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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**FOR THE COUNTY OF ORANGE – CENTRAL JUSTICE CENTER**

11 MISSION HOSPITAL REGIONAL  
12 MEDICAL CENTER, a California nonprofit  
public benefit corporation d/b/a Mission  
13 Hospital

14 Plaintiff,

15 vs.

16 BURR VON MAUR, M.D., INC., a California  
corporation; BURR VON MAUR, an  
17 individual; and DOES 1 through 10,

18 Defendants.

Case No. 30-2011-00497722

**OPPOSITION TO DEMURRER TO  
FIRST AMENDED COMPLAINT**

Date: December 2, 2011  
Time: 11:00 A.M.  
Dept: C32

Complaint filed: 8/5/11  
First Amended Complaint Filed: 10/19/11

19  
20 MISSION HOSPITAL REGIONAL MEDICAL CENTER d/b/a MISSION HOSPITAL  
21 (“Mission”), Plaintiff in the above titled action, hereby submits its Opposition (the “Opposition”)  
22 to the Demurrer of Defendant BURR VON MAUR, M.D. (the “Second Demurrer”) to Plaintiff’s  
23 First Amended Complaint for Unlawful Detainer (the “Amended Complaint”). The Defendant’s  
24 previous Demurrer (the “First Demurrer”), to the original Complaint in this matter (the  
25 “Complaint”), was sustained solely on this Court’s finding that the affidavit of service of the  
26 three-day notice, prepared by the process server, was defective in that it did not state the “place  
27 of signing.” Defendant’s Second Demurrer restates, almost verbatim, the exact same arguments  
28 made in the First Demurrer with the exception of the argument referring to the defect in the

1 process server's affidavit. Because the Court has already considered all of the arguments  
2 contained within the Second Demurrer, the Second Demurrer should be overruled.

3 **I. INTRODUCTION**

4 This matter stems from the termination of a Sublease<sup>1</sup> pursuant to which Mission leased  
5 medical office space to BURR VON MAUR, M.D., INC. (the "Corporation" or "Tenant"). The  
6 Sublease was guaranteed by DR. BURR VON MAUR, M.D. ("Dr. Von Maur" or "Guarantor"),  
7 the Corporation's namesake and principal.

8 Mission filed the Complaint on August 5, 2011. Both the Corporation and Dr. Von Maur  
9 were served with the summons and Complaint on August 18, 2011. On August 23, 2011, the  
10 deadline to respond to the Complaint, counsel for Defendants contacted counsel for Mission and  
11 requested an extension of time in which to respond to the Complaint. Defendants' request was  
12 granted, giving them until August 30, 2011 to respond. On August 30, 2011, the First Demurrer  
13 was filed.

14 The First Demurrer relied on six assertions, namely; 1) the Complaint was not verified  
15 properly; 2) the Proof of Service of the Three-Day Notice (the "Notice") was not verified  
16 properly; 3) the Notice was not served properly; 4) the content of the Notice was inadequate; 5)  
17 the Guaranty is invalid; and 6) the Sublease was not executed by an officer of the tenant. At the  
18 hearing on The First Demurrer, the Court stated that the First Demurrer was being sustained  
19 solely on the second assertion above, that the proof of service of the Notice was defective  
20 because it did not list the place of signing.

21 The Second Demurrer relies on four of the same arguments that were previously used by  
22 Dr. Von Maur to no avail, plus two additional arguments that also have no merit. The four  
23 assertions in the Second Demurrer upon which the Court has already ruled are; 1) the Notice was  
24 not served properly; 2) the content of the Notice was inadequate; 3) the Guaranty is invalid; and  
25 4) the Sublease was not executed by an officer of the tenant. The two new assertions are; 5) the  
26

27  
28 <sup>1</sup>All capitalized terms, unless otherwise defined herein, shall have the same meaning ascribed to them in the Amended Complaint.

1 Amended Complaint improperly combines a claim for unlawful detainer with a breach of  
2 contract claim; and 6) the Notice was defective because it did not provide a detailed accounting  
3 of the base rent and common area maintenance charges that were due and owing under the  
4 Sublease.

5 **II. THE CORPORATION HAS NO RIGHT TO DEFEND AN ACTION AGAINST IT**

6 First and foremost, it should be noted that, as alleged in the Amended Complaint, the  
7 Corporation is currently in “suspended” status as reported by the California Secretary of State,  
8 and has been at all times beginning no later than the filing of the Complaint. As a result of its  
9 suspended status, the Corporation has no right to appear itself, or through counsel, in this action.  
10 *See, Grell v. Laci Le Beau Corp.*, (1999) 73 Cal.App.4th 1300, 1306, “During the period that a  
11 corporation is suspended for failure to pay taxes, it may not prosecute or defend an action.”

