be excessive punishment for failure to appear for deposition or to answer interrogatories in an auto accident case, where (i) defendant's whereabouts were unknown to his attorney; and (ii) lesser sanctions were available).

As a preliminary matter, the Court grants plaintiff's request for judicial notice as to defendant's opposition to plaintiff's motion to compel verified answers, etc., dated September 26, 2017 and plaintiff's motion to compel deposition of Hawkley, set to heard with the instant motion but denies plaintiff's request for judicial notice as to the notice of motion and motion for protective order, and supporting declaration of defense counsel as those documents were never filed in the instant action. While plaintiff provides numerous examples to show how defendants have repeatedly engaged in misuse of the discovery process, his main contention is that defendant has failed to comply with the Court's October 11, 2017 order compelling Defendant Hawkley to provide discovery responses. It is undisputed that discovery responses have been provided; instead, plaintiff contends that defendant's responses are deficient and therefore in violation of the Court's October 11, 2017. Notably, however,

plaintiff's separate statement only addresses five responses to Request for Production of Documents, Set One and does not include any discussion of Form Interrogatories. Given that CRC 3.1345 requires a separate statement to include "all the information necessary to understand each discovery request and all the responses to it that are at issue" and be "full and complete so that no person is required to review any other document in order to determine the full request and the full response," the Court will consider the late-filed Separate Statement but limits its inquiry regarding the instant motion to those discovery items specifically discussed in the Separate Statement.

Plaintiff's Separate Statement argues that defendant has violated the Court's October 11, 2017 Order by (1) failing to provide documents referenced in response to Request for Production of Documents Nos. 5, and 7-9; (2) providing untimely responses (the amended responses were provided after the October 27, 2017 deadline); and (3) providing a false response to Request for Production of Documents No. 24 (alleging that it is impossible that defendant has no documents responsive to the request). On October 11, 2017, the Court issued an order compelling Defendant Hawkley to provide verified responses to plaintiff's Demand for Production, Set One and Form Interrogatories, Set One and ordered responses due within 14 days service of notice of the order (by October 27, 2017). Defendant Hawkley's discovery responses were served by mail on Friday, October 27, 2017. On Monday, October 30, 2017, plaintiff's counsel received the responses and spoke with defense counsel regarding deficiencies as well as the need to remove objections. Defendant then provided amended responses on October 31, 2017, with objections removed.

Plaintiff seeks to show that Defendant Hawkley has failed to comply with the Court's October 11, 2017 Order by arguing that the amended responses were untimely. However, that Order simply required defendant to provide discovery responses without objections. While defendant's initial responses did contain some objections, they were timely provided and upon conferring with plaintiff's counsel, defendant amended his responses by removing those objections and served those amended responses within one day of discussion with plaintiff's counsel. The Court is unpersuaded by plaintiff's argument that such conduct would warrant sanctions of any kind.

Plaintiff's allegation that the responses to Request for Production of Documents, Nos. 5, and 7 through 9 violate the Court's Order because they do not provide the documents to which defendant is referring or even specifically state them is similarly unconvincing. Each of these amended responses is identical, and states "vehicle photos and damage estimate, which documents have been provided, as well as plaintiff's medical records, which are equally available to plaintiff." Plaintiff acknowledges receipt of a compact disc containing photographs of plaintiff's vehicle as well as a damages estimate as part of Defendant Hawkley's initial discovery responses. Thus, it would appear that he takes issue with the fact that those same documents were not again included in duplicate form with defendant's amended responses. Regarding plaintiff's medical records, defendant's responses make clear that the reference medical records were obtained pursuant to subpoena, which would have required plaintiff to receive notice. Therefore, plaintiff could have just as easily determined the list of providers of those medical records and obtained copies himself. The duty to obtain requested information does not apply to "information equally available to the propounding party." CCP § 2030.220(c). Defendant was not required to produce documents equally available to plaintiff.

Plaintiff further contends that it is impossible that defendant has no documents responsive to Request No. 24, particularly because defendant has made reference in prior communications and declarations that a claims file and related correspondence relating exists. Defendant has provided a verified response stating under penalty of perjury that he has no documents responsive to the request. Given that defendant has provided responses in compliance with the Court's Order, if plaintiff wishes to challenge those responses as incomplete or otherwise deficient, the appropriate mechanism to do so would be a motion to compel further responses under CCP § 2030.300. Notably, however, plaintiff is not requesting that the Court order defendant to produce the documents plaintiff claims exist in response to Request No. 24, but is instead asking for severe sanctions that would either result in default being entered against *both* parties or issue sanctions that would relieve plaintiff of the burden to prove the elements of his case. Such sanctions are unwarranted under the circumstances.

A party may seek a trial continuance by either ex parte application or noticed motion. CRC 3.1332(b). Since both parties have briefed plaintiff's request for a trial continuance, the Court will rule on the merits despite the procedural defects. Under CRC 3.1332(c)(6), the court may grant a continuance upon a showing of a party's excused inability to obtain essential testimony, documents, or other material evidence despite diligent efforts. Plaintiff has presented evidence showing that he has been unable to take Defendant Hawkley's deposition or conduct subsequent related discovery because (1) defense counsel could not locate Hawkley until late October 2017 and (2) at the time the instant motion was filed, defense counsel had refused to make his client available for deposition.

