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13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **COUNTY OF SAN DIEGO**

15
16 KARL BECK, individually and on behalf
17 of all other similarly situated California
residents,

18 Plaintiff,

19 vs.

20 POINT LOMA PATIENTS CONSUMER
21 COOPERATIVE CORPORATION, a
California corporation, ADAM KNOPF, an
22 individual, JUSTUS H. HENKES IV, an
individual, 419 CONSULTING INC, a
23 California corporation, GOLDEN STATE
GREENS LLC, a California LLC, FAR
24 WEST MANAGEMENT LLC, a
California LLC, FAR WEST
25 OPERATING, LLC, a California LLC,
FAR WEST STAFFING LLC, a California
26 LLC, and DOES 1-50;

27 Defendants.
28

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

04/30/2018 at 03:08:00 PM

Clerk of the Superior Court
By Katelin O'Keefe, Deputy Clerk

CASE NO. 37-2017-00037524-CU-BT-CTL

CLASS ACTION

**DEFENDANT POINT LOMA PATIENT
CONSUMER COOPERATIVE'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
PLAINTIFF'S EX PARTE APPLICATION
FOR ISSUANCE OF ORDER TO SHOW
CAUSE FOR CIVIL CONTEMPT AND
REQUEST FOR ATTORNEYS FEES**

Judge: Hon. Joel Wohlfeil

Dept.: 73

Date: May 1, 2018

Time: 8:30 a.m.

1 Defendants Point Loma Patients Consumer Cooperative Corporation (“PLPCC”) and
2 Adam Knopf (“Knopf”) (collectively “Defendants”) respectfully submit the following
3 memorandum of points and authorities in opposition to plaintiff Karl Beck’s improper ex parte
4 application (“Opposition”).

5 **I. INTRODUCTION**

6 The issue of compliance with the Court’s Order is moot as PLPCC produced the
7 responsive data to the notice administrator last Thursday - the same day Plaintiff filed this request
8 - and yet Plaintiff has refused to withdraw the application. The ex parte application is also devoid
9 of any facts evidencing the necessity for ex parte relief. The contempt request is baseless because
10 Plaintiff’s counsel was kept apprised of PLPCC’s intent to comply and progress in preparing the
11 data. The application is also directed at an individual defendant – Adam Knopf – who is not the
12 subject of the Court’s Order. Lastly, the fee request is improper and excessive.

13 Plaintiff’s ex parte application was written for one purpose - attorneys’ fees. Plaintiff
14 claims \$8,515 for less than one page of legal analysis on the contempt and fee issues. Despite
15 express knowledge of PLPCC’s plan to comply and progress in preparing the data, Plaintiff rush-
16 filed this ex parte request to attempt to claim entitlement to \$8,515 in attorneys’ fees. Such bad
17 faith litigation tactics should be rejected.

18 For all of these reasons, the application and fee request should be denied.

19 **II. STATEMENT OF FACTS**

20 On March 23, 2018, the Court confirmed its tentative ruling that granted Plaintiff’s motion
21 compelling Defendant to respond to Plaintiff’s request for production (the “March 23, 2018
22 Order”).

23 On April 3, 2018, Plaintiff serve a notice of ruling of the March 23, 2018 Order pursuant
24 to Code of Civil Procedure section 1019.5.

25 On April 13, 2018, PLPCC appeared ex parte to request the Court stay the March 23, 2018
26 Order. The Court denied the request.

27 On April 20, 2018, PLPCC filed a petition for writ of mandate with the Fourth District
28 Court of Appeal with a request to stay this action pending appellate review of the March 23, 2018

1 Order.

2 On April 23, 2018, the Court of Appeal denied PLPCC’s petition for writ of mandate.

3 On April 24, 2018, PLPCC notified Plaintiff’s counsel that it was “...processing the
4 remaining data” and that “it will promptly go out to Mr. Fisher” upon receipt. (See Exhibit J to
5 the Restis Declaration.)

6 On Thursday, April 26, 2018, PLPCC produced the class list to the notice administrator
7 and notified Plaintiff’s counsel that the class list had been provided. (Dart Decl. ¶ 2.) Earlier the
8 same day, Plaintiff’s counsel filed this Ex Parte Application without inquiring as to production
9 status. (Dart Decl. ¶ 7.)

10 **III. THERE IS NO CONTEMPT BECAUSE PLPCC INTENDED TO AND DID**
11 **PRODUCE THE RESPONSIVE DATA TO THE NOTICE ADMINISTRATOR**

12 On April 24, 2018, the morning after the Court of Appeal denied PLPCC’s writ of
13 mandate, PLPCC expressed *to Plaintiff’s counsel* its written intent to comply with the March 23,
14 2018 Order. On April 26, 2018, PLPCC supplied the name and address list (many thousands of
15 entries) to the notice administrator in compliance with the March 23, 2018 Order, albeit three
16 days after the deadline, solely due to unforeseen technical and logistical issues.

