

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF MARIN**

DATE: 03/20/26      TIME: 1:30 P.M.      DEPT: L      CASE NO: CIV2202485

PRESIDING: HON. MARK A. TALAMANTES

REPORTER:

CLERK: M. GIL

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PLAINTIFF:      LELAND SPELMAN, ET  
AL

vs.

DEFENDANT:    STATE FARM GENERAL  
INSURANCE COMPANY, ET AL

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NATURE OF PROCEEDINGS: 1) MOTION – DISMISS  
2) MOTION – COMPEL ANSWERS TO INTERROGATORIES – DISCOVERY  
FACILITATOR PROGRAM

**RULING**

There are two motions on calendar filed by Defendant State Farm General Insurance (“State Farm”), both of which were filed on January 6, 2026.

A. Motion to Dismiss

Defendants State Farm General Insurance Company (“State Farm”) and Renee Waina’s (“Waina”; together with State Farm, “Defendants”) motion to dismiss for failure to prosecute is DENIED.

**BACKGROUND**

This is an insurance coverage dispute. Plaintiffs Leland Spelman and Linnea Carlson, a married couple, bring this case in their individual capacities and in their capacities as guardians ad litem for three of their family members (their children, Ellie and Julian, and Ms. Carlson’s father, Oscar). (FAC, ¶¶ 1-5.) Plaintiffs allege that all family members resided at a home insured by State Farm. (*Id.* at ¶ 10.) They identify Waina as an agent of State Farm. (*Id.* at ¶¶ 13, 35.) Plaintiffs allege that in two separate incidents (June 15, 2019, and April 15, 2021), the property was “heavily damaged by water and other covered causes of loss.” (*Id.* at ¶ 21.) Plaintiffs filed claims with State Farm. (*Ibid.*) They allege that State Farm “paid for some of Plaintiffs’ losses, but not all[,]” and that they were entitled to additional funds to cover the losses under the applicable insurance policies. (*Ibid.*) The FAC asserts causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and negligent misrepresentation.

The Court now considers Defendants’ motion to dismiss for failure to prosecute.

**LEGAL STANDARD**

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Code of Civil Procedure, section 583.410 (“Section 583.410”) gives a court discretion to “dismiss an action for delay in prosecution . . . if to do so appears to the court appropriate under the circumstances of the case.” (Code Civ. Proc., § 583.410, subd. (a).) A court may not dismiss an action under Section 583.410 unless at least one of the conditions specified in Section 583.420(a) has occurred. (Code Civ. Proc., § 583.420, subd. (a).) In ruling on a motion to dismiss for delay in prosecution, the court must consider specified matters enumerated in California Rules of Court, rule 3.1342(e). Its decision must be guided by the policies set forth in Code of Civil Procedure, section 583.130. (Cal. Rules of Court, rule 3.1342(e).) That section declares “that a plaintiff shall proceed with reasonable diligence in the prosecution of an action[,] but . . . all parties shall cooperate in bringing the action to trial or other disposition.” (Code Civ. Proc., § 583.130.)

The section also provides that when ruling on a motion to dismiss for failure to prosecute, a court should generally give the policy favoring dispositions of actions on their merits precedence over the one requiring dismissal for failure to proceed with reasonable diligence. (Code Civ. Proc., § 583.130.)

To avoid a dismissal under Section 583.410, “the plaintiff must show a reasonable excuse for [the] delay” in prosecuting the case. (*Wagner v. Rios* (1992) 4 Cal.App.4th 608, 611-612.) “[O]nce that showing is made, the trial court must consider all pertinent factors, including those under [Cal. Rules of Court, rule 3.1342(e)] and any prejudice to the defendant from the delay, before deciding whether to dismiss.” (*Ibid.*) Prejudice to the defendant is inferred if there has been a “protracted and unexplained delay in prosecution[,]” and the defendant need not make an affirmative showing of prejudice under those circumstances. (*Id.* at p. 612.)

## DISCUSSION

Plaintiffs commenced this case against Defendants with the filing of their original complaint more than three years ago on August 5, 2022. That an action has not been brought to trial within three years of the date it commenced is one of the conditions that triggers a court’s discretion to dismiss the action for failure to prosecute. (Code Civ. Proc., § 583.420, subd. (a)(2)(A).)

In March 2025, the parties stipulated to continue a case management conference to permit Plaintiffs more time to look for new counsel after the withdrawal of their original counsel in July 2024. (Ellingson Dec., ¶¶ 4,16.) The case management conference was continued to June 30, 2025, but Plaintiffs did not appear on that date. (*Id.* at ¶ 7.)

The Court issued an order to show cause as to “why the whole case should not be dismissed for multiple failures to appear” and set it for hearing on August 25, 2025. (See Jun. 30, 2025, Notice of Hearing.) Plaintiff Leland Spelman appeared at the hearing on the order to show cause and explained that Plaintiffs had been unable to retain counsel. (Case Management Conference Minutes, Aug. 25, 2025.) The Court set the matter for a trial setting conference on October 29, 2025. (*Ibid.*; Ellingson Dec., ¶ 8.) Plaintiffs failed to appear at that trial setting conference, prompting another order to show cause for failure to appear, set for February 25, 2026. (Oct. 29, 2025, Notice of Hearing.) Plaintiff Leland Spelman appeared at that hearing. (Case Management Conference Minutes, Feb. 25, 2026.) The Court dropped the order to show cause and set this motion to dismiss for hearing instead. (*Ibid.*) This evidence establishes a significant pattern of lack of diligence by Plaintiffs. (See Cal. Rules of Court, rule 3.1342(e)(4), (e)(7).)

