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Demur
1/6/87
- given permission to amend to complaint again.
- Saltz filed a 2nd demur
It was sustained w/ ~~off~~ leave to amend on 8/8 causes for action
- demur sustained on 3/4 causes.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

RUTH CISNEROS, ALICE ARIAS, RUDINE PETTUS, VINCENT LOVEN, LOUISE CARTER, WILLIAM WALKER, VIRGINIA WALKER, JUNE HALSELL, QUIDA JOHNSON, on behalf of themselves and the general public, pursuant to section 17204 of the California Business and Professions Code, Plaintiffs, -vs- THE U.D. REGISTRY, INC., a California corporation, HARVEY SALTZ, MS. D. ROBINSON, and DOES 1 through 100, Inclusive, Defendants.	CASE NO. C 645123 DATE: October 15, 1987 TIME: ~~9:00 a.m.~~ PLACE: Dept. "81" PLAINTIFF'S OPPOSITION TO DEMURRER OF DEFENDANT U.D. REGISTRY, INC.; AND HARVEY SALTZ

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TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (continued)

CASES — Page

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

I.

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants' demurrer to plaintiffs' complaint is based upon the inability of the "four pillars" to support plaintiffs' claims.

With respect to the first pillar, defendant, relying on Black's Law Dictionary, concludes that by implication an adjudication requires a court hearing. Plaintiffs show that many courts have analyzed many contexts, other than a court hearing, to find an adjudication.

Defendant's second pillar argument is similarly without benefit of any authority. Plaintiffs set forth, authority which uphold agency principles as applied to attorneys representing consumers.

Plaintiffs contend that constitutional protections as well as state statutes apply to protect grants of fee waivers against dissemination by defendants based on the authorities discussed below. Defendant's third pillar must fall.

Fourthly, as argued wiith respect to the Unruh Civil Rights Act, plaintiffs have properly alleged facts in support thereof, i.e., that defendants unlawfully report representation by legal services attorneys to incite denial of housing to their clients.

Finally, plaintiffs contend that defendants' demurrer to the Seventh, Eighth and Ninth causes of action is without merit. The facts alleged support a claim for emotional distress and establish plaintiffs as members of the public with a right to be protected against business practices that are unlawful or deceitful.

II.

DEFENDANTS' ARGUMENT THAT ALLEGATIONS REGARDING PLAINTIFFS ARIAS, HALSELL AND JOHNSON ARE UNCERTAIN IS WITHOUT MERIT.

Defendants' demur on the basis of uncertainty to those allegations in the complaint concerning plaintiffs Arias, Halsell and Johnson. For the reasons below, plaintiffs contend that the demurrer is without merit.

With respect to plaintiff Arias, as defendants acknowledge, plaintiffs allege that plaintiff Arias was not involved in the unlawful detainer action reported by defendants, Complaint, paragraph 8, p. 5:10-12. The fact that plaintiffs admit that the unlawful detainer is in the name of "Alice Arias" and deny that plaintiff Arias is the same defendant is not inconsistent. It goes to the core of the Complaint: defendants' failure to appropriately identify the consumer about whom it reports.

It is irrelevant to observe, as defendants urge, that plaintiff Arias does not allege whether she made a request for disclosure or correction of her file. Whether plaintiff Arias has sought either disclosure or correction of the incorrect information is a matter apart from the fact that plaintiff alleges that defendants reported erroneous information about her.

In arguing that plaintiff Halsell has failed to allege that defendants report inaccurate information about her, defendants argue the absence of another fact not relevant to plaintiff Halsell's allegations that she requested defendants to re-investigate her report and that defendants refused to do

so, Complaint, paragraph 21, p. 10:13-18. The only "foundation" required is that consumers communicate disputes to defendants. Plaintiff did this by her request for re-investigation.

Finally, defendants argue that there is ambiguity or uncertainty in the allegations concerning plaintiff Johnson. Defendants create ambiguity or uncertainty in the speculative possibilities that defendants themselves raise, Demurrer, paragraph 8, p. 8:8-18. Apart from the confusion defendant creates with speculating about possibilities, the defendant is clear in stating what plaintiffs' allegations are: plaintiff Johnson was not involved in eviction actions as reported by defendants. This is erroneous information sufficient to support a claim that defendants fail to maintain accurate records.

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III.

PLAINTIFFS HAVE PROPERLY ALLEGED THEY WERE ADJUDGED PREVAILING PARTIES IN THEIR UNLAWFUL DETAINER ACTIONS

Civil Code §1785.13(a)(4) prohibits consumer credit reporting agencies from making credit reports regarding unlawful detainer actions where the defendant/tenant was "adjudged the prevailing party." Defendants demur based on their claim that a full trial on the merits is the only method a person may be "adjudged the prevailing party," but cite no authority, except in Black's Law Dictionary.

Defendants' claim lacks merit. As shown below, the resolutions of the unlawful detainer were "adjudications," and plaintiffs were the "prevailing parties."

A. An Adjudication may be Obtained by Means Other Than a Trial on the Merits.

Code of Civil Procedure §577 defines "judgment" as "the final determination of the rights of the parties in an action or proceeding." The terms "judgment" and "matters adjudged" are used synonymously in CCP §§ 1908 and 1911. As discussed below, judgments are regularly entered pursuant to stipulations, dismissals, demurrers, and motions for failure to prosecute. Greatorex v. Board of Administration, 91 Cal.App.3d 54, 58, 154 Cal.Rptr. 37 (1979) [stipulation]; Gates v. Superior Court, 178 Cal.App.3d 301, 311, 223 Cal.Rptr. 678 (1986) [dismissal following settlement]; Biggs v. Biggs, 103 Cal.App.2d 741, 230 P.2d 32 (1951) [voluntary dismissal by

plaintiff]; McKinney v. County of Santa Clara, 110 Cal.App.3d 787, 794, 168 Cal.Rptr. 89 (1980) [demurrer]; Winick Corp. v. Safeco Insurance Company, 187 Cal.App.3d 1502, 232 Cal.Rptr. 479 (1986) [failure to timely serve and return summons]; McMahon's of Long Beach v. McMahon Service Corp., 145 Cal.App.2d 607, 302 P.2d 847 (1956) [dismissal for failure to prosecute].

