

# RIGUERO v. MENDEZ

23CV46995

## DEFENDANT'S MOTION TO SET ASIDE DEFAULT

This is a verified complaint to remove the executor and recover the memorial and funeral expenses incurred by plaintiff.

Service was effected on October 25, 2023, and default was entered on November 27, 2023. The Motion to Set Aside Default was filed on November 29, 2023.

Since 1/1/18, all matters noticed for the Law & Motion calendar shall include the following language in the notice:

**Pursuant to Local Rule 3.3.7, the Court will make a tentative ruling on the merits of this matter by 2:00 p.m. the court day before the hearing. The complete text of the tentative ruling may be accessed on the Court's website or by calling 209-754-6285 and listening to the recorded tentative ruling. If you do not call all other parties and the Court by 4:00 p.m. the court day preceding the hearing, no hearing will be held and the tentative ruling shall become the ruling of the court.**

Failure to include this language in the notice is a basis for the Court to deny the motion.

Motion is DENIED without prejudice to re-filing with proper language included in Notice of Motion..

The Clerk shall provide notice of this Ruling to the parties forthwith. No further formal Order is required.

# COMBRINCK v. CLERICO

23CV46872

## MOTION TO COMPEL INITIAL RESPONSES [to second sets of discovery] and MOTION TO COMPEL FURTHER RESPONSES [to second sets of discovery] and FOR SANCTIONS

Plaintiff's suit seeks a partition by sale of the real properties located at: 1) 41 Purdy Road, Angels Camp; 2) 938 Purdy Road, Angels Camp; and 3) "Dead Horse Mine" (Calaveras County Assessor Parcel Number 062-002-094-000), and Declaratory Relief. The matters before the court are two separate discovery motions brought by plaintiff.

On October 11, 2023, plaintiff served second set of form interrogatories, second set of special interrogatories, second set of requests for admission, and second set of document production requests to defendant who has not responded to these discovery requests, requested an extension of time to respond, or contacted plaintiff's counsel (**Initial Motion**).

The 330-page **Second Motion** seeks to compel further responses to the supplemental responses to first sets of discovery (form and special Interrogatories, requests for admission, and document production). Defendant responded to the first sets of discovery, asserting numerous objections. After exchanges as to the sufficiency of responses between counsel, defendant provided supplemental responses, which plaintiff claims are still defective as they contain the same objections. Sanctions are also requested as part of both motions.

Courts construe the discovery statutes broadly. (*Flagship Theatres of Palm Des., LLC v. Century Theatres, Inc.* (2011) 198 Cal.App.4th 1366, 1383.) "All doubts about discovery are resolved in favor of disclosure." (*Glenfed Dev. Corp. v. Superior Court (National Union Fire Ins. Co. of Pittsburgh, Penn.)* (1997) 53 Cal.App.4th 1113, 1119.)

A party objecting to discovery bears the burden of justifying its objections. (*Fairmont Ins. Co. v. Superior Court (Stendell)* (2000) 22 Cal.4th 245, 255; *Kirkland v. Superior Court (Guess?)* (2002) 95 Cal.App.4th 92, 98.) Similarly, the burden is on the defendant to demonstrate that disclosure is inappropriate. (*Babcock v. Superior Court (DiGiovanni)* (1994) 29 Cal.App.4th 721, 727-728.) Here, the defendant is silent.

### **Initial Motion**

Plaintiff's second sets of discovery were electronically served on October 11, 2023; responses were all electronically served on November 15, 2023, i.e., the last day for a

response. (In what strikes the Court as inappropriate gamesmanship, the motion to compel was filed that very same day, reflecting preparation in advance of receipt of responses.)

Initial Motion to Compel Responses is DENIED as moot.

## **Second Motion**

- **Form Interrogatories** Plaintiff's focus on the propriety of objections is misguided; reservation of admissibility objections is an issue to be decided at the time of trial and their assertion does not obviate the proper responses that follow the objections.
- **Special Interrogatories** Again, the responses to special interrogatories contain a combination of objections and responses, and insofar as the defendant provided responses after interposing objections and then prefacing the response with the statement "Without waiving said objections", the Court denies plaintiff's motion as the responses are complete and appropriate.
- **Requests for Admission** Once again, multiple objections are asserted combined with a response that is made "Without waiving said objections."
- **Requests for Production** Once again, multiple objections are asserted combined with a response that is made "Without waiving said objections."