Plaintiffs were represented by two separate law firms, Mannion Lowe & Oksenendler PC and Merlin Law Group. Both law firms were relieved as counsel upon motion on July 22, 2024, which was 18 months ago. (Ellingson Dec., ¶ 4.) The lawyers requested separate from the clients citing Plaintiffs and their counsel had “reached an impasse about the direction and handling of the case”; that Plaintiffs had “refused to follow their attorneys’ advice” and had either taken or

threatened to take actions that would make it unreasonably difficult for their attorneys to carry out the representation; and that an erosion of trust and confidence had resulted in an irreparable breakdown of the attorney-client relationship. (See Decs. in Supp. of Attorney's Motion to Be Relieved as Counsel, both filed May 24, 2024.) Plaintiffs have not been able to find anyone to represent them considering the manner of their previous counsel's departure. (Opposition, p. 3.)

Plaintiffs did not, with their opposition, present any evidence substantiating their stated efforts to obtain new counsel or supporting any of the factual statements they make in their brief. "In law and motion practice, factual evidence is supplied to the court by way of declarations." (*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 224.) Statements in a brief are not legally competent evidence. (See *Gdowski v. Gdowski* (2009) 175 Cal.App.4th 128, 139; accord *Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1433.)

Plaintiffs submitted a supplemental opposition (effectively a sur-reply), which is expressly permitted in connection with motions to dismiss under Section 583.410. (Cal. Rules of Court, rule 3.1342(d).) The court will accept the late filing finding that the papers assist the court without prejudicing to the Defendant. [The court has discretion whether to consider late filed papers. Cal. Rules of Court 3.1300(d).]

Plaintiffs' inability to obtain new counsel after a year and a half cannot be considered excusable delay. A civil litigant has a right to be represented by counsel only to the extent he or she can retain counsel. (*Chan v. Curran* (2015) 237 Cal.App.4th 601, 625, fn. 12.) This means a litigant *who secures counsel* cannot be barred from appearing in court through that counsel in connection with the litigant's civil case. (*Ibid.*) Civil litigants who cannot retain counsel for any reason – perhaps because they cannot afford it, or because, as here, the representation is undesirable to attorneys – are held to same responsibilities and standards as represented litigants, including (in the case of a plaintiff) the responsibility to diligently prosecute one's case. (See *Rappleyea*, *supra*, 8 Cal.4th 975, 984-985; *Wilshire Bundy Corp. v. Auerbach* (1991) 228 Cal.App.3d 1280, 1286.) An 18 month delay is simply too much time, and Plaintiffs do not offer any explanation of how the barrier to their retaining counsel could be overcome.

Plaintiffs further argue that Plaintiff Oscar Carlson passed during the pendency of this litigation, that a personal representative of his estate must be appointed if the estate is to continue to participate in this lawsuit, and that a licensed attorney must be appointed to represent the estate's personal representative in this case. Plaintiffs state that Mr. Carlson had passed away by June 2024. The Court also does not see why difficulties in Mr. Carlson's estate's pressing forward with his claims has stalled the litigation on behalf of the remaining four Plaintiffs.

Plaintiffs also cite as excuses for the delay certain medical conditions affecting multiple plaintiffs; Mr. Carlson's death during the pendency of this action and associated end-of-life and estate-related responsibilities; the fact that one plaintiff has a developmental disability that makes it difficult to navigate the litigation; and financial hardship.

Here, the Court is not convinced that a discretionary dismissal is "appropriate under the circumstances of [this] case." (Code Civ. Proc., § 583.410, subd. (a).) "[Section 583.410]e places no restrictions on the exercise of the trial court's discretion, and there is no requirement that the motion to dismiss must be granted unless opposed by an adequate showing of diligence or excuse for delay." (*Rathbun v. Superior Court* (1970) 8 Cal.App.3d 690, 694-695.) Defendants appear to be about to defeat this case without the help of Section 583.410.

The motion to dismiss is DENIED.

B. Motion to Deem Requests of Admissions to be admitted

Defendants have served Plaintiffs with requests for admission cutting to the heart of their claims. (Ellingson Dec., Ex. 3; see also Reply, p. 4 [per Defendants, the RFAs “cut to the core of plaintiffs’ liability contentions”].) For example, Plaintiffs are requested to admit that State Farm owes them no additional policy benefits arising out of either the June 2019 or the April 2021 incident and that Defendant Renee Waina made no misrepresentations to them. (*Ibid.*) Plaintiffs have neither responded to the RFAs nor requested an extension of time to respond (*id.* at ¶ 11), and the RFAs are the subject of a motion to deem admitted that is set for hearing the same day as the instant motion. Plaintiffs have not opposed that motion. Defendants state that they are confident that the motion to deem admitted will be granted, and that if it is, assuming the Court does not grant the instant motion, they will file a summary judgment motion based on these admissions. (Reply, p. 4.)

The motion to deem admitted being granted will lay the groundwork for a short and dispositive summary judgment motion. In that event, a discretionary dismissal under Section 583.410 would, again, not be necessary for Defendants to achieve the same outcome they are requesting by way of this motion.

The discovery motion is GRANTED.

The parties are ordered to meet and confer by telephone on Friday, March 27, 2026, at noon, to discuss a resolution of this matter to save further the compensable defense attorneys’ fees that may be necessary to pursue more litigation.

#### C. Referral to Disability Right California

Plaintiffs request that the Court’s order supply a “referral” to Disability Rights California (“DRC”) for a plaintiff who has a developmental disability.

The court is unable to assist with this request as the case is ongoing.