The Motion for Sanctions is **DENIED**. The Motion for Trial Continuance is **GRANTED**. The trial date of January 23, 2018 is vacated. Counsel are ordered to appear to set a new trial date. A proposed order has been lodged and will be modified for execution by the Court.

LYTLE VS. FORD MOTOR COMPANY

Case Number: 187076

Tentative Ruling on Motion to Vacate or Continue Trial Date: Plaintiff filed suit in this "lemon law" action on April 3, 2017, with first amended complaint filed June 15, 2017, alleging violation of the Song-Beverly Act and fraud causes of action based, among other things, upon an alleged defect in the DPS6 PowerShift transmission of her Ford Fiesta. A settlement conference occurred on December 4, 2017 but the case was not resolved.

As a preliminary matter, the Court grants defendant's request for judicial notice of the Opposition of plaintiff's counsel to Ford's Petition to Coordinate the Northern California DPS6 Actions. Defendant seeks to vacate or continue the March 3, 2018 trial date on grounds that defendant inadvertently omitted this case from a list of Northern California DPS6 PowerShift transmission actions which were coordinated and assigned to Sacramento County Superior Court in September 2017. Because Sacramento Superior Court has not yet assigned a coordination judge, defendant cannot file a motion to add this case to the Northern California DPS6 coordinated actions and therefore requests a continuance to allow additional time to file a petition to add this case to the coordinated proceedings once a coordination judge is assigned.

Trial dates should be considered as certain. CRC 3.1332(a). Motions to continue trial are generally disfavored. *See* Gov. Code § 68607(f), (g). The Court has discretion to continue a trial date upon an affirmative showing of good cause. CRC 3.1332(c), (d). Defendant argues that if trial is not vacated or continued in this matter, discovery and motion practice will likely result in inconsistent orders and undermine the goals of the coordination proceedings, including judicial economy. Yet, defendant has not provided the Court with any time estimate as to when a coordination judge will be assigned, when a petition to add this case to the coordinate proceedings will be filed, or when a ruling upon such a petition will be issued. At this point, any concern that proceeding with trial in the instant action would frustrate the coordinated proceedings is purely speculative and does not amount to good cause to vacate or continue trial, particularly in light of plaintiff's right to have her case heard in a timely fashion.

In its Order Granting Petition for Coordination, the San Francisco Superior Court determined that actions that had progressed to the point where "trial or settlement is imminent" should be excluded from the coordinated proceedings as there would be no benefit to coordination. That Order, issued September 13, 2017, excluded cases with trial dates up to January 1, 2018 (approximately three and one-half months away). While the Order acknowledges the value that consolidation plays in reducing duplication of efforts and the risk of inconsistent discovery and other motion rulings, the court's exclusion of cases with approaching trial dates indicates that some duplication of efforts or inconsistent rulings in cases where trial was imminent is inevitable and would not mandate coordination of those cases that would not benefit from such coordination. Trial is scheduled to begin in approximately three and one-half months and both parties have already undertaken significant discovery,

particularly if the depositions of the dealership employees occurred on December 12, 2017 as indicated by defendant. Even if a petition for adding the instant action to the coordination proceeding were pending, there is no guarantee that the court would find a benefit to coordinating the instant action.

The motion is **DENIED** without prejudice. A proposed order was lodged with the Court which will be modified to reflect the denial.

NORDSTROM VS. RUTLEDGE, ET AL

Case Number: 185180

Tentative Ruling on Order to Show Cause re Sanctions and Further Orders: An Order to Show Cause Re: Sanctions and Further Orders issued on November 15, 2017 to plaintiff and plaintiff's counsel for failure to timely prosecute and failure to appear at the mandatory settlement conference on November 13, 2017. While Defendants Tom Spaulding, Beth Spaulding, Shane Schall and Brian Schall have been dismissed by Plaintiff, the action remains pending as against Defendant Shayne Rutledge. Plaintiff attempted to file a request for entry of default on October 30, 2017, but the default was not entered because Defendant Rutledge filed an answer on May 5, 2017.

No response to the Order to Show Cause having been filed, sanctions are hereby imposed in the sum of \$250.00 against plaintiff and counsel. Said sum is to be paid to the Court no later than 30 days from the date of issuance of the order, failure of which may result in issuance of an Order to Show Cause re additional monetary sanctions or, in the alternative, issuance of a writ of execution. The clerk is instructed to prepare a separate Order of Sanctions.

RYNESS VS. PLUM HEALTHCARE, ET AL

Case Number: 186924

Tentative Ruling on Order to Show Cause re Sanctions and Further Orders: An Order to Show Cause Re: Sanctions and Further Orders issued on November 16, 2017 to plaintiff for failure to timely prosecute (California Rules of Court, Rule 3.110(b)) and failure to appear at mandatory settlement conference on November 6, 2017 (California Rules of Court, Rule 3.1380(b)).