The Court also notes plaintiff filed both motions incorporating different methods of discovery in single motions. Each type of discovery is controlled by a different statute and requires separate motions to compel; plaintiff tacitly recognized this by filing separate Separate Statements as to each discovery method.

The **Initial Motion** to Compel is DENIED as moot. The **Second Motion** is DENIED as defendant has provided sufficient responses and the crux of the argument is as to the breadth and propriety of objections, an issue that is not ripe for decision until trial admissibility issues arise. The requests for sanctions are DENIED. [The Court cautions plaintiff to take the totality of this ruling to heart before filing any future discovery motions.]

The Clerk shall provide notice of this Ruling to the parties forthwith. Plaintiff to prepare a formal Order pursuant to Rule of Court 3.1312 in conformity with this ruling.

# MATTER OF SILVEIRA

21PR8357

## MOTION TO COMPEL ANSWERS TO DEPOSITION QUESTIONS AND TO AMEND PRIVILEGE LOG; MOTION FOR SANCTIONS FOR FAILURE TO CONDUCT DEPOSITION

### I. MOTION TO COMPEL ANSWERS TO DEPOSITION QUESTIONS AND TO AMEND PRIVILEGE LOG

This matter includes four consolidated probate petitions and one related civil complaint. On September 8, 2023, petitioner Audrey Petrecevich took the deposition of attorney Steven Cottrell (previous counsel for decedent Carolyn Silveira in a dissolution action). During the deposition, the deponent made it clear that he would not answer any questions regarding the purpose of his meetings and communications with Carolyn or Francille Peters (Carolyn's daughter whom Mr. Cottrell says was authorized to speak for Carolyn) unless a court ordered him to do so.

The Separate Statement filed in conjunction with this motion, sets out five questions where Mr. Cottrell was instructed not to answer the question:

1. **Did she tell you why she wanted a divorce?**
2. **So there was a meeting with Carolyn Silveira and Francille Peters that you testified about where all three were present. What was the purpose of that meeting.**
3. **And was Carolyn Silveira able to provide you that information [to identify the marital assets]?**
4. **What about those discussions do you remember [concerning the availability of \$500,000 to settle the claim]?**
5. **This was a big deal, wasn't it? Okay. You had discussions. Okay. You remember those discussions. Okay. Let me ask you what you remember about those discussions [again concerning the source of the \$500,000 to settle the claims].**

The Evidence Code provides three express exceptions to the attorney-client privilege when, as here, the client has passed away:

**Evidence Code section 957:** There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased client, regardless of whether the claims are by testate or intestate succession, nonprobate transfer, or inter vivos transaction.

**Evidence Code section 960:** There is no privilege under this article as to a communication relevant to an issue concerning the intention of a client, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the client, purporting to affect an interest in property.

**Evidence Code 961:** There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a client, now deceased, purporting to affect an interest in property.

The attorney-client privilege is a legislative creation that courts have no power to limit unless expressly provided by statute. Evidence Code sections 956 through 962, describe eight exceptions to the attorney-client privilege. Where none of these exceptions applies, the privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case. (See *O&C Creditors Group, LLC v. Stephens & Stephens XII, LLC* (2019) 42 Cal. App. 5th 546.) "The attorney-client privilege, however, may be waived only by the holder of the privilege... .As relevant here, the holder is the client, a guardian or conservator of the client, or the personal representative of the client if the client is deceased... . The privilege is not waived when the client's agent discloses a privileged communication without the client's authorization." (*DP Pham, LLC v. Cheadle* (2016) 246 Cal.App.4th 653, 668.)

Surmise and supposition are insufficient Evidence Code Sections 960 and 961 establish two related exceptions to the attorney-client privilege concerning a deceased client's writing affecting an interest in property. These exceptions provide that the attorney-client privilege does not protect a communication relevant to an issue (1) "concerning the intention of a client, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the client, purporting to affect an interest in property" (Evid. Code § 960); or (2) "concerning the validity of a deed of conveyance, will, or other writing, executed by a client, now deceased, purporting to affect an interest in property" (Evid. Code § 961; *DP Pham, LLC, supra*, at p. 672).

These exceptions to the attorney-client privilege for deceased clients are limited to the types of communications to which an ordinary attesting witness would testify; they are not wholesale exceptions for all communications concerning the attested document or related transaction (*DP Pham, LLC, supra*, at p. 673). There is no waiver of the right to ask any related follow-up questions, but the petitioner must develop some factual showing that Evidence Code Section 960 and/or 961 applies.