Judgments so entered are final determinations of the rights of the parties, are appealable, and can have the effect of res judicata and collateral estoppel. Id.; see, also, Eichman v. Fotomat Corp., 147 Cal.App.3d 1170, 197 Cal.Rptr. 612 (1983); Datta v. Staab, 173 Cal.App.2d 613, 621, 343 P.2d 977 (1959); Rodriquez v. Fireman's Fund Insurance, 142 Cal.App. 3d 46, 190 Cal.Rptr. 705 (1983). Thus a judgment, or "final determination of the rights of the parties," may be obtained by numerous methods other than by a trial on the merits.

The unlawful detainer actions alleged in plaintiff's complaint fall into four categories:

(1) Demurrer sustained without leave to amend;

(2) Dismissal by the landlord;

(3) Dismissal pursuant to CCP §583.360; and,

(4) Actions resolved by settlement.

1. **A Demurrer Sustained Without Leave to Amend Constitutes an Adjudication That Defendant is the Prevailing Party.**

Plaintiffs allege Louise Carter was adjudged the prevailing party in an unlawful detainer action filed against her

when her demurrer was sustained without leave to amend, Complaint, paragraph 17, p. 8:8-18. Defendants assert, without authority, that this ruling does not constitute an adjudication that Ms. Carter was the prevailing party. Defendants' claim lacks merit.

A demurrer which is sustained for failure to allege facts sufficient to state a cause of action is a judgment on the merits for defendant. McKinney v. County of Santa Cruz, 110 Cal.App.3d 787, 168 Cal.Rptr. 89 (1980); Goddard v. Security Title Insurance, 14 Cal.2d 47, 92 P.2d 804 (1939). In McKinney, defendant's demurrer was sustained without leave to amend on the ground that the complaint failed to state a cause of action. Plaintiff filed another action and defendant successfully demurred based on the result in the first action. The court stated:

> A judgment on a general demurrer will have the effect of a bar in a new action in which the complaint states the same facts which were held not to constitute a cause of action on the former demurrer.

110 Cal.App.3d at 794. The court held the first judgment was res judicata to the second action. Id. While the courts in both McKinney and Goddard, supra, recognized that a demurrer sustained for technical defects, which could be remedied by amendment, is not a judgment on the merits, leave to amend must be granted where there is any reasonable possibility that a plaintiff can state a good cause of action. Goodman v. Kennedy, 18 Cal.3d 335 (1976). Demurrers are sustained without leave to amend when the issues are legal and the court decides

against the plaintiff as a matter of law. Lawrence v. Bank of America, 163 Cal.App.3d 431 (1985). Because Ms. Carter's demurrer was sustained without leave to amend, the court ruled on the substance of the complaint and finally determined the rights of the parties, thus adjudging Ms. Carter the prevailing party as a matter of law.[1]

2. **A Dismissal Constitutes an Adjudication in the Tenant's Favor.**

Plaintiffs Cisneros, Loven, Walker and Pettus each allege they were adjudged prevailing parties in unlawful detainer actions filed against them, because the actions were dismissed by their landlords. Such dismissals constitute adjudications that the tenants were prevailing parties.

In Biggs v. Biggs, 103 Cal.App.2d 741, 230 P.2d 32 (1951), plaintiff filed a request for dismissal with prejudice. The clerk entered the dismissal and plaintiff later attempted to set it aside. The motion was denied and plaintiff appealed. 230 P.2d at 32. The Court of Appeal upheld the trial court and stated:

> The entry of an order for dismissal in the clerk's register has the effect of a final judgment. Id.

In Kronkright v. Gardner, 31 Cal.App.3d 214, 107 Cal.Rptr. 270 (1973), the plaintiff voluntarily dismissed its action with

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[1] It is noteworthy that defendants accept the conclusion that Ms. Carter was adjudged the prevailing party, and eventually changed Ms. Carter's record in that unlawful detainer action, (Complaint, paragraph 17, p. 9:1-3)

prejudice prior to trial. The court held the dismissal constituted a judgment. 31 Cal.App.3d at 218. Thus, plaintiffs' allegations that the unlawful detainer actions filed against them were dismissed, are sufficient to constitute adjudications of those actions.

Plaintiffs also plead sufficient facts to show they were prevailing parties in those dismissed unlawful detainer actions. Section 1032 of the Code of Civil Procedure defines prevailing party. It states in pertinent part:

> 'Prevailing party' includes . . . a defendant in whose favor a dismissal is entered, . . .

Accordingly, plaintiffs have alleged sufficient facts to show they were adjudged the prevailing party in the unlawful detainer actions filed, and dismissed, against them.

Moreover, plaintiffs allege additional facts which support the finding that they were prevailing parties. Plaintiff Cisneros alleges that she continues to reside in the rental unit that was the subject of each of the three unlawful detainer actions filed, and dismissed, against her, Complaint, paragraph 5, p. 4:9-20. The primary purpose of an unlawful detainer action is to obtain possession of the premises. Strickland v. Becks, 95 Cal.App.3d Supp. 18, 21 (1979). A tenant who retains possession is the prevailing party. Id. The allegations of plaintiff Cisneros, that each unlawful detainer action was dismissed, and that she retained possession, leave no doubt but that she was adjudged the prevailing party.

Similarly, plaintiff Loven alleges that the unlawful

detainer action against him was dismissed and that he retained possession of the premises, Complaint, paragraph 13, p. 7:7-14). These allegations are sufficient to show plaintiff Loven was adjudged the prevailing party as well. CCP §1032; Strickland v. Becks, supra, 95 Cal.App.3d Supp. at 21.

Plaintiffs Walker and Pettus each allege one of the unlawful detainer actions filed against them was resolved whereby plaintiff dismissed the case without prejudice. Again, pursuant to CCP §1032, the Walkers and Ms. Pettus prevailed in each of those actions.