12 More specifically, it is improper for a suspended corporation to file a demurrer to an  
13 action against it (*See, Grell*, 73 Cal.App.4th at 1306-7), and pursuant to Cal. Rev. & T. Code  
14 §19719, any person who attempts to do so is liable to be sanctioned up to \$1,000 and/or  
15 imprisoned for up to one year.

16 Although the Second Demurrer claims to be filed on behalf of Dr. Von Maur, it is clear  
17 that Dr. Von Maur’s Second Demurrer is making arguments on behalf of both Dr. Von Maur and  
18 the Corporation. To the extent any of the assertions, allegations, or arguments in the Second  
19 Demurrer are made on behalf of the Corporation, those portions of the Second Demurrer must be  
20 stricken, and this court must find both Dr. Von Maur and his counsel liable for sanctions.

21 **III. STANDARD OF REVIEW**

22 “In determining the merits of a demurrer, all material facts pleaded in the complaint and  
23 those which arise by reasonable implication, but not conclusions of fact or law, are deemed  
24 admitted by the demurring party.” *Orange Unified School Dist. v. Rancho Santiago Community*  
25 *College Dist.*, (1997) 54 Cal.App.4th 750, 757.

26 For the purpose of the Second Demurrer, Dr. Von Maur admits that 1) the Corporation  
27 and Mission entered into the Sublease; 2) Dr. Von Maur executed a guaranty of the Sublease; 3)  
28 the Corporation took possession of the Premises pursuant to the Sublease; 4) the Corporation and

1 Dr. Von Maur have failed to pay Mission pursuant to the Corporation's monthly rental  
2 obligations under the Sublease beginning on or about January 1, 2011; 5) notice of the  
3 Defendants' defaults under the Sublease was served on Corporation and Dr. Von Maur; and 6)  
4 the Corporation and Dr. Von Maur remain in possession of the Premises without the permission  
5 of Mission.

6 **IV. THE NOTICE WAS PROPERLY SERVED AND ADEQUATE**

7 The Second Demurrer makes much of the content and service of the Notice on the  
8 Defendants. The Second Demurrer, however, fails to acknowledge that the Sublease is a  
9 commercial lease, and thus the statutory requirements related to a three-day notice may be  
10 waived or altered as the parties agree. "In commercial leases the landlord and commercial tenant  
11 may lawfully agree to notice procedures that differ from those provided in the statutory  
12 provisions governing unlawful detainer... Thus, if the lease contains service requirements for the  
13 notice to quit at variance with the requirements in the unlawful detainer statutes, the lease  
14 provisions control." Culver Center Partners East No. 1, L.P. v. Baja Fresh Westlake Village, Inc.,  
15 (2010) 185 Cal.App.4th 744, 750 (internal citations omitted).

16 In this matter, the parties agreed, in the Sublease, to modify the statutory notice  
17 requirements upon the Corporation's default. The Sublease, at Section 17, states:

18  
19 Without the giving of any notice by Landlord, except as specified herein, the  
20 occurrence of any one or more of the following events shall constitute a default  
21 hereunder by Tenant...(2) Failure of Landlord to receive when due any Rent,  
Additional Rent or other payment required by Tenant hereunder, and the  
22 continuation of such failure for a period of three (3) days after written notice  
thereof from Landlord to Tenant.

23 Section 17 then goes on to say that "[i]n the event any such default and breach by Tenant  
24 shall occur, Landlord may in its sole discretion, at any time thereafter, with or without notice or  
demand... Terminate this Sublease and recover possession of the Premises."

25 As is clear from the terms of the Sublease, upon failure to pay rent, the Corporation  
26 would be considered in default if it failed to make the required payment within three days after  
27 receiving written notice from Mission. Mission served not one, but two notices of default on the  
28 Corporation and Dr. Von Maur. The first notice was delivered on June 30, 2011 via FedEx, and

1 in an abundance of caution, on July 25, 2011, a second notice was served via the means stated in  
2 the Declaration attached to the Amended Complaint as Exhibit 4. Mission went above and  
3 beyond that which was required of it under the Sublease. Regardless of the fact that the  
4 requirements of §1161(2) are not applicable in light of the notice provisions of the Sublease, the  
5 Notice provided by Mission complied with these requirements.

