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The Kralowec Law Group

September 30, 2016

VIA HAND DELIVERY

Hon. Ignazio John Ruvulo, Presiding Justice
Hon. Maria P. Rivera, Justice
Hon. Timothy A. Reardon, Justice
California Court of Appeal
First Appellate District, Division Four
350 McAllister Street
San Francisco, CA 91402-7421

Re: Request for Publication of Opinion:
*Nicodemus v. Saint Francis Memorial Hospital*, No. A141500

Dear Honorable Justices:

Pursuant to Rule of Court 8.1120, Consumer Attorneys of California ("CAOC") respectfully requests publication of this Court's opinion in *Nicodemus v. Saint Francis Memorial Hospital*, No. A141500. This publication request is timely submitted within 20 days after the opinion was filed on September 14, 2016. *See* Cal. Rules of Ct., rule 8.1120, subd. (a)(3).

**Statement of Interest**

Founded in 1962, CAOC is a voluntary non-profit membership organization of over 6,000 associated consumer attorneys practicing in California. Its members predominantly represent individuals subjected to consumer fraud, unlawful employment practices, personal injuries and insurance bad faith. CAOC's members have taken a leading role in advancing and protecting the rights of injured victims, consumers and employees in both the courts and in the Legislature. This has often occurred through class action litigation brought under California's Unfair Competition Law ("UCL") (Bus. & Prof. Code §§ 17200 et seq.). CAOC's members, and their clients, thus have an abiding interest in the correct development of the law in these practice areas.

**Reasons Why the *Nicodemus* Opinion Should Be Published**

*Nicodemus* meets the standards for publication stated in the Rules of Court because it "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions"; because it "[m]odifies, explains, or criticizes with reasons given, an existing rule of law"; and/or because it "reaffirms a principle of law not applied in a recently reported decision." Cal. Rules of Ct., rule 8.1105, subds. (c)(2), (3), (8).

**1. The Opinion's Discussion of the "Ascertainability" Element of Class Certification Should Be Published**

The opinion's detailed discussion of the ascertainability element of class certification restates and applies important legal principles that have not been considered in recent opinions. *Nicodemus*, slip op. at 10-17. Specifically, the opinion discusses ascertainability in the context of a class definition that (arguably) encompasses class members who may not ultimately be entitled to share in the recovery. *Id.* at 13-14. Of the several cases cited in this section of the opinion, the most recent, *Aguiar v. Cintas Corp. No. 2*, 144 Cal.App.4th 121 (2006), was handed down more than ten years ago. Publication of the opinion would provide more contemporary guidance to lower courts faced with similar class definitions and similar arguments against certification.

The opinion's ascertainability discussion also warrants publication because it is the first case to distinguish *Hale v. Sharp Healthcare*, 232 Cal.App.4th 50 (2014). *See Nicodemus*, slip op. at 14-15. In fact, *Hale* has never been cited in any published opinion to date. If published, *Nicodemus* would be the first to stress that *Hale* involved a fully-developed record and robust proof, not "speculation," concerning purported difficulties in identifying class members from a defendant's records. Publishing *Nicodemus* will forestall potential future misreadings of *Hale*, such as that advanced by Saint Francis and HealthPort in this case.

Of similar import is the opinion's discussion of the portion of *Bufil v. Dollar Financial Group, Inc.*, 162 Cal.App.4th 1193 (2008), that addressed ascertaining class membership from a defendant's records. *See Nicodemus*, slip op. at 15-16. The opinion applies *Bufil* to a set of facts significantly different from those stated in other opinions and, if published, would provide needed guidance to lower courts and litigants alike.

Finally, the opinion confirms the rule that class members' *names* need not be shown at the class certification stage. *Nicodemus*, slip op. at 16-17. The portion of the opinion warrants publication both because it would provide a modern application of a rule established 49 years ago in *Daar v. Yellow Cab Co.*, 67 Cal.2d 695 (1967), and also because the opinion recognizes and applies this rule in the context of an argument that a class definition was "under-inclusive." Defendants attempting to defeat class certification frequently resort to claiming—often based on nothing more than "speculation"—that a class definition is either "under-inclusive," "over-inclusive," or both. This part of *Nicodemus* puts these arguments to rest and confirms *Daar*'s applicability in this factual context.