17 There is no contempt issue. PLPCC expressed to Plaintiff’s counsel an intent to comply
18 and thereafter complied. Plaintiff was aware the records were voluminous, requiring redactions,
19 and were being prepared – despite no instruction from the notice administrator – and yet, Plaintiff
20 still filed his Application seeking fees. (Dart Decl. ¶¶ 4-5.) Because PLPCC complied with the
21 March 23, 2018 Order, this ex parte application is moot and should be denied.

22 **IV. PLAINTIFF’S EX PARTE APPLICATION IS IMPROPER**

23 Plaintiff’s ex parte application is improper. It fails to detail why ex parte relief is
24 necessary and suffers from other procedural deficiencies.

25 **A. Plaintiff Failed To Allege Irreparable Harm, Immediate Danger, Or Any Other**
26 **Statutory Basis For Granting Ex Parte Relief**

27 California Rule of Court 3.1200, et seq. delineates the “ex parte rules.” California Rule of
28 Court, Rule 3.1202 requires an “affirmative factual showing in a declaration containing competent

1 testimony based on personal knowledge of *irreparable harm, immediate danger, or any other*
2 *statutory basis* for granting relief ex parte.” Pursuant to Rule 3.1202, Plaintiff’s ex parte application
3 should contain competent testimony which explains why ex parte relief is necessary. Plaintiff’s ex
4 parte request fails to do so because there is no emergency and there never was an emergency.
5 Plaintiff’s “emergency” was to get this request in before PLPCC complied in order to request fees.
6 A fee motion, which is what this is, is not an emergency and should be done on a noticed basis.
7 Without a showing as to the irreparable harm immediate danger, or any other statutory basis for
8 which Plaintiff’s Application is being brought, this Court should deny the request.

9 **B. Plaintiff’s Ex Parte Contempt Request Is Defective Because It Fails To Meet**
10 **The Requirements To Have Civil Contempt Adjudicated**

11 Code of Civil Procedure 128(a)(4) provides the court with the power “[t]o compel
12 obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an
13 action or proceeding pending therein.” Code of Civil Procedure section 1209, et seq., provides
14 this Court with the power to punish acts which are in " disobedience of any lawful . . . order of the
15 court." (Code Civ. Proc. § 1209(a)(5); *see also, Pacific Telephone and Telegraph Co. v. Superior*
16 *Court* (1968) 265 Cal.App.2d 370 (section 1209 contempt proceedings are special proceedings,
17 criminal in character and intended to implement the inherent power of the court to enforce its
18 lawful orders).)

19 To institute an indirect contempt proceeding, an affidavit must be presented to the court
20 setting forth the facts constituting the contempt. (Code Civ. Proc., § 1211(a).) Filing a sufficient
21 affidavit is a jurisdictional prerequisite to a contempt proceeding. Without an initiating affidavit, a
22 contempt order is void. After notice to the opposing party's lawyer, the court (if satisfied with the
23 sufficiency of the affidavit) must sign an order to show cause regarding contempt in which the
24 date and time for a hearing are set forth. (Code Civ. Proc. § 1212.) The court makes the
25 determination of when the order to show cause hearing will be held. The issuance of the order to
26 show cause commences a "separate action" on the contempt charges. The accused is entitled to a
27 full and fair hearing that satisfies due process. (Code Civ. Proc. § 1217.)

28 An order to show cause to bring a party into contempt must be served on the alleged

1 contemnor in the same manner as a summons, i.e., by personal service on the contemnor even if
2 he or she is represented by counsel. (Code Civ. Proc. §§1016–1017; *Cedars-Sinai Imaging*
3 *Medical Group v. Superior Court* (2000) 83 Cal.App.4th 1281, 1286–1288 (court does not have
4 jurisdiction to proceed unless party charged is personally served with OSC).) The order to show
5 cause notifies the alleged contemnor of the nature of the charges and the time of the hearing, and
6 is the means for obtaining personal jurisdiction. Service of an initial order on the alleged
7 contemnor’s attorney is inappropriate. (See *In re Morelli* (1970) 11 Cal.App.3d 819, 838.)

8 Here, Plaintiff has circumvented the process by which civil contempt and an Order to
9 Show Cause are sought. Assuming arguendo that Plaintiff’s Application, which contains the
10 Restis Declaration, can be construed as the required affidavit, the Court has yet to approve it.

11 Further, again assuming this ex parte application is a sufficient affidavit for purposes of
12 setting an Order to Show Cause hearing, the “Proposed Order” provided by Plaintiff does not set
13 forth a Court-determined date and time for a hearing requiring PLPCC and Knopf to appear and
14 explain their alleged failure to comply with the March 23, 2018 Order. In fact, Plaintiff’s
15 “Proposed Order” only awards fees and fails to request an Order to Show Cause Hearing.