3. Dismissals for Failure to Prosecute Constitute Adjudications in Favor of the Defendant.

Plaintiffs allege that plaintiff Rudine Pettus was adjudged the prevailing party in an unlawful detainer action filed against her on February 10, 1981 because it must be dismissed pursuant to CCP §583.360, as of February 11, 1986. CCP §583.360 provides that an action must be dismissed if not brought to trial within five years, and that this dismissal is mandatory, and not subject to extension or excuse.

"A dismissal for failure to prosecute . . . is not a dismissal on technical grounds . . . ." Minasian v. Sapse, 80 Cal.App.3d 823, 826, 145 Cal.Rptr. 829, 831 (1978). "A dismissal for failure to prosecute . . . reflect(s) on the merits of the action, and that reflection is favorable to the defendant in the action." 80 Cal.App.3d at 827.

In Winick Corp. v. Safeco Insurance Company, 187 Cal.App.3d 1502 (1986), the court held, in awarding attorneys

fees under Civil Code §3250, that a defendant is the prevailing party when it obtains a dismissal for failure to timely serve and return the summons as required by Code of Civil Procedure §990. The court stated:

> The most Safeco--or any other civil defendant--ordinarily can hope to achieve is to have the plaintiff's claim thrown out completely. This is exactly what happened. In 'pragmatic' terms, it does not make any difference whether this total victory comes only after a jury reaches a verdict as to each and every substantive issue or whether, as here, it comes through a judge's decision the plaintiff waited too long to serve its complaint on defendant. In any practical sense of the word, the defendant 'prevailed'. 187 Cal.App.3d at 1508.

If a party can be adjudged prevailing when the plaintiff fails to timely serve the complaint, it follows the defendant can be adjudged prevailing when the plaintiff failed to pursue the case within the five year provisions of CCP §583.360. At the expiration of that five year period the court is required to "throw out completely" the landlord's action. As in Winick, Ms. Pettus is the prevailing party as a matter of law.

Dismissals for lack of prosecution constitute adjudications. McMahan's of Long Beach v. McMahan Service Corp., 145 Cal.App.2d 607, 302 P.2d 847 (1956). In McMahan, defendants moved to dismiss the action for lack of prosecution for

plaintiff's failure to bring the case to trial within about three years after filing. The motion was granted and the court awarded costs to defendants stating:

> [A] dismissal of an action with prejudice is in fact a judgment in defendant's favor, carrying with it the right to recover costs.

302 P.2d at 849. Similarly, a dismissal under CCP §583.360 constitutes an adjudication in Ms. Pettus' favor.

4. **A Judgment Entered Pursuant to Stipulation or Settlement Constitutes an Adjudication.**

In re Casa de Valley View Owner's Association Inc. v. Stevenson, 167 Cal.App.3d 1181, 213 Cal.Rptr. 790 (1985) was an action arising out of a condominium conversion. Two of the plaintiffs entered into a settlement and the court entered judgment pursuant to CCP §664.6. The plaintiffs later appealed the judgment. On appeal the court held that '[b]y its . . . ruling granting the 664.6 motion to enter judgment . . . the court 'rendered' its decision and judgment (§577)." 167 Cal.App.3d at 1193. The court further noted that "the granting of the motion constituted the rendition of a judgment." Id.

In Gates v. Superior Court, 178 Cal.App.3d 301 (1986), a city brought a taxpayer action against police officers, seeking an accounting. A prior taxpayer action against the same defendants on the same cause of action had been filed by other plaintiffs, and had been resolved by a consent decree and dismissal following settlement. The court held that the prior

settlement "amounts to a decision on the merits." 178 Cal.App. 3d at 311. The court also stated:

> The effect of a dismissal with or without prejudice, when it is filed in return for consideration from the defendant, acts as a complete bar to any further action on the same controversy and has the same legal effect as a common law retraxit. Id.

See, also, Greatorex v. Board of Administration, 91 Cal. App.3d 54, 58 (1979) [stipulated judgment is a decision on the merits]; Eichman v. Fotomat Corp., 147 Cal.App.3d 1170 (1983) [judgment following a settlement bars future actions to the same extent as a judgment after a full trial]; Rodriquez v. Fireman's Fund Insurance, 142 Cal.App.3d 46 (1983) [compromise settlement can be the basis of a final judgment, operating as a merger and bar of all pre-existing claims and causes of action.].

Plaintiffs allege that four unlawful detainer actions were resolved in their favor by stipulations or settlements, two involving plaintiffs William and Virginia Walker, and two involving plaintiff Rudine Pettus. The two involving the Walkers are described in paragraph 19 of the Complaint, at pages 9-10. In the first, plaintiffs allege it was resolved by a stipulated judgment granting possession to the Walkers. Under Strickland v. Becks, supra, 95 Cal.App.3d 18, 21, the Walkers were adjudged the prevailing parties in that action. In the second, plaintiffs allege the parties to that action stipulated to enter judgment for the Walkers. The Walkers obviously prevailed in that action as well, receiving judgment

in their favor.

The allegations concerning Ms. Pettus are found at paragraph 9 of the Complaint, pages 5-6. Plaintiffs allege that in the second unlawful detainer action filed against Ms. Pettus, she withheld her rent due to habitability violations, and settled the case whereby she agreed to vacate the premises and her landlord waived all back rent, damages, attorneys fees and costs, Complaint, p. 6:1-8. This rendered Ms. Pettus the prevailing party. Green v. Superior Court, 10 Cal.3d 616 (1974); Strickland v. Becks, supra, 95 Cal.App.3d Supp. at 21. In Green, the Supreme Court held that a tenant may withhold rent when the landlord violates the implied covenant of habitability. 10 Cal.3d at 635. The rent is reduced to reflect the habitability defects. Id. at 638-39. Strickland recognized that a tenant may prevail by successfully establishing a defense of habitability violations. 95 Cal.App.3d Supp. at 20-21. In Ms. Pettus' case, she was successful in her habitability defense because the settlement reduced her rent.