No response to the Order to Show Cause having been filed, sanctions are hereby imposed against plaintiff in the sum of \$250.00. Said sum is to be paid to the Court no later than 30 days from the date of issuance of the order, failure of which may result in issuance of an Order to Show Cause re additional monetary sanctions or, in the alternative, issuance of a writ of execution. An Order to Show Cause re dismissal of the action shall issue, with a hearing date of **Monday, February 5, 2018 at 8:30 a.m. in Department 8**. The clerk is instructed to prepare a separate Order of Sanctions. The Court notes that trial is scheduled to commence in this matter on Tuesday, February 6, 2018.

WESTERN SURETY CO. VS. WHITNEY-STONE, INC.,

Case Number: 186382

Tentative Ruling on Order to Show Cause re Sanctions and Further Orders: An Order to Show Cause Re: Sanctions and Further Orders issued on November 13, 2017 to plaintiff and counsel for failure to timely prosecute and serve pleadings on defendant (California Rules of Court, Rule 3.110(b)); failure to timely file a settlement conference statement (California Rules of Court, Rule 3.725); and failure to appear at mandatory settlement conference on November 6, 2017 (California Rules of Court, Rule 3.1380(b)).

A late response was filed December 12, 2017 but does not discuss plaintiff's failure to timely file a settlement conference statement or failure to appear at the mandatory settlement conference on November 6, 2017. Sanctions are hereby imposed against plaintiff and counsel in the sum of \$250.00. Said sum is to be paid to the Court no later than 30 days from the date of issuance of the order, failure of which may result in issuance of an Order to Show Cause re additional monetary sanctions or, in the alternative, issuance of a writ of execution.

Resolution Review – 9:00 a.m.

BORGESON VS. LEWIS, ET AL

Case Number: 185986

This matter is on calendar for review regarding status of trial setting. The Court previously designated this matter as a Plan II case. Court intends to set this matter for trial no later than April 17, 2018. Defendants have submitted a case management statement indicating that discovery will not be completed until May 2018. Neither party has provided available trial dates. The parties are ordered to appear to provide the Court with available trial dates.

CITY OF REDDING VS. SHREE SHIVA, ET AL

Case Number: 183558

This matter is on calendar for review regarding status of receivership. At the previous hearing on September 25, 2017, the Receiver was ordered to file a Status Report apprising the Court of the status of the receivership at least five court dates prior to today’s hearing. The last Monthly Accounting by the Receiver for October 2017 was filed November 27, 2017. No objections having been received, the Court intends to approve Monthly Accounting by the Receiver for October 2017. A Resolution Review Re: Status of Receivership is set for **Monday, January 22, 2018 at 9:00 a.m. in Dept. 8.** The Receiver is ordered to file a Status Report apprising the Court of the status of the receivership at least five court dates prior to the hearing. The Clerk is directed to serve a copy of today’s minutes upon all parties to the action.

HOUSTON CASUALTY COMPANY VS. KINGSWAY INDS

Case Number: 185384

This matter is on calendar for review regarding status of dismissal/judgment. A Conditional Notice of Settlement of the Entire Case was filed on October 12, 2017. The notice sets forth that the settlement is conditional on the satisfactory completion of specified terms that are not to be performed with 45 days of the date of settlement, and that a request for dismissal will be filed no later than August 15, 2018. The Court encourages the parties to resolve such cases in a way which results in a conditional dismissal; i.e., a stipulation that the dismissal may be set aside and judgment entered if there is a default in completing the terms of the settlement. The Court continues the hearing on Resolution Review Re: Status of Dismissal to **Monday, August 20, 2018 at 9:00 a.m. in Dept. 8.** If a Request for Dismissal is filed and dismissal entered prior to the hearing date, the hearing date will be vacated and the file closed. Otherwise, the court intends to administratively close the case at that time and deem it exempt from the case disposition time standards. No appearance is necessary on today’s date.

IN RE WOLF

Case Number: 29130

This matter is on calendar for review regarding confirmation of filing of receipts. The Court has received and reviewed the Declaration of Douglas Mudford which provides new receipts related to the distribution of the settlement funds. Plaintiff’s counsel is authorized to distribute the remaining funds in the amount of \$43.33 in the form of a pre-paid gas card. No receipt will be required. The clerk is instructed to close the file. No appearance is necessary on today’s calendar.

NOONKESTER VS. ORREY, ET AL

Case Number: 185098

This matter is on calendar for review regarding status of dismissal, having been continued from November 6, 2017. On September 12, 2017, the Court granted Plaintiff until October 31, 2017 to file a Request for Dismissal of Entire Case. No request for dismissal or status report has been filed. The parties are ordered to appear to provide the Court with the status of settlement and funding of the structured settlement annuity. The Court reminds Plaintiff that Plaintiff must file a declaration with supporting documentation demonstrating funding of the

obligation of periodic payments.

NORDSTROM VS. RUTLEDGE, ET AL

Case Number: 185180

This matter is on calendar for review regarding status of trial. The Court notes that trial has been set for December 27, 2017. No appearance is necessary on today's calendar.