6 **The Three-Day Notice was Properly Served Pursuant to §1161(2)**

7 The Second Demurrer states that the Notice is invalid because it was served only on Dr.  
8 Von Maur and not the Corporation. An in-depth analysis of which defendant was served, how,  
9 and when, is unnecessary because where a tenant admits that it has received the requisite notice  
10 under §1161(2), the requirements for service under that section are deemed to have been  
11 satisfied. *See, e.g., Culver Center Partners East No. 1*, 185 Cal.App.4th at 751; *Valov v.*  
12 *Tank*, (1985) 168 Cal.App.3d 867, 876.

13 On July 25, 2011, the same day the Notice was served as alleged in the Amended  
14 Complaint, the Corporation's office manager, Nicole Dixon, admitted in an email sent to the  
15 Hospital's property manager that the Corporation received the Notice and that they were to  
16 respond within three days. A true and correct copy of the July 25, 2011 email from Nicole Dixon  
17 to Kathy O'Brien is attached to the Amended Complaint as Exhibit 5 and incorporated herein by  
18 reference. The email makes it clear that the Corporation was served inasmuch as the email states  
19 "we received..." (emphasis added), not "Dr. Von Maur received." Accordingly, the  
20 Corporation's admission as to the receipt of the Notice waives any alleged technical deficiency  
21 related to the service of the Notice.

22 **The Content of the Three-Day Notice was Sufficient Pursuant to §1161(2)**

23 The Second Demurrer misstates the law applicable to the content of three-day notices.  
24 The Second Demurrer cites the case of *Delta Imports, Inc. v. Municipal Court*, (1983) 146 Cal.  
25 App. 3d 1033, for the proposition that a three-day notice must unequivocally demand possession  
26 within three days, but then extends that language to the current matter, where the breach was  
27 capable of being cured. As the court in *Delta Imports* noted, "[w]here the condition or covenant  
28 allegedly violated is capable of being performed, the notice must give the tenant the alternative

1 of performing or quitting possession.” Delta Imports, 146 Cal. App. 3d at 1036.

2 The Second Demurrer, as stated above, misstates the law and claims that, where a  
3 violation is capable of being performed, there must be an “unequivocal demand for payment or  
4 the tenant to vacate.” The Notice provided the option of paying rent, or being subject to an  
5 unlawful detainer action. There is no magic language required under §1161(2), indeed, all that is  
6 required under that section is that three days’ written notice be provided stating the amount of  
7 rent to be paid or that possession be given back to the landlord. As the Notice in this matter  
8 clearly stated, the Corporation owed past-due rent, and if such rent was not paid, Mission may  
9 institute an action for unlawful detainer. The Corporation was on Notice that if it did not pay the  
10 rent, it would be unlawfully withholding possession of the Premises from Mission. As such, the  
11 content of the Notice, even if it was subject to §1161(2) and not the terms of the Sublease, was  
12 sufficient to put the Corporation on notice that it would be subject to an unlawful detainer action  
13 if it did not either pay the rent demanded or vacate the premises.

14 **V. THE GUARANTY IS VALID AND ENFORCEABLE**

15 Dr. Von Maur, through some creative pleading, attempts to convince this Court that the  
16 Guaranty he executed did not, in fact, guarantee anything. Despite the fact that the Guaranty  
17 executed by Dr. Von Maur is attached as Exhibit E to the Sublease, which is the same Sublease  
18 Dr. Von Maur himself executed on behalf of the Corporation for medical office space, Dr. Von  
19 Maur claims the Guaranty is unenforceable because it refers to the Sublease as a “Medical Office  
20 Lease.” This argument is disingenuous at best, and Dr. Von Maur recognizes this by hedging his  
21 argument with the qualifier, “[e]ven if a reference to the ‘Medical Office Lease’ in the Guaranty  
22 was intended to be a reference to the ‘Sublease,’ the Guaranty expired...”

23 This statement brings up Dr. Von Maur’s next assertion that the Guaranty somehow  
24 expired and is unenforceable. The Guaranty states that Dr. Von Maur personally guarantees “the  
25 prompt, full and faithful performance and discharge by Tenant of each and every obligation of  
26 Tenant set forth in the Agreements.” The Guaranty goes on to state that the Guaranty “is  
27 absolute, unconditional and continuing and shall remain in effect until all of Tenant’s  
28 Obligations have been paid, performed and discharged.”