California courts have recognized that the determination of prevailing party is not always easy, mechanical or clear cut. Coalition for Economic Survival v. Deukmejian, 171 Cal.App.3d 954, 961 (1985); Folsom v. Butte County Assn of Gov., 32 Cal.3d 668, 685 (1982); Nasser v. Superior Court, 156 Cal.App.3d 52 (1984). Courts sometime look beyond the boundaries of the lawsuit to determine prevailing party, and the inquiry may be a pragmatic one, focusing on the impact and results of the action, not its manner of resolution. Coalition for Economic Survival, supra, 171 Cal.App.3d at 961; Folsom,

supra, 32 Cal.3d at 684-685.

In this unlawful detainer action involving Ms. Pettus, the allegations that she raised a habitability defense and received a significant rent reduction, indicate she was the prevailing party. Even if a closer look at that case later reveals she was not the prevailing party, defendants have not met their burden of showing Ms. Pettus could not be the prevailing party as a matter of law.

The other settled unlawful detainer action involving Ms. Pettus alleges the case was dismissed with prejudice by the landlord. Pursuant to CCP §1032, Ms. Pettus was adjudged the prevailing party. Moreover, plaintiffs allege the settlement provided that Ms. Pettus would not be reported by a tenant credit reporting agency in connection with that action, indicating the intent of the parties to determine Ms. Pettus the prevailing party under Civil Code §1785.13(a)(4). Courts are under a duty to enter judgment in conformity with the agreement of the parties. Jones v. World Life Research Institute, 60 Cal.App.3d 836, 840 (1976). Those agreements should be interpreted to give effect to the intent of the parties. Id.; Civil Code §1636. Here, too, plaintiffs have alleged sufficient facts to demonstrate Ms. Pettus was adjudged the prevailing party, and defendants' demurrers must be overruled.

B. Public Policy Supports Plaintiffs' Position

Certainly, the defendants would contend that a default judgment, entered by the clerk following a tenant's failure to timely file an answer, is a "final determination of the rights

of the parties." A default judgment is obtained without a trial on the merits. It is obtained as a result of the tenant's failure to abide by a "technical" requirement of the court.

On the other hand, judgments pursuant to dismissal, stipulation, settlement, or demurrer are as much or more fully "adjudicated" in the sense of participation by the court, than is a judgment entered by default. Plaintiffs and defendants should not be held to different standards with respect to adjudications in the unlawful detainer process.

Judgments pursuant to stipulations, settlements and dismissals are favored as furthering the sound public policy of judicial economy. Tenants whose unlawful detainers are resolved by such judgments should not be penalized because their cases are resolved without trial. Such judgments must be considered adjudications for the purpose of Civil Code §1785.13. Plaintiffs have alleged sufficient facts to show they prevailed in those actions, and defendants' demurrers must be overruled.

IV.

PLAINTIFFS CAN SEEK DISCLOSURE AND CORRECTION OF THEIR FILES THROUGH THEIR ATTORNEYS.

Defendants assert that plaintiffs did not follow the statutory procedure in seeking disclosure or correction of their files because plaintiffs made their requests through their attorneys, rather than personally, Demurrer, pages 9 to 10). Defendants state:

> In each and every case, the plaintiffs claim that their respective attorneys made requests to see files, not they. Demurrer, p. 10:24-27 (emphasis in original).

Defendants' interpretation of the consumer credit reporting statutes is without merit. In Pinner v. Schmidt, 617 F.Supp. 342 (E.D. La. 1985), the court addressed this issue, interpreting federal consumer credit reporting agency statutes virtually identical to California's.[2] In Pinner, the consumer credit reporting agency asserted that a letter by a consumer's attorney disputing the accuracy of the consumer's file and requesting a reinvestigation was insufficient because the dispute was not conveyed by the consumer himself. 617 F.Supp. at 346-347. The court found that contention "wholly unacceptable." Id. at 347. The court stated:

> It is inconceivable to the Court that an attorney could not represent a consumer in this regard, and the Court opines that requirements of direct communication elsewhere in the FCRA [Fair Credit Reporting Act] are intended only to protect the consumer by affording him a qualified confidentiality in the extensive information available from his credit file. Id.

Here, too, defendants are attempting to use provisions of

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[2] California's consumer credit statutes are modeled after, and similar to the federal Fair Credit Reporting Act. Pulver v. Avco Financial Services, 182 Cal.App.3d 622, 634-635 (1986). Thus, decisions interpreting the federal Act are persuasive in construing California law. Id., Kaplan's Fruit & Produce Co. v. Superior Court (1979) 26 Cal.3d 60, 73.

state law, identical to federal law and also intended to protect the consumer, to hinder the consumer from asserting his or her rights. As in Pinner, defendants' argument is "wholly unacceptable" and must not be permitted.

State law also militates against defendants' interpretation. Under the law of agency any person who has the capacity to contract may appoint an agent. Civil Code §2296. Civil Code §2305 provides that every act which may be done by any person under the Civil Code may be done by the agent of that person, unless a contrary intent clearly appears. Thus, disputes under Civil Code §§1785.16 and 1786.24 can be made on behalf of the consumer by his agent.

Generally, speaking, an attorney is an agent of his client. 1 Witkin, California Procedure (3d ed.) Attorneys, §184, p. 213; Blanton v. Womancare, Inc., 38 Cal.3d 396 (1985). While there are some distinctions from an ordinary agency relationship, e.g., Witkin, supra, §185, it is presumed that an attorney has the authority to do all actions necessary and incidental to properly represent his client. Clark Equipment Co. v. Wheat, 92 Cal.App.3d 503 (1979). Requests to view files or to correct records under Civil Code §§1785.16 and 1786.24 are clearly acts that are necessary and proper to represent consumers.

This interpretation is supported by the legislative findings of both state and federal law, where the legislatures have recognized:

> There is a need to insure that consumer credit reporting agencies exercise their responsibility with fairness, im-

partiality, and a respect for the consumer's right to privacy. Civil Code §§1785.1(c), 1786(b), 15 U.S.C. §1681(a)(4).