***Parties must comply with Marin County Superior Court Local Rules, Rule 7.12(B), (C), which provides that if a party wants to present oral argument, the party must contact the Court at (415) 444-7046 and all opposing parties by 4:00 p.m. the court day preceding the scheduled hearing. Notice may be by telephone or in person to all other parties that argument is being requested (i.e., it is not necessary to speak with counsel or parties directly.) Unless the Court and all parties have been notified of a request to present oral argument, no oral argument will be permitted except by order of the Court. In the event no party requests oral argument in accordance with Rule 7.12(C), the tentative ruling shall become the order of the court.***

***IT IS ORDERED that evidentiary hearings shall be in-person in Department L. For routine appearances, the parties may access Department L for video conference via a link on the court website. Kindly turn your camera on when your case is called and make sure the party or lawyer making the appearance is properly identified on the screen.***

***FURTHER ORDERED that the parties are responsible for ensuring that they have a good connection and that they are available for the hearing. If the connection is inadequate, the Court may proceed with the hearing in the party’s absence.***

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF MARIN**

DATE: 03/20/26      TIME: 1:30 P.M.      DEPT: L      CASE NO: CV0000265

PRESIDING: HON. MARK A. TALAMANTES

REPORTER:

CLERK: M. GIL

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PLAINTIFF:      LEE LOMBARDI

vs.

DEFENDANT:    AUDI OF AMERICA, INC.,  
AN UNKNOWN BUSINESS ENTITY, ET AL

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NATURE OF PROCEEDINGS: MOTION – ATTORNEY’S FEES

**RULING**

Plaintiff Lee Lombardi (“Plaintiffs”) seeks an award of prevailing party compensable attorney’s fees, a fee multiplier, fees on fees, and litigation associated costs. The fee request is GRANTED, in part.

**BACKGROUND**

This motion for compensable attorney’s fees follows a comprehensive settlement reached after hard fought litigation. The case included pre litigation discussions, preparation for arbitration, motion practice and summary adjuration.

The parties agreed that Plaintiffs’ attorney’s fees would be decided by noticed motion (see Declaration of John R. Hendrickson in Support of Plaintiff’s Motion for Attorney’s Fees and Costs (“Hendrickson Decl.”), ¶ 5). Plaintiff, as prevailing party, seeks reasonable attorneys’ fees and pursuant to the Song-Beverly Consumer Warranty Act and the Settlement Agreement between the parties. Having met his litigation goals, Plaintiff is entitled to a mandatory award of the aggregate amount of costs, expenses and attorney’s fees deemed to be reasonably incurred by this Court, pursuant to Civil Code § 1794(d) and the terms of the Settlement Agreement.

**LEGAL STANDARD**

Attorney’s fees are permitted under California law pursuant to the Song Beverly Consumer Warranty Act (Civil Code §§ 1794(d)), which states in the relevant part:

If the buyer prevails in an action under this section, the buyer shall be allowed by the court to recover as a part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney’s fees based on actual time expended, determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of such action.”

Plaintiff is the prevailing party in this matter. (See *Wohlgemuth v. Caterpillar Inc.* (2012) 207 Cal.App.4th 1252, 1263)

## DISCUSSION

Plaintiff succeeded at trial after hard fought litigation. Defendant AUDI of America, Inc. (“AUDI”) raises three arguments in opposition to the prevailing party fee motion. First, AUDI questions the requested reasonable rate of \$600.00 per hour for attorney time. Second, AUDI argues that the hours billed are excessive. Finally, AUDI argues this case does not warrant a multiplier to account for the risk taken by Plaintiff’s counsel, arguing that this was a “typical” lemon law case that required no skill or expertise.

### I. Attorneys’ Fees

The court will scrutinize the reasonableness of the fee petition under the “lodestar” method by determining the lodestar, which consists of the number of hours reasonably spent by the reasonable hourly rates for that work on a non-contingency basis. The lodestar method requires the trial court to determine a lodestar figure based on careful examination of reasonable hourly compensation of each attorney and consideration of the time spent to perform each task. (*Vo v. Las Virgenes Water District*, (2000) 79 Cal.App.4th 440, 445-446.)

#### A. Reasonable Rate.

Plaintiff’s counsel John Hendrickson, Esq., licensed in 2009, is the founding attorney at Hendrickson Law Group, PC, seeks compensable fees for himself and for fellow firm partner Jennifer Hendrickson, Esq. who was licensed in 2008. The requested hourly rate for both attorneys is \$600.00 per hour.

The lodestar method requires the trial court to determine a lodestar figure based on careful examination of reasonable hourly compensation of each attorney and consideration of the time spent to perform each task. (*Vo*, 79 Cal.App.4th 445-446.). “The experienced trial judge is the best judge of the value of professional services rendered in his court.” (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095, citing *Serrano v. Priest (Serrano III)* (1977) 20. Cal.3d 25, 49.)

Defendant’s Opposition objects to the requested hourly rate as being excessive. Counsel bears the burden of proof to establish “reasonable rates in the local community as a basis for [the fee] award.” (*Nemecek & Cole v. Horn* (2012) 208 Cal. App. 4th 641, 652; see also *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 155 [explaining the reasonable hourly rate is that prevailing in the community for similar work].) “The relevant ‘community’ is that where the court is located.” (*Altavion, Inc. v. Konica Minolta Sys. Lab., Inc.* (2014) 226 Cal.App.4th 26, 71.) “[U]se of reasonable rates in the local community, as an integral part of the initial lodestar equation, is one of the means of providing some objectivity to the process of determining reasonable attorney fees.” (*Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1243.).

The court has reviewed the declaration submitted by counsel. The court has also reviewed the supporting declarations of Scott Kauffman, Neil Fineman and Elliot Conn, finds the hourly rate requested by the Hendrickson law firm \$600.00 per hour to be eminently reasonable, and well in line with the reasonable rate charged by Marin County attorneys with similar experience.

#### B. Hours worked.

A party who seeks attorney's fees has the initial burden of "documenting the appropriate hours expended." (*ComputerXpress Inc. v. Jackson*, (2001) Cal.App.4<sup>th</sup> 993, 1020.) Once a documented hour total has been submitted, the opposing party may make objections to the hours claimed. General objections that work is "excessive" or "unreasonable" are insufficient. The objections should be specific. (*Premier Med. Mgmt. v California Ins. Guarantee Ass'n*, (2008) 163 Cal.App. 4<sup>th</sup> 550, 563.)