**2. The Opinion's Discussion of the "Community of Interest" Element of Certification Should Be Published**

The opinion holds that "community of interest" element of class certification is "patently satisfied" if the evidence shows that the defendant has adopted a uniform policy or practice and that practice is alleged to violate California law. *Nicodemus*, slip op. at 18-20.

This portion of the opinion warrants publication because, although this rule has been stated and applied in other recent published opinions, the lion's share of those opinions involve wage and hour claims and were handed down in the wake of *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012). *See, e.g.*, *Williams v. Superior Court (Allstate Ins. Co.)*, 221 Cal.App.4th 1353 (2013); *Jones v. Farmers Insurance Exchange*, 221 Cal.App.4th 986 (2013); *Bluford v. Safeway Stores, Inc.*, 216 Cal.App.4th 864 (2013).

*Nicodemus* would be one of the few, if not the only, recent published opinion to apply this rule in the context of a consumer action brought under the UCL. Publishing *Nicodemus* would materially contribute to the body of case law considering class certification of such consumer claims. *See* Cal. Rules of Ct., rule 8.1105, subd. (c)(2).

**3. The Opinion's Discussion of Class Certification in Multi-Defendant Cases Should Be Published**

Finally, the opinion addresses class certification, and in particular the "ascertainability" prong, in the context of a case against multiple defendants in which the class size, and the scope of potential liability, may vary significantly for each defendant. *Nicodemus*, slip op. at 20-22. No recent published opinion has considered this fact pattern. Indeed, the two main authorities that the Court cites in *Nicodemus* date back to 1971 and 1987. *Id.* at 21 (citing *Vasquez v. Superior Court*, 4 Cal.3d 800 (1971); *BWI Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal.App.3d 1341 (1987)). The one recent case cited by the Court in this section, *Thompson v. Automobile Club*, 217 Cal.App.4th 719 (2013), involved only a single defendant.

Publishing this portion of *Nicodemus* will provide guidance in future multi-defendant cases, including, possibly, future class actions asserting violation of Evidence Code section 1158 and the UCL's "unlawful" prong.

**Conclusion**

For the reasons stated above, CAOC respectfully asks the Court to enter an order directing publication of the *Nicodemus* opinion.

Sincerely,

Kimberly A. Kralowec
State Bar No. 163158

cc: See attached proof of service

**PROOF OF SERVICE**

I, the undersigned, hereby declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States; am over the age of 18 years; am employed by THE KRALOWEC LAW GROUP, located at 44 Montgomery Street, Suite 1210, San Francisco, California 94104, whose principal attorney is a member of the State Bar of California and of the Bar of each Federal District Court within California; am not a party to the within action; and that I caused to be served a true and correct copy of the following documents in the manner indicated below:

1. REQUEST FOR PUBLICATION OF OPINION FILED SEPTEMBER 14, 2016; and
2. PROOF OF SERVICE.

☑ **By Mail**: I placed a true copy of each document listed above in a sealed envelope addressed to each person listed below on this date. I then deposited that same envelope with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that upon motion of a party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

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| Counsel for Plaintiff and Appellant Kristen Nicodemus | Lori Erin Andrus<br>Andrus Anderson<br>155 Montgomery Street, Suite 900<br>San Francisco, CA 94104<br><br>Mark Etheredge Burton<br>Hersh & Hersh<br>601 Van Ness Avenue, Suite 2080<br>San Francisco, CA 94102 |
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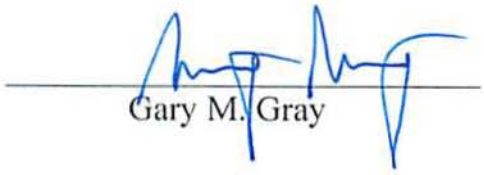
Executed September 30, 2016, at San Francisco, California.



Gary M. Gray