The purpose of the consumer credit reporting agencies acts is to protect the consumer, not the agency. Hansen v. Morgan, 582 F.2d 1214 (9th Cir. 1978). It is fundamentally unfair to prohibit a consumer from having an attorney handle disputes on the consumer's behalf. Plaintiffs' requests to view or correct their files, made through their attorneys, are entirely permissible and proper. Here, as in Pinner, it is "inconceivable" that an attorney cannot represent a consumer in this regard, and defendants' assertion that plaintiffs must make these requests personally is "wholly unacceptable." Plaintiffs' allegations that they made requests through their attorneys are sufficient to show that defendants failed to comply with both state and federal law by refusing to allow plaintiffs to view or correct their records.

V.

PLAINTIFFS HAVE STATED A CAUSE OF ACTION FOR VIOLATION OF GOVERNMENT CODE SECTION 68511.3 AND THEIR RIGHT TO PRIVACY UNDER ARTICLE 1, SECTION 1 OF THE CALIFORNIA CONSTITUTION

Government Code Section 68511.3 provides for the confidentiality of a fee waiver and the California Constitution guarantees the right to privacy of this information.

Defendants simply assert that the order granting plaintiffs' applications for a fee waiver is a matter of public record and contend that such information is of a probative interest to landlords. In these arguments, for the reasons stated below, defendants failed to recognize both the public policy underlying the design of the state statute and the compelling interest test that must be met before plaintiffs waive the right to privacy.

A. PLAINTIFFS ARE MEMBERS OF THE PUBLIC IN WHOSE BEHALF GOVERNMENT CODE SECTION 68511.3 WAS ENACTED

In the Memorandum of Ruling on defendants' demurrer dated July 20, 1987, the court questions whether the statute was intended to create a civil remedy, Memorandum of Ruling page 10. There exists a judicial answer to this question. In Czap v. Credit Bureau of Santa Clara Valley, 7 Cal.App.3d 1 (1970), the court with respect to a Business and Professions Code Section 6947, governing the conduct of a collection agency, determined that a cause of action had been alleged stating:

> It does appear that the standard of conduct defined in the statute was designed for protection of the public. Violation of a statute embodying a public policy is generally actionable even though no specific remedy is provided in the statute; any injured member of the public for whose benefit the statute was enacted may bring an action [citation].

(Wetherton v. Growers Farm Labor Assn. (1969) 275 Cal.App.2d 168m 174 [79 Cal.Rptr. 543], citing McIron v, Mercer-Fraser Co. (1946) 76 Cal.App.2d 247 [179 P.2d 758].

B. GOVERNMENT CODE SECTION 68511.3 PROVIDES FOR THE CONFIDENTIALITY OF FEE WAIVER INFORMATION

Government Code §68511.3 provides:

> (a) The Judicial Council shall formulate and adopt uniform forms and rules of court for litigants proceedings in forma pauperis. These rules shall provide:...(4) for the confidentiality of the financial information provided to the court by these litigants; ...

The Judicial Council thereafter adopted Rule 985(h) of the California Rules of Court which states:

> [Confidentiality] No person shall have access to the application except the court and authorized persons authorized to verify the information pursuant to subdivision (b) and Government Section Code 68511.3, and any person authorized by the applicant. No person shall reveal any information contained in the application except as authorized by law.

The language of both the statute and court rule is clear in protecting the confidentiality of in forma pauperis applicants.

What may be less clear is the extent of the protection

from the language of the statute itself. The statute speaks only in terms of an application. However, in reality an application is a process which is initiated with the application form and culminated by the decision thereon. To cloak only the application itself with the protection of confidentiality is to deny this reality. The public policy being furthered both in keeping confidential the information form as well as the decision on the application is the same. Only by providing confidentiality to both the application information and the fact of proceeding in forma pauperis, is the interest in eliminating poverty and its stigma as barriers to utilizing the judicial system effectively enforced.

C. PLAINTIFFS HAVE A CONSTITUTIONAL RIGHT TO PRIVACY IN PROCEEDING IN FORMA PAUPERIS

1. Defendants' collection and dissemination of fee waiver information is the type of activity the Constitution was amended to prohibit.

Article I, Section 1 of the California Constitution states:

> All people who are by nature free and independent, and have certain inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness, and privacy. (Emphasis added).

In the first California Supreme Court privacy case decided after the Constitution was amended to include a right to

privacy, the Court in White v. Davis, 13 Cal.3d 757 (1975), set forth the "principal `mischiefs'" at which the amendment was directed:

> (1) `government snooping' and the secret gathering a personal information, (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained for specific purpose, for example, the use of it for another purpose or the disclosure of it to some other party; and (4) the lack of a reasonable check on the accuracy of existing records.

13 Cal.3d at 775. The collection and publication of the fact that a consumer is proceeding in forma pauperis exemplify two of the mischiefs the constitutional provision was meant to prohibit. First, properly obtained information is being improperly used. While court personnel properly obtain information about whether a litigant is eligible to proceed in forma pauperis, defendants are disclosing this information for another purpose, i.e., as evidence of the credit unworthiness of a tenant. Second, they are disclosing it to third parties, i.e., prospective landlords.

2. **PLAINTIFFS HAVE A RIGHT TO PRIVACY IN PERSONAL FINANCIAL INFORMATION WHICH CAN ONLY BE ABRIDGED BY DEFENDANTS FOR A COMPELLING PUBLIC INTEREST.**

It is well established that Article 1 Section 1 of the California Constitution includes personal financial information

within the protected zone of privacy. Valley Bank of Nevada v. Superior Court, 15 Cal.3d 652 (1975); Dompeling v. Superior Court, 117 Cal.App.3d 798 (1981). It is a right that does not require state action and is enforceable against private individuals. Porten v. University of San Francisco, 64 Cal.App.3d 825 (1976). It is a right that cannot be abridged without a compelling interest. Id.; White v. Davis, 13 Cal.3d 757 (1975). Even if a compelling interest can be shown, the scope of the intrusion must be narrowly drawn. Id.