The basis for calculating the lodestar "must be the actual hours counsel devoted to the case, less those resulting from ineffective or duplicative use of time." (*Horsford v. Board of Trustees of Cal. State*, (2005) 132 Cal.App. 4<sup>th</sup> 359, 395.) The court also recognizes these billing records of counsel constitute "verified time statements of the attorneys, as officers of the court, and are entitled to credence in the absence of a clear indication that the records are erroneous." *Id.* at 394.

AUDI argues that the time billed is excessive and that based on a review of the billing, the Court would be justified in awarding "no fee whatsoever." Now that the merits have been concluded and an objection based on "privilege" would most probably not be sustained, the parties might consider an open exchange of account billing records to compare the hours spent by both the defense and plaintiff to get gage if the hours billed are reasonable, particularly now that Plaintiff has produced a complete unredacted set of billing records.

If the parties wish a continuance to schedule a long cause hearing on the fee issue, the court would accommodate the request.

Mr. Hendrickson submitted detailed billing statements attached to his request and the Hendrickson Decl. as Exhibit B filed on December 18, 2025, indicates the firm lawyers worked 228.9 hours to prevail in this matter.

It is unclear if the total amount of hours requested includes fees worked on the fee motion ("fees on fees"). The total time entries have been adjusted by counsel to address "quick tasks" such as routine emails, resulting in no charge for those time entries reducing the requested time by 16.2 billable hours. Counsel also reduced to zero charge is notated on the time accounting, reducing the request to 212.7 hours, for a lodestar of \$127,620 (hours x rate).

The court has reviewed the billing statements provided by counsel attached as Exhibit E to the Decl. of Hendrickson in Support of Attorney's Fees and awards, and finds the records to be credible, reasonable and contemporaneously created. The court notes that Defendant is not being charged for administrative time. This declaration is submitted under penalty of perjury by an officer of the court. The court has no basis to suspect that the statements contained in the declaration relative to the work associate with prevailing in this case are not accurate.

The court will apply an across the board billing correction of 10% to account for possible billing errors and duplicative work, which adjusts down the attorney hours worked from 212.7 to 193.43 hours.

Counsel is awarded \$114,858 (\$600 per hour x 193.43 hours) in reasonable compensable attorney's fees.

### C. Multiplier.

In considering whether to apply a multiplier, the Court should not consider factors which are already included in the lodestar amount, such as extraordinary skill and the difficulty of the question involved. (*Ketchum v. Moses* (2001) 24 Cal.4<sup>th</sup> 1122, 1138-1139.) "Thus, a trial court should award a multiplier for exceptional representation only when the quality of representation

far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation.” (Id. at p. 1139.)

The Court recognizes that Plaintiff’s counsel must be compensated for the risk associated with contingency cases. (*Ketchum*, 24 Cal. 4<sup>th</sup> 1132-1133.) As noted in *Ketchum*, there are two methods a Court may employ to compensate for this risk. One method is to use an adorned lodestar rate, as discussed above. The other method is to use an unadorned lodestar rate and then to award a multiplier to compensate for the contingent nature of the case.

The court invites argument as to why a multiplier should be awarded, otherwise, the request is DENIED.

D. Hours Spent Drafting the Fee Motion

It is unclear how many hours counsel claims for time spent on the attorney’s fees motion. Fees on fees are tentatively awarded after review of the compensable time worked, after accounting for the 10% across the board discount

E. Costs

Exhibit K attached to Hendrickson Decl. request cost recovery of \$6,006.19. Defendant filed no objection to the cost request. Counsel also request recovery of the filing fee in the amount of \$60.00 for the filing of this motion.

Plaintiff’s request for recovery of reasonable costs in the amount of \$3,066.19 is GRANTED.

CONCLUSION

Plaintiff’s request for prevailing party fees in the amount of \$114,858 is GRANTED

Plaintiff’s request for a 1.3 multiply is DENIED pending argument.

Plaintiff’s request for fees on fees is GRANTED, pending clarification on the total hours worked.

Plaintiff’s request for recovery of reasonable costs in the amount of \$3,066.19 is GRANTED.

***Parties must comply with Marin County Superior Court Local Rules, Rule 7.12(B), (C), which provides that if a party wants to present oral argument, the party must contact the Court at (415) 444-7046 and all opposing parties by 4:00 p.m. the court day preceding the scheduled hearing. Notice may be by telephone or in person to all other parties that argument is being requested (i.e., it is not necessary to speak with counsel or parties directly.) Unless the Court and all parties have been notified of a request to present oral argument, no oral argument will be permitted except by order of the Court. In the event no party requests oral argument in accordance with Rule 7.12(C), the tentative ruling shall become the order of the court.***

***IT IS ORDERED that evidentiary hearings shall be in-person in Department L. For routine appearances, the parties may access Department L for video conference via a link on the court website. Kindly turn your camera on when your case is called and make sure the party or lawyer making the appearance is properly identified on the screen.***

***FURTHER ORDERED that the parties are responsible for ensuring that they have a good connection and that they are available for the hearing. If the connection is inadequate, the Court may proceed with the hearing in the party's absence.***

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF MARIN**

DATE: 03/20/26      TIME: 1:30 P.M.      DEPT: L      CASE NO: CV0002210

PRESIDING: HON. MARK A. TALAMANTES

REPORTER:

CLERK: M. GIL

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PLAINTIFF:      LESTER PETRACCA

vs.

DEFENDANT:    ELIZABETH THIERIOT,  
ET AL

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NATURE OF PROCEEDINGS: DEFAULT HEARING

RULING

This matter is on for a prove-up hearing. Appearances are required.