Motion to Compel Answers to Deposition Questions and to Amend Privilege Log is GRANTED. Attorney Cottrell is ordered to answer the five questions and any appropriate follow up questions.

## II. MOTION FOR SANCTIONS FOR FAILURE TO CONDUCT DEPOSITION

After a conference call on Friday, October 20, 2023, between all counsel a proposed deposition schedule for the parties' depositions was confirmed. An email was circulated with dates, times, and locations.

A great deal of emphasis is placed on the fact that the deposition of David Silveira Jr. was to be taken "November 21, 2023 (all day) to be taken either in Arizona or via zoom." Although notices were exchanged by e-mail and mail, the Silveira, Jr. deposition was not taken off calendar until the day preceding.

If the party giving notice of a deposition fails to attend or proceed with it, the court shall impose a monetary sanction against that party, or the attorney for that party, or both, and in favor of any party attending in person or by an attorney, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. (CCP §2025.430.)

The executor argues that CCP Section 2025.430 does not apply because the deposition was noticed to be taken "either in Arizona or via zoom" and without citing authority expresses "[a] Zoom deposition cannot be attended in person by a party or attorney."

CCP § 2025.310(b) provides:

\* \* \*

(b) Subject to Section 2025.420, any party or attorney of record may, but is not required to, be physically present at the deposition at the location of the deponent. If a party or attorney of record elects to be physically present at the location of the deponent, all physically present participants in the deposition shall comply with local health and safety ordinances, rules, and orders.

Motion for sanctions is GRANTED. In awarding discovery sanctions, Counsel incurred reimbursable travel costs in the amount \$919.92. As to the requested attorney's fees, the Court first notes the going hourly rate in this community is \$300. Additionally, travel time for counsel will be awarded at a reduced rate of \$100 per hour. The Court also notes that despite objections as to the timeliness of the deposition notice, counsel and the deponent were fully prepared to proceed and noticing counsel's expression that he was "inclined" to reschedule was insufficient to take the deposition off calendar.

The **awarded attorney's fees total \$2,410** (10 hours at \$100 for travel time, 1.5 hours at \$300 for deposition preparation and client meeting, 3 hours at \$300 for the motion, and the \$60 filing fee). With the awarded travel costs, total sanctions are \$3,329.92, to be paid by Petitioners Audrey Petrecivich and Manuel Silveira to counsel for Objectors forthwith.

The Clerk shall provide notice of this Ruling to the parties forthwith. Objectors to prepare a formal Order pursuant to Rule of Court 3.1312 in conformity with this ruling.

# **ESTATE OF DeREIS**

**10PR7129**

## **MOTION TO COMPEL**

On August 21, 2023, Deborah Burke (“Burke”) served plaintiffs/cross-defendants DeReis (“DeReis”) form interrogatories and request for production of documents. Initial responses were served ; thereafter, despite promises to further respond, the petitioner claims that no supplemental responses have been served. The Motion To Compel was served on November 21, 2023.

DeReis filed a Response/Opposition to the Motion to Compel with copies of e-mails showing attachments constituting supplemental responses denominated as case number 21CV45133.

The procedural presentation of the discovery issues and parallel discovery in the related case, as well as new counsel substituting for the moving party, is convoluted. The Court will order that irrespective of any Form Interrogatory responses previously provided in either related matter, responses without objection based on “previously provided” answers will be provided within thirty days of notice of this order. The court questions the efficacy of an objection based on assertions that questions have been “asked and answered” or “previously answered.”

The Separate Statement in Support of Motion to Compel filed Nov. 21, 2023, sets forth a continuing Response to Form Interrogatories that “Object as previously answered . . .” When matters are related, as here, discovery sent in one matter must be responded to fully and appropriately, even if the requests and responses fully mirror those in the other matter.

Motion to compel is GRANTED. Cross-defendants DeReis are ordered to serve verified responses, without the objection of “already previously been answered [in a related matter]”, within 30 (thirty) days..

The court does not award sanctions as it does not deem either party a prevailing party.

The Clerk shall provide notice of this Ruling to the parties forthwith. Burke to prepare a formal Order pursuant to Rule of Court 3.1312 in conformity with this ruling.