Moskowitz v. Superior Court, 137 Cal.App.3d 313 (1982), involved the right of privacy in personal financial information. As petitioner had already disclosed information about the financial affairs, the court addressed the question of whether petitioner was entitled to constitutional protection regarding the dissemination of the information, similar to the case herein. The court finding a constitutional right to privacy in personal financial information refused to limit those protection to the stage of disclosure stating:

> ...the fact that petitioner is attempting to restrict the use of the facts discovered, rather than the scope of the discovery itself, cannot justify denial of his constitutional right of privacy in the financial information divulged in his deposition.

(Emphasis added) Id. at 316. The court although recognized the distinction between disclosure and dissemination stated that the same principles were applicable quoting Britt v. Superior Court, 20 Cal.3d 844 (1978):

> [W]hile the filing of a lawsuit may implicitly bring about partial waiver of one's constitutional right of

associational privacy, the scope of such 'waiver' must be narrowly rather than expensively construed, so that plaintiffs will not be unduly deterred from instituting lawsuits by the fear of exposure of their private associational affiliations and activities are directly relevant to the plaintiff's claim, and disclosure of the plaintiff's affiliations is essential to the fair resolution of the lawsuit, a trial court may properly compel such disclosure. [Citation]. Even under such circumstances, however, the general First Amendment principles noted above dictate that the compelled disclosure be narrowly drawn to assure maximum protection of the constitutional interests at stake. 137 Cal.App.3d at 317 (emphasis in original).

Even if the court were to find (1) that Government Code Section 68511.3 does not protect the order granting a fee waiver from disclosure and (2) that the public has a right to disclosure of information in a court record [3], a Moskowitz analysis is still required [4], and courts should apply

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[3] Code of Civil Procedure §1904 provides that: "A Judicial record is the record or official entry of the proceedings in a court of justice, or of the official act of a judicial officer, in an action or special proceedings.

[4] In a statutory construction case resolving the conflict between a procedural statute and the common law, the Court stated: (3) The general rule is that statutes do not supplant the common law unless it appears that the Legislature intended to cover the entire subject or, in other words, to "occupy the field." (See Justus vs. Atchison 19 Cal.3d 564, 574-575 [139 Cal.Rptr, 97, 565 P.2d 122]; Gray vs. Sutherland 124 Cal.App.2d 280, 290 [268 P.2d 754].) "[G]eneral and comprehensive legislation, where course of conduct, parties, things affected, limitations and exceptions are minutely described, indicates a legislative intent that the statute should totally supersede and replace the common law dealing with the subject matter."

constitutional protection to the dissemination of the information and attempt to narrowly draw the lines of such dissemination.

The fact is that a tenant proceeded in forma pauperis is not relevant to whether that tenant is a credit risk. To qualify for a fee waiver the applicant must declare that income is from a government benefit program, in an amount at the poverty level, or that the income is insufficient to afford payment of court fees, in addition to other expenses. As the court succinctly stated in Earls v. Superior Court, 6 Cal.3d 109, 117 (1971):

> [A]n applicant need not establish total destitution in order to qualify for in forma pauperis relief.

For the prospective landlord, his interest is in assessing credit risk, that is information regarding the tenant's current income, and its relationship to the amount of rent. Information regarding current income are available from more direct sources, namely the tenant. The landlord can require authorization from the tenant to verify the information. It is illogical to infer from the granting of a fee waiver that could be quite dated that a tenant lacks credit worthiness, and it is unnecessary to rely on this indirect information about income. There is no reasonable, and certainly no compelling interest, in compiling and disclosing this information, because it provides no reasonable or direct evidence of a tenant's credit worthiness. Defendants should be enjoined from this

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(2A Sutherland, Statutory Construction (Sands 4th ed. 1984) §50.05, pp. 440-441.) Clearly neither Code of Civil Procedure 1904 nor Government Code §68511.3 is of the total legislation to supercede the common law dealing with the constitutional right to privacy.

abridgement of plaintiffs' right to privacy in their financial affairs. Unless defendants are enjoined, plaintiffs and UDR Consumers will be deterred from exercising their right to fee waivers and litigating claims for fear that the exercise of that right will decrease their acceptability to landlords based on misleading information.

3. **BOTH STATE AND FEDERAL CONSUMER CREDIT REPORTING PROVIDE FOR A PRIVACY RIGHT TO CONSUMERS.**

It is clear from the express findings and intent of federal and state law that both Congress and our state legislature intended to protect the consumers' right to privacy. The federal Fair Credit Reporting Acting provides:

> There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality and a respect for the consumer's right to privacy. 15 U.S.C. §1681(a)(4) (emphasis added).

The exact same language is found in the California statues at Civil Code §§1785.1(c) and 1786(b). Publication that consumers were granted fee waivers violates these statutory rights to privacy as well.

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VI.

THE SIXTH CAUSE OF ACTION STATES A CLAIM FOR RELIEF UNDER THE UNRUH CIVIL RIGHTS ACT AND PLAINTIFFS SHOULD BE ALLOWED TO PROVE THAT RELIEF IS WARRANTED.

With respect to the demurrer to the Sixth Cause of Action in the First Amended Complaint for Relief under the Unruh Civil Rights Act, Civil Code §51, et. seq., defendants assert no new basis upon which a demurrer may be sustained. The Unruh Act provides that "all persons within the jurisdiction of this state are free and equal" and are "entitled to the full and equal accommodations, advantages, facilities, privileges or services in all business establishments of every kind whatsoever.

Defendant's demurrer to the complaint asserts that the cause of action predicated upon the Unruh Act (Fifth Cause of Action of the Complaint) failed to state a claim for relief because the Unruh Act applied only to "discrimination, distinction or restriction on account of sex, color, race, religion, ancestry or national origin, demurrer to Complaint, pp. 14-15.

In the Memorandum of Ruling the court ruled, with respect to the Unruh cause of action:

> The recognized purpose of the Unruh Act is to prevent certain forms of arbitrary discrimination. (citations omitted.) (emphasis is the court's.) Memorandum of Ruling, p. 13.