*Parties must comply with Marin County Superior Court Local Rules, Rule 7.12(B), (C), which provides that if a party wants to present oral argument, the party must contact the Court at (415) 444-7046 and all opposing parties by 4:00 p.m. the court day preceding the scheduled hearing. Notice may be by telephone or in person to all other parties that argument is being requested (i.e., it is not necessary to speak with counsel or parties directly.) Unless the Court and all parties have been notified of a request to present oral argument, no oral argument will be permitted except by order of the Court. In the event no party requests oral argument in accordance with Rule 7.12(C), the tentative ruling shall become the order of the court.*

***IT IS ORDERED*** that evidentiary hearings shall be in-person in Department L. For routine appearances, the parties may access Department L for video conference via a link on the court website. Kindly turn your camera on when your case is called and make sure the party or lawyer making the appearance is properly identified on the screen.

***FURTHER ORDERED*** that the parties are responsible for ensuring that they have a good connection and that they are available for the hearing. If the connection is inadequate, the Court may proceed with the hearing in the party's absence.

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF MARIN**

DATE: 03/20/26      TIME: 1:30 P.M.      DEPT: L      CASE NO: CV0003965

PRESIDING: HON. MARK A. TALAMANTES

REPORTER:

CLERK: M. GIL

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PLAINTIFF:      AUGUST KILES

vs.

DEFENDANT:    USA TRACK & FIELD ET  
AL

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NATURE OF PROCEEDINGS: 1) MOTION - STRIKE  
2) DEMURRER

**RULING**

Defendants Usa Track & Field and Rafael Ayala's ("collectively known as "Defendants") Demurrer to the First Amended Complaint ("FAC") filed by plaintiff August Kiles ("Plaintiff") is **OVERRULED**. Defendants' Motion to Strike **GRANTED**, in part, as to Defendant the USA Track & Field only, with leave to amend.

**REQUEST FOR JUDICIAL NOTICE**

The Request for Judicial Notice No. 2 (Exhibit No. 1) is **GRANTED**. (Evid. Code, § 452, subd. (d).) Request No. 1 (Exhibit No. 2) is **DENIED**.

**ALLEGATIONS IN THE FIRST AMENDED COMPLAINT**

Plaintiff alleges two causes of action against Defendant: 1) Negligence; and 2) Wanton and Reckless Misconduct.

On September 25, 2022, Plaintiff August Kiles, an aspiring Olympic pole vaulter, attended a training session at Terra Linda High School under the supervision of Defendants. During this session, Coach Rafael Ayala ("Coach Ayala") personally folded the rain tarp back over steel gates concealing them from view in the pole vault landing area. (FAC, ¶ 19.) Coach Ayala never informed Mr. Kiles of the concealed gates (*Id.*, ¶ 28), never cautioned him not to use the area (*Id.*, ¶ 29), and permitted Mr. Kiles to train in the unsafe area despite having actual knowledge that the pole vault area had not been safely secured and that steel gates remained hidden under the cover. (*Id.*, ¶ 60.) USA Track & Field ("USATF") publishes Rule 6-9, which mandates specific safety requirements for pole vault areas, including that landing areas must be clear of hazards. (*Id.*, ¶¶ 20-21, 49-51.) Any track and field coach, including Coach Ayala, should know these basic, mandated safety requirements. (*Id.*) Despite this knowledge, USATF and Coach

Ayala made a conscious decision not to comply with Rule 6-9 by intentionally electing to leave the steel gates in the pit area and to conceal them by folding the pit cover back over the gates. (*Id.*, ¶ 60.) Mr. Kiles ran down the pole vault runway onto the soft landing area and then ran off the back of the pit where the rain covers concealed several steel gates. (*Id.*, ¶ 18.) His left foot was inverted when he landed on the hidden steel gates, causing severe injury that ended his Olympic aspirations. (*Id.*, ¶¶ 18-20, 32.)

#### LEGAL STANDARD – DEMURRER

The function of a demurrer is to test the legal sufficiency of the challenged pleading. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) As a general rule, in testing a pleading against a demurrer, the facts alleged in the pleading are deemed to be true, however improbable they may be. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) The court gives the pleading a reasonable interpretation by reading it as a whole and all its parts in their context. (*Moore v. Regents of Univ. of Calif.* (1990) 51 Cal.3d 120, 125.)

In a demurrer proceeding, the defects must be apparent on the face of the pleading or via proper judicial notice. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) The face of the complaint includes matters shown in exhibits attached to the complaint and incorporated by reference. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.) “The only issue involved in a demurrer hearing is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action.” (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 747.)

If the complaint fails to state a cause of action, the court must grant the plaintiff leave to amend if there is a reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

#### DISCUSSION – DEMURRER

Defendants’ demur to Plaintiff’s FAC on the following grounds:

1. Wanton and reckless conduct is not a separate tort apart from negligence under California law;
2. The FAC fails to plead facts that reach the standard of willful or reckless misconduct; and,
3. The FAC contains inconsistent conclusory allegations.

##### 1. *Wanton and Reckless Conduct*

The Court has ruled on whether wanton and reckless conduct was a separate cause of action in its ruling on the Demurrer to the original Complaint. It is generally recognized that willful or wanton misconduct is separate and distinct from negligence, involving different principles of liability and different defenses. (See *Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714, 729, disapproved of on other grounds by *Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826.)

Even if it were merely a negligence cause of action with a heightened pleading requirement as Defendants suggest (citing *Doe v. United States Youth Soccer Association, Inc.* (2017) 8 Cal.App.5th 1118, 1140; *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 526), the fact that the FAC would then state duplicative causes of action for negligence is not grounds to sustain the demurrer. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 890 [the fact that the third cause of action mirrors the first cause of action and is duplicative is not a ground on which a demurrer may be sustained].)

2. The FAC Pleads Sufficient Facts to State a Cause of Action for Willful or Reckless Misconduct

Unlike negligence, which implies a failure to use ordinary care, and even gross negligence, which connotes such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results, willful misconduct is not marked by a mere absence of care. Rather, it involves a more positive intent to harm another or to do an act with a positive, active and absolute disregard of its consequences. (*Alcosta v. Glenfed Development Corp.* (2005) 128 Cal.App.4th 1278, 1294; see also *Johns-Manville Sales Corp. v. Workers' Compensation Appeals Bd.* (1979) 96 Cal.App.3d 923, 930 ["Under general state law willful misconduct has a well-established meaning which is clearly differentiated from negligence and gross negligence."].)