16 Lastly, no Order to Show Cause with a hearing date and time was personally served on
17 Defendants, as required under Code of Civil Procedure. Instead, Plaintiff filed this ex parte
18 request for relief that requests the Court immediately and without notice to PLPCC and Adam
19 Knopf adjudge them in contempt without any notice and opportunity to be heard.

20 Accordingly, Plaintiff’s request for relief is improper, bordering on abusive, and the Court
21 lacks jurisdiction at this ex parte to make any contempt findings.

22 **C. There Are No Facts To Show PLPCC Or Adam Knopf Acted Willfully Or**
23 **Wantonly**

24 Plaintiff, without supporting evidence, claims that PLPCC “wantonly and willfully
25 disobeyed” the March 23, 2018 Order. Plaintiff has not, and cannot, show wanton or willful
26 conduct. To the contrary, Plaintiff’s documentary evidence shows that PLPCC intended on
27 complying and PLPCC submitted documentary evidence that it did comply.

28 Plaintiff further claims, without support, that because Mr. Knopf is PLPCC’s CEO, he

1 should be held personally liable for contempt. Plaintiff ignores that an officer of a contemnor
2 entity is only liable “if they had knowledge and authorized the contemptuous acts.” (*In Re*
3 *Coleman* (1974) 12 Cal.3d 568, 573.) Prior to filing this request, Plaintiff’s counsel was notified
4 that the voluminous database of names was incoming. Plaintiff cannot point to one instance since
5 the Court’s March 23, 2018 Order where Adam Knopf authorized PLPCC to refuse to turn over
6 the class list. The facts show that Plaintiff’s counsel was aware that there was a delay in
7 production due to the sheer volume of data and need for redactions (Restis Decl. ¶¶ 17-18.)
8 Plaintiff’s counsel acknowledged the delay and indicated that he wished to ensure there was no
9 further delay. (*Id.*)

10 There are no facts to support Plaintiff’s attempt to hold Mr. Knopf liable because there is
11 no evidence that shows Mr. Knopf knew of an alleged non-compliance of the March 23, 2018
12 Order and willfully and wantonly disobeyed the order. Plaintiff cannot show knowledge and
13 authorization of contempt and therefore Mr. Knopf should not be found liable for any alleged
14 contemptuous act.

15 **D. Plaintiff Is Not Entitled To Attorney’s Fees And A Fee Motion Should Not Be**
16 **Made On An Ex Parte Basis**

17 “Upon the answer and evidence taken, the court or judge shall determine whether the
18 person proceeded against is guilty of the contempt charged.” (Code of Civ. P. section 1218(a).)
19 “In addition, a person who is subject to a court order as a party to the action, or any agent of this
20 person, who is adjudged guilty of contempt for violating that court order may be ordered to pay to
21 the party initiating the contempt proceeding the reasonable attorney's fees and costs incurred by
22 this party in connection with the contempt proceeding.” (*Id.*)

23 Plaintiff is not entitled to attorneys’ fees because PLPCC and Knopf have not been
24 adjudicated in contempt and cannot be adjudicated in contempt at this ex parte hearing. Unless
25 and until the Court adjudicates the contempt issues, Plaintiff cannot make a request for attorneys’
26 fees. Plaintiff’s fee request ignores the most significant part of contempt proceedings, the Court’s
27 issuance of an Order to Show Cause and the requisite hearing, and goes straight to a purported
28 entitlement.

1 In fact, Plaintiff was on notice that the voluminous database of names was being processed
2 as of April 24, 2018 and that the information would be turned over to Joe Fisher of the Notice
3 Company, as soon as available. Counsel for Defendants even indicated that private information was
4 included on the first issuance of the list of names, and further redactions were needed. Plaintiff's
5 counsel filed his Application the day the records were turned over, despite knowing the records
6 were being delivered.

7 **V. CONCLUSION**

8 There is no contempt because PLPCC complied with the March 23, 2018 Order, there is
9 no emergency situation that warrants ex parte relief, and the law does not support ex parte relief.
10 Plaintiff's Application has one purpose: to request attorneys' fees. This request is not articulated
11 to bring PLPCC and Adam Knopf into the Court to show cause why they did not comply with the
12 Court's March 23, 2018 Order. Instead, this ex parte request is articulated to give Plaintiff's
13 counsel an \$8,515 windfall. Accordingly, PLPCC and Adam Knopf respectfully request the
14 Court deny this request.

15
16 Dated: April 30, 2018

AUSTIN LEGAL GROUP, APC

17
18 By: 

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Attorneys for Point Loma Patients
Consumer Cooperative Corporation,
Golden State Greens, LLC, Far West
Management, LLC, Far West Operating,
LLC, and Far West Staffing, LLC

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