The court's reasoning in this regard was founded upon well

established interpretations of the Unruh Act which have applied the Act to prohibit many varied forms of arbitrary discriminations. See, In Re Cox, 3 Cal.3d 205, 216, (1970). Recent interpretations of Unruh Act by the California Supreme Court clearly show that the Act is applicable to a variety of arbitrary discriminations based upon factors beyond those recognized by defendants. Marina Point Ltd. v. Wolfson, 30 Cal.3d 721 (1982); O'Connor v. Village Green Owner's Assoc., 33 Cal.3d 796 (1983); See also, Hubert v. Williams, 133 Cal.App.3d Supp. 3 (1982). And although Civil Code §51 enumerates discrimination based upon such characteristics as sex, race, color and national origin, the Supreme Court has ruled that list of characteristics to be "illustrative rather than restrictive." In Re Cox, supra, at 216.

In the First Amended Complaint, plaintiffs allege that defendants incite its customers, who are landlords and prospective landlords, to discriminate against the plaintiffs and members of the general public based upon such arbitrary characteristics as the filing of an In Forma Pauperis application ("Fee Waiver") with the court, or the fact that such persons are or have been represented by a Legal Aid agency. Plaintiffs allege that defendants indicate that such applicants would therefore be undesirable tenants. Discrimination based upon these arbitrary factors has a chilling effect upon the statutory entitlement of plaintiffs and members of the general public eligible for free legal services; Legal Services Corporation Act of 1974, 42 U.S.C. 2996, et. seq., and to access to the courts by those who cannot afford to pay filing fees, Government Code Section 68511.3. Ironically, plaintiffs

and other members of the general public are left in the position of choosing between access to housing or the right to access to and representation in court.

Plaintiffs further allege that defendants' conduct incites the improper and unlawful exclusion of plaintiffs and members of the general public from full and equal accommodations, advantages, facilities, privileges and services in violation of the Unruh Act, complaint, paragraph 72. There can be no question that allegations of such arbitrary distinctions constitute an actionable claim under the Unruh Act, which provides that "[W]hoever denies, or who aids, or incites such denial, or whoever makes any [arbitrary] discrimination, distinction or restriction . . . " is liable for each such offense. Civil Code Section 52(a).

In the Memorandum of Ruling on the demurrer to the complaint, the court discussed the view of that the Unruh Act's prohibition against arbitrary discrimination was not applicable to a rational business decision not to rent to a prospective tenant made by a prospective landlord based upon the tenant's financial situation. The court opined that "a prospective landlord may properly take these types (sic) of information into account when evaluating the financial suitability of a new tenant." Memorandum of Ruling, p. 15.

However, defendant's subscribers never reaches the issue of the financial suitability of a prospective tenant. Because defendants hold themselves out to their subscribers as THE authority on tenant screening, the incitement to arbitrary discrimination is so complete and final that once accomplished, a prospective tenant rarely, if ever, has a chance to submit

information typically and more appropriately associated with financial suitability, such as income and relevant credit history, or to rebut or counter the incitement by defendants.

In any event, the demurrer merely tests the sufficiency of the allegations on the face of the complaint to state, not prove, a claim for relief. Ion Equip. Corp. v. Nelson, 110 Cal.App.3d 868, 168 Cal.Rptr. 361 (1980); Afuso v. U.S. Fidelity & Guaranty Co., Inc., 169 Cal.App.3d 859, 215 Cal.Rptr. 490 (1985). And, for purposes of the demurrer, plaintiff's allegations must be accepted as true. Meyer v. Graphic Arts Int'l Union Local No. 63-B, 88 Cal.App.3d 176, 151 Cal.Rptr. 597 (1979), and defendants are deemed to have admitted all material facts. Serrano v. Priest, 5 Cal.3d 584, 96 Cal.Rptr. 601 (1971). Having alleged the incitement by defendants of arbitrary discrimination in violation of the Unruh Act and facts which, if proved, would entitle plaintiffs to relief, plaintiffs should be allowed the opportunity to prove their claims. Likewise, defendants will have every opportunity to attempt to show that they are not liable for violations of the Unruh Act. The law and public policy favor decisions on the merits and where a complaint alleges some right to relief, even if not clearly stated or intermingled with irrelevant matters if relief which the plaintiff is not entitled to is demanded, the demurrer should be overruled. Gresslet v. Williams, 193 Cal.App.2d 636, 14 Cal.Rptr. 496 (1961). This is especially true when, as here, the issues involve such vital interests of the members of our society.

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VII.

THE DEMURRERS TO THE SEVENTH AND EIGHTH CAUSES OF ACTION MUST BE OVERRULED.

Defendants attack the seventh and eighth causes of action (for intentional and negligent infliction of emotional distress, respectively) for failure to allege facts sufficient to constitute "outrageous and extreme conduct" upon which relief for intentional and negligent infliction of emotional distress must be granted.

In the First Amended Complaint plaintiffs allege that the defendants:

(1) maintain and disseminate untrue, misleading, incorrect and irrelevant information concerning plaintiffs and members of the general public; Complaint, paragraphs 5, 9, 13, 17, 19, and 22;

(2) refuse to allow plaintiffs and the members of the general public to inspect and correct the untrue, misleading and incorrect information; Complaint, paragraphs 6, 10, 12, 14, 15, 16, 18, 20, 21 and 25;

(3) refuse to respond to legal services attorneys' requests regarding plaintiffs and consumers they represent; Complaint, paragraphs 7, 10, 12, 14, 15, 16, 18, 20, 25, and 26;

(4) prevent plaintiffs and other consumers from being represented by legal services attorneys regarding UDR matters; Complaint, paragraphs 7, 10, 12, 14, 15, 16, 18, 20, 25, and 26;

(5) incite landlords to deny housing to plaintiffs and consumers who have been represented by legal services attorneys and/or who have been granted a waiver of court fees; Complaint, paragraphs 71 and 72;

(6) caused plaintiff Arias to become homeless, Complaint, paragraph 8;

all with the intent to embarrass, shock and humiliate them and to impair their credit reputations and ability to obtain housing. Plaintiffs also allege that defendants knew or should have known that their conduct as alleged would cause such severe emotional distress.