Second, willfulness generally is marked by three characteristics: (1) actual or constructive knowledge of the peril to be apprehended; (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger; and (3) conscious failure to act to avoid the peril. (*Bains v. Western Pacific R. Co.* (1976) 56 Cal.App.3d 902, 905, internal quotations omitted.)

Most important, to plead a claim for willful misconduct, "[a] plaintiff must allege specific facts establishing the three essential elements—knowledge of the peril, knowledge of the probability of injury, and conscious failure to act to avoid the peril—necessary to raise the defendant's alleged negligence to the level of willful misconduct. (*Charpentier v. Von Geldern* (1987) 191 Cal.App.3d 101, 114.)

The allegations in the FAC are as follows:

"Before a practice, the pit tarp or cover is unhooked from the sides (which keeps it from blowing off), and then folded back behind the pit." (FAC, ¶ 16.) "However, on this occasion, the rain tarp or cover was folded back behind the pit on top of several steel barricades used for crowd control that were lying flat on the ground, and that were described as gates or grates in the original complaint. This completely concealed them from view. A true and correct copy of a photograph showing what these objects look like is attached as Exhibit B." (*Id.*, ¶ 17.) "Due to the material the rain cover is made of, and how it was folded back, there were no visible indentations or raised areas that would indicate to anyone that the tarp was concealing the gates." (*Id.*, ¶ 20.) "Regulations of multiple sporting organizations, including the National Federation of State High School Associations ("NFHS"), the NCAA, and USA Track & Field, prohibit the placement of hard materials near a pole vault pit absent specified protective padding, and are intended to prevent injuries from unyielding surfaces." (*Id.*, ¶ 21.) "Any track and field coach, including Coach Ayala, should know these basic, mandated safety requirements." (*Id.*, ¶ 51.)

"Safety duties are made explicit by Rule 6-9, Art. 28 promulgated by the National Federation of State High School Associations ("NFHS"), which provides, 'Hard or unyielding surfaces, such as but not limited to concrete, metal, wood or asphalt around the landing pad, or between the planting box and the landing system shall be padded or cushioned with a minimum of two inches (fifty millimeters) of dense foam or other suitable materials(s).'" (*Id.*, ¶ 49.) "USATF and Coach Ayala knew Rule 6-9 was intended to prevent injury to pole vaulters like Mr. Kiles by either eliminating potentially harmful structures or providing sufficient padding to prevent harm." (*Id.*, ¶ 51.) "USATF and Coach Ayala knew that it was incumbent on them, before permitting Mr. Kiles to use the pole vault area, to see to it that the pole vault area and its immediate surroundings were free of anything that would normally be found on an athletic field, such as hurdles, starting blocks, throwing implements, as well as track and field meet management

materials such as barricades, tents, benches, and chairs.” (*Id.*, ¶ 52.) “USATF and Coach Ayala knew no steel gates should be anywhere near the pole vault pit area covered by Rule 6-9.” (*Id.*, ¶ 53.) “USATF and Coach Ayala knew the pit cover should never have been folded back over the steel gates.” (*Id.*, ¶ 54.) “USATF and Coach Ayala made the conscious decision not to comply with Rule 6-9 by intentionally electing to leave the steel gates in the pit area, and to conceal them by folding the pit cover back over the gates.” (*Id.*, ¶ 55.)

“USATF and Coach Ayala knew that if Rule 6-9 was violated, then athletes such as Mr. Kiles using the pole vault area would probably suffer injury.” (*Id.*, ¶ 56.) “USATF and Coach Ayala knew that it was hazardous to leave steel gates in the pole vault area.” (*Id.*, ¶ 57.) “USATF and Coach Ayala knew that athletes such as Mr. Kiles using the pole vault area would probably suffer injury from concealed steel gates.” (*Id.*, ¶ 58.) “The danger would have been eliminated had USATF and Coach Ayala decided to comply with Rule 6-9, and remove the steel gates from pole vault area—or at the very least, not actively choose to conceal the gates under the pit cover.” (*Id.*, ¶ 59.) “Thus, USATF and Coach Ayala had actual knowledge that the pole vault area had not been safely secured in compliance with Rule 6-9, made a conscious decision not to comply with Rule 6-9 and remove the hidden gates, and knew or should have known that injury was a probable result of not properly clearing the pole vault area.” (*Id.*, ¶ 60.)

“Coach Ayala is the person who folded the rain tarp back over the gates, concealing them from view.” (*Id.*, ¶ 19.) “USATF and Coach Ayala made the conscious decision not to comply with Rule 6-9 by intentionally electing to leave the steel gates in the pit area, and to conceal them by folding the pit cover back over the gates.” (*Id.*, ¶ 55.) “Almost immediately after Mr. Kiles was injured, Coach Ayala apologized to Mr. Kiles and stated that he (Rafael Ayala) should have removed the gates from the pit area. Coach Ayala then removed the gates before letting anyone else use the pole vault area.” (*Id.*, ¶ 30.)

These allegations are sufficient to state a cause of action for willful or reckless misconduct.

### 3. The Amendments in the FAC do not Rise to the Level of a “Sham Pleading”

Here, the original Complaint alleged that “Someone had placed the pole vault pit’s rain cover over the top of several steel gates that were not visible due to the cover.” (Compl., ¶ 14.) (emphasis added). The FAC alleges that “Coach Ayala is the person who folded the rain tarp back over the gates.” (FAC, ¶ 19.) Defendants argue that these allegations are inconsistent. The Court disagrees.

Additionally, the original complaint alleged that “The USATF, Rafael Ayala, and Warren Lanier, in permitting Mr. Kiles to use the pole vault area without inspecting the landing area, acted so recklessly, unreasonably, and dangerously, that regardless of any intent to harm Mr. Kiles, the USATF, Rafael Ayala, and Warren Lanier each knew, or should have known, that it was highly probable harm would result to Mr. Kiles from landing in a pole vault area with concealed steel grates.” (Compl., ¶ 39). The FAC alleges that “USATF and Coach Ayala made the conscious decision not to comply with Rule 6-9 by intentionally electing to leave the steel gates in the pit area, and to conceal them by folding the pit cover back over the gates.” (FAC, ¶ 60.) And “Their intentional concealing of the gates under the pit’s cover prevented Mr. Kiles or anyone else from seeing the danger and thus having any chance to avoid injury.” (*Id.*, ¶ 65.)

The sham pleading doctrine is not intended to prevent honest complainants from correcting erroneous allegations or to prevent correction of ambiguous facts. Instead, it is intended to

enable courts to prevent an abuse of process. (*Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 344, *as modified* (Oct. 2, 2014).) It is designed to permit a court to disregard the falsely pleaded facts. (*Ibid.*)

Here the amendments are not clearly inconsistent with the original Complaint. Nor are the allegations in the FAC clearly false. The sham pleading doctrine does not justify disregarding the allegations in the FAC.

For these reasons, the Demurrer to the FAC is OVERRULED.

### LEGAL STANDARD - MOTION TO STRIKE

In ruling on a motion to strike, the court may (1) strike out any irrelevant, false, or improper matter inserted in any pleading; or (2) strike out all or any part of any pleading not drawn or filed in conformity with the laws of California, a court rule, or an order of the court. (Code Civ. Proc., § 436, subds. (a)-(b).)

Defendants seek to strike the following language from the FAC:

1. Page 12, lines 6-14: "On information and belief, the USATF and Coach Ayala's above-stated conduct was a conscious disregard of known safety requirements, compliance with which would have prevented injury to Mr. Kiles. Their intentional concealing of the gates under the pit's cover prevented Mr. Kiles or anyone else from seeing the danger, and thus having any chance to avoid injury. These actions, in intentionally creating an unsafe situation that they knew should have never existed, equates to "malice" within the meaning of that term as used in Civil Code § 3294; and further, the USATF and Coach Ayala's intentional actions, were taken with a reckless disregard for the safety of others, including Mr. Kiles, and thus is entitled to an award of exemplary and punitive damages."
2. Page 9, lines 1-24, page 10, lines 1-26, page 11, lines 2-27, and page 12, lines 2-14, which assert cause of action (2) Wanton and Reckless Misconduct [against all Defendants]

Punitive damages may be imposed where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice. (Civ. Code, § 3294, subd. (a).) "Malice" is conduct intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on with a willful and conscious disregard of the rights or safety of others. (Civ. Code, § 3294, subd. (c)(1).) An award of punitive damages requires "despicable conduct," meaning behavior that is "vile," "base," or contemptible" and that would be "looked down upon and despised by ordinary decent people," in addition to willful and conscious disregard for the rights and safety of others. (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725.) "Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate." [Citation.] (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1210.)

A motion to strike punitive damages is properly granted where a plaintiff does not state a prima facie claim for punitive damages, including facts showing that defendant is guilty of oppression, fraud or malice. (*Turman v. Turning Point of Cent. California, Inc.* (2010) 191 Cal.App.4th 53, 63.)

Defendants argue that Plaintiff has not alleged any facts regarding the Defendants' knowledge and appreciation of a risk nor are there any facts that Defendants were aware of the probable dangerous consequences of this conduct. This is simply not true. (See FAC, ¶¶ 49-60.)

Defendants further contend that the FAC fails to state any facts to support punitive damages against the USA Track & Field. An employer shall not be liable for punitive damages "based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (Civ. Code, § 3294, subd. (b).)

The Complaint alleges that USA Track & Field is a business entity, form unknown. It does not allege that that is a corporate employer. Accordingly, the Court looks to whether the FAC alleges that the employer authorized or ratified the wrongful conduct.

The FAC alleges that "all defendants committed the hereinafter mentioned acts and conduct as the agents, employees, servants... officers, directors... or representatives of each other defendant" and that these acts were done "with the knowledge and consent of their respective agents, employees, servants... officers, directors... or representatives." (FAC, ¶ 6.)

These allegations are insufficient to meet the required standard for employer authorization or ratification. For these reasons, the Motion to Strike Punitive Damages is GRANTED, in part, as to Defendant the USA Track & Field only, with leave to amend.

***Parties must comply with Marin County Superior Court Local Rules, Rule 7.12(B), (C), which provides that if a party wants to present oral argument, the party must contact the Court at (415) 444-7046 and all opposing parties by 4:00 p.m. the court day preceding the scheduled hearing. Notice may be by telephone or in person to all other parties that argument is being requested (i.e., it is not necessary to speak with counsel or parties directly.) Unless the Court and all parties have been notified of a request to present oral argument, no oral argument will be permitted except by order of the Court. In the event no party requests oral argument in accordance with Rule 7.12(C), the tentative ruling shall become the order of the court.***

***IT IS ORDERED that evidentiary hearings shall be in-person in Department L. For routine appearances, the parties may access Department L for video conference via a link on the court website. Kindly turn your camera on when your case is called and make sure the party or lawyer making the appearance is properly identified on the screen.***

***FURTHER ORDERED that the parties are responsible for ensuring that they have a good connection and that they are available for the hearing. If the connection is inadequate, the Court may proceed with the hearing in the party's absence.***

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF MARIN**

DATE: 03/20/26      TIME: 1:30 P.M.      DEPT: L      CASE NO: CV0004067

PRESIDING: HON. MARK A. TALAMANTES

REPORTER:

CLERK: M. GIL

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PLAINTIFF:      DAVID SOLOMON

vs.