Such conduct is extreme and outrageous so as to exceed all bounds of that usually tolerated in a civilized community. Alcorn v. Anbo Engineering, Inc., 2 Cal.3d 493, 499 (1970); Kiseskey v. Carpenters' Trust for So. California, 144 Cal.App. 3d, 222, 229 (1983).

With respect to the demurrer to the first amended complaint by Defendant Harvey Saltz, defendants apparently contest the ability of a party to be sued in both a corporate capacity and as in individual. In Price v. Hibbs, 225 Cal. App.2d, 209, 222 (1964), the court held that:

> when . . . corporate officials act tortiously and individuals are injured as a result, such tortfeasors are liable to the injured persons even though the corporation might also be liable . . . .

Further, it is well established that individuals are liable for torts committed within the course of their cor-

porate positions. O'Connel v. Union Drilling, etc., Co., 121 Cal.App. 302, 308-309 (1932). In O'Connel, the court recognized the important public policy reason for holding corporate officers liable, as to do otherwise would allow agents to commit wrongs, and then use the corporate structure in order to shield themselves from responsibility. Id., at p. 309. For purposes of the demurrer, the facts alleged are sufficient to state a claim for relief.

VIII.

THE PROTECTION TO THE PUBLIC OFFERED BY SECTION 17200 IS NOT LIMITED TO SPECIFIC UNLAWFUL PRACTICES NOR LIMITED TO CUSTOMERS ONLY

Defendants' contend that plaintiffs have failed to state a cause of action for Unlawful Business Practice on two particular grounds apart from defendants' "four pillars" argument:

(1) That Business and Professions Code (Section 17200), was intended to apply only to prohibit violations of certain specific statutes and that the alleged acts of the defendants do not fail within those specific statutes;

(2) That the plaintiffs do not have standing to bring a cause of action for unlawful business practices in that they are not alleged to be customers of the defendants. In other words, that there must exist a "nexus" between plaintiffs and defendants and that plaintiffs have failed to alleged said "nexus."

Defendants do not offer any case authority for their position.

As to the first issue, the California courts have found that it was the intent of the legislature not to limit the protection offered by Section 17200 to the specific statutes enumerated in that section. In Committee on Children's Television, Inc. vs. General Foods Corp., 35 Cal.3d 197, 209 (1983), the Supreme Court paraphrased and cited with approval the Court of Appeal's decision in Barquis v. Merchants Collection Assn., 7 Cal.3d 94 (1972). The Supreme Court stated:

> Thus, Section 17200 is not confined to anti-competitive business practice, but it is equally directed toward 'the right of the public to protection from fraud and deceit.' Furthermore, the Section 17200 proscription of 'unfair competition' is not restricted to deceptive or fraudulent conduct, but extends to any unlawful business practice. The legislature apparently intended to permit courts to enjoin ongoing wrongful business conduct in whatever context such activity might occur.

In Committee on Children's Television, Inc., vs. General Foods Corp., supra, the Court determined that violations of a statute, the Sherman Food, Drug and Cosmetic Law, Health & Safety Code, Section 2600 et. seq., while not included within Section 17200, could nevertheless be enjoined. The Court stated, at pages 210-211:

> The parties vigorously dispute whether a

> private right of action should be implied under the statute, but the question is immaterial since any unlawful business practice, including violations of the Sherman law, may be redressed by a private action charging unfair competition in violation of Business and Professions Code Sections 17200 and 17203.

In the present case, plaintiffs have alleged numerous violations of statutes and unlawful business practices. The protection and remedies offered by Section 17200 are not inclusive as asserted by defendants, but as stated by our Supreme Court include any unlawful business practice. See also, Perdue v. Crocker National Bank, 38 Cal.3d 913, 929 (1985) and Stoiber v. Honeychuck, 101 Cal.App.3d 903, 927 (1980).

As to the issue of standing, California courts have determined that it was the intent of the legislature in enacting Section 17200 to allow private persons to seek injunctive relief under the act. The courts have rejected the contention that a plaintiff must be personally harmed or that there must exist a "nexus" between the plaintiff and defendant.

In Hernandez v. Atlantic Finance Co., (1980) 105 Cal.App.3d 65, the plaintiff sought injunctive relief pursuant to section 17200 for unlawful business practices in the financing and sale of automobiles. Both the pleading and evidence disclosed that the plaintiff did not purchase nor obtain or attempt to obtain financing from the defendants. The Court determined that plaintiff, pursuant to Business and

Professions Code Section 17204, had standing to maintain the action. The Court stated:

> . . . we read the statute as expressly authorizing the institution of action by any person on behalf of the general public. The Legislature has provided that suit may be brought by any person acting in his own behalf or on behalf of the general public.
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> * * * *
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> Nothing in the legislature history of this section nor in the manner in which it has been interpreted by the courts reflects an intention to narrowly circumscribe the class of persons who may seek injunction under its terms." at pages 72-73.

See also, Committee on Children's Television, Inc., vs. General Foods Corp., supra., citing Hernandez with approval; Barquis v. Merchants Collection Assn., supra.

DATED: October 8, 1987

SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES, INC.

LEGAL AID FOUNDATION OF LOS ANGELES

WESTERN CENTER OF LAW & PROVERTY

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PROOF OF SERVICE BY MAIL
(C.C.P. SECTIONS 1013a and 2015.5)

I, the undersigned, am a citizen of the United States, a resident of the county of Los Angeles, State of California, over the age of eighteen years, and not a party to the within action.

I am employed by LEGAL AID FOUNDATION OF LOS ANGELES, 1544 West Eighth Street, Suite "A", Los Angeles, California 90017.

On the 8th day of October, 1987, I served the within PLAINTIFF'S OPPOSITION TO DEMURRER OF DEFENDANT U.D. REGISTRY, INC. AND HARVEY SALTZ

on the interested parties in said action by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

SEE THE ATTACHED

I declare under penalty of perjury that the foregoing is true and correct.

Executed on OCT 08 1987, at Los Angeles, California.

Elizabeth Whiteside

ELIZABETH WHITESIDE
Declarant

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