DEFENDANT:      CRISTINA ROSALES

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NATURE OF PROCEEDINGS: MOTION – SET ASIDE/VACATE

**RULING**

This matter was called for trial as regularly scheduled in Department E, Hon. Andrew Sweet presiding. Defense counsel answered the call. Plaintiff's counsel did not.

On October 16, 2025, Plaintiff's counsel filed an *Ex Parte* Application to Continue Trial date. Court minutes entered on October 20, 2025, indicate that Plaintiff failed to appear and the *ex parte* was DENIED. Plaintiff's counsel argues that counsel was not informed that the *ex parte* they filed to continue the trial date was DENIED.

The matter was called as regularly scheduled for an at issue conference in Dept E, on November 3, at 9 a.m. Again, Plaintiff failed to appear. The court denied defense counsel's request to dismiss the case at that time. The matter was called for trial the following day at 10 a.m. The case was dismissed for Plaintiff's failure to prosecute.

Plaintiff seeks to set aside judgment in favor of the defense pursuant to Code of Civil Procedure §473(b) which permits a party to seek relief from an order entered as a result of mistake, inadvertence, surprise or excusable neglect. The trial court has broad discretion to grant or deny the requested relief. CCP §473. Plaintiff seeks relief pursuant to CCP § 473(b), arguing the failure to appear was due to an administrative error and clerical oversight by Plaintiff Counsel's office. Unfortunately, counsel does not take responsibility for the failure to make the trial date. Rather, the staff paralegal is blamed, which is simply inappropriate. An attorney is responsible for all the actions of the staff under their direction. Counsel then claims he did not realize that trial was going forward until the day of trial and yet they did nothing until 20 days later and are calling this a prompt response.

Between the time the *ex parte* was denied on October 20, 2025, and the trial date of November 3, Defense counsel served upon the Plaintiff an Issues Conference Statement, a Proposed Statement of the Case, Proposed Jury Instructions, Proposed Special Verdict and Motions *in Limine* 1-9. Plaintiff's counsel also ignored the Defendant's final \$998 offer, proffered on October 27.

Defense counsel was available and prepared to proceed with trial on November 4.

The trial was called as regularly scheduled on November 4. Plaintiff's counsel filed this *ex parte* motion relief 21 days later, on November 25, 2025.

Plaintiff's motion to set aside and vacate the judgment is DENIED.

***Parties must comply with Marin County Superior Court Local Rules, Rule 7.12(B), (C), which provides that if a party wants to present oral argument, the party must contact the Court at (415) 444-7046 and all opposing parties by 4:00 p.m. the court day preceding the scheduled hearing. Notice may be by telephone or in person to all other parties that argument is being requested (i.e., it is not necessary to speak with counsel or parties directly.) Unless the Court and all parties have been notified of a request to present oral argument, no oral argument will be permitted except by order of the Court. In the event no party requests oral argument in accordance with Rule 7.12(C), the tentative ruling shall become the order of the court.***

***IT IS ORDERED that evidentiary hearings shall be in-person in Department L. For routine appearances, the parties may access Department L for video conference via a link on the court website. Litigants in the virtual courtroom are required to leave the video screen on and wait for your case to be called.***

***FURTHER ORDERED that the parties are responsible for ensuring that they have a good connection and that they are available for the hearing. If the connection is inadequate, the Court may proceed with the hearing in the party's absence.***

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF MARIN**

DATE: 03/20/26      TIME: 1:30 P.M.      DEPT: L      CASE NO: CV0005157

PRESIDING: HON. MARK A. TALAMANTES

REPORTER:

CLERK: M. GIL

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PLAINTIFF:      LIA ROGERS

vs.

DEFENDANT: FIDELILTY NATIONAL  
FINANCIAL, LLC

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NATURE OF PROCEEDINGS: MOTION – SET ASIDE/VACATE

RULING

Plaintiff Lia Rogers (“Plaintiff”) filed her Complaint for damages against Defendant Fidelity National Financial, LLC (“Defendant”) on or about January 22, 2025, asserting claims for disability discrimination, retaliation, interference with CFRA rights, wrongful termination, and intentional infliction of emotional distress. On or about March 28, 2025,

The statement of damages and the request for entry of default were filed and served by the Plaintiff simultaneously on or about March 28, 2025, rather than sequentially as required. Plaintiff now seeks relief to set aside the request for entry of default to correct this procedural error, allowing Plaintiff to properly serve the statement of damages, provide Defendant with adequate notice, and then request entry of default in compliance with California Code of Civil Procedure section 425.11(c).

Proof of Service indicates the defendant was served by mail with the motion and supporting papers on December 15, 2025.

Defendant has not filed a response or opposition to the motion. The failure to oppose is considered as consent to the granting of the motion. (Cal. Rules of Court, rule 8.54(c); Civ. Local Rule 2.8G.1.) Plaintiff’s motion is GRANTED.

Plaintiff to prepare the order.

***Parties must comply with Marin County Superior Court Local Rules, Rule 2.10(A), (B), which provides that if a party wants to present oral argument, the party must contact the Court at (415) 444-7046 and all opposing parties by 4:00 p.m. the court day preceding the scheduled hearing. Notice may be by telephone or in person to all other parties that argument is being requested (i.e., it is not necessary to speak with counsel or parties directly.) Unless the Court and all parties have been notified of a request to present oral argument, no oral argument will be permitted except by***

*order of the Court. In the event no party requests oral argument in accordance with Rule 2.10(B), the tentative ruling shall become the order of the court.*

*IT IS ORDERED that evidentiary hearings shall be in-person in Department L. For routine appearances, the parties may access Department L for video conference via a link on the court website. Kindly turn your camera on when your case is called and make sure the party or lawyer making the appearance is properly identified on the screen.*

*FURTHER ORDERED that the parties are responsible for ensuring that they have a good connection and that they are available for the hearing. If the connection is inadequate, the Court may proceed with the hearing in the party's absence.*