1 The Sublease included, as Rider No. 1, an Option to Renew, which explicitly states  
2 “[t]his Option to Renew is attached to and made part of the Sublease dated March 1, 2006, by  
3 and between Mission Hospital... and Burr Von Maur, M.D., Inc...” The Guaranty, regardless of  
4 Dr. Von Maur’s desire to paint it otherwise, did not just guarantee the Corporation’s obligations  
5 under a single lease term, rather, as the Guaranty itself makes explicitly clear, the Guaranty  
6 guarantees “each and every obligation of Tenant set forth in the Agreements.” The Option to  
7 Renew was explicitly attached to and made part of the Sublease and thus became, upon the  
8 exercising thereof of the Corporation, an obligation of the Corporation guaranteed by Dr. Von  
9 Maur.

10 **VI. THE SUBLEASE WAS EXECUTED BY AN OFFICER OF THE CORPORATION**

11 The final of the four previously-heard arguments contained in the Second Demurrer is  
12 that the Sublease is unenforceable, and an action for unlawful detainer cannot be maintained,  
13 because “the Sublease was not executed by any officers of the [C]orporation.” *See* Second  
14 Demurrer, Page 7. Not only is this argument irrelevant in terms of sustaining a demurrer, the  
15 factual allegation contained therein is a blatant falsehood, and the law relied upon in the Second  
16 Demurrer is misquoted and misstated to the point of being sanctionable.

17 Dr. Von Maur claims that Corporations Code Section 313, along with the holding in  
18 Snukal v. Flight Ways Manufacturing, Inc. (2000) 23 Cal.App.4, 754, requires every contract  
19 entered into by a corporation to be signed both by “(a) the chairman of the board, the president or  
20 any vice president; and (b) the secretary, any assistant secretary, the chief financial officer or any  
21 assistant treasurer of such corporation. How this requirement was divined is beyond explanation.  
22 The court in Snukal explains that, even if the legislative intent behind Section 313 was to require  
23 two signatures, such a requirement is only a “safe harbor” to the party seeking to enforce the  
24 contract, to show that the officers who entered into the contract had the authority to do so.

25 Corporations Code Section 313 states, in its entirety, the following:

26 Subject to the provisions of subdivision (a) of Section 208□, any note,  
27 mortgage, evidence of indebtedness, contract, share certificate, initial  
28 transaction statement or written statement, conveyance, or other instrument in  
writing, and any assignment or endorsement thereof, executed or entered into  
between any corporation and any other person, when signed by the chairman of

1 the board, the president or any vice president and the secretary, any assistant  
2 secretary, the chief financial officer or any assistant treasurer of such  
3 corporation, is not invalidated as to the corporation by any lack of authority of  
the signing officers in the absence of actual knowledge on the part of the other  
person that the signing officers had no authority to execute the same.

4 Section 313 clearly deals with the validity of a corporate officer's signature where the  
5 officer did not have the authority to enter into the contract at issue. Section 313 contains no  
6 requirement, whatsoever, that a contract be signed by two officers of a corporation. There is also  
7 no such requirement contained in the Snukal case. Rather, as stated above, the court in Snukal  
8 refers to Section 313 as a tool to be used by a party seeking to enforce a contract with a  
9 corporation, so that when a contract is signed by both an "operational" officer and a "record  
10 keeping" officer, the presumption is that the corporation will be bound by the contract.

11 Corporations Code section 313 thus creates a "safe harbor" for persons entering  
12 into an agreement with a corporation: pursuant to that section, a corporation  
13 may not disclaim its authorization of those persons entering into an agreement  
14 on its behalf. If, on the other hand, an agreement is not entered into on behalf of  
the corporation by the specified officers, the third party still may seek its  
validation by invoking traditional common law theories, thereby incurring an  
increased burden of proof.

15 Snukal at 784. On page 39 of the Sublease, the signature of Dr. Von Maur, the sole  
16 shareholder, principal, and namesake of the Corporation, appears on the signature line for the  
17 Corporation. As the sole shareholder, principal, and namesake of the corporation, there is  
18 absolutely no scenario under which Dr. Von Maur would not have the authority to enter into a  
19 contract on behalf of the Corporation. As such, this argument is wholly without merit. If Dr. Von  
20 Maur asserts he did not have the authorization to enter into the Sublease on behalf of his own  
21 corporation, perhaps a cause of action against Dr. Von Maur for fraud would be appropriate.

22 **VII. THE FACT OF DR. VON MAUR'S PERSONAL GUARANTY CANNOT SUSTAIN A DEMURRER**

23 The first of the two new arguments set forth in the Second Demurrer is that the Amended  
24 Complaint contains a claim for breach of contract on the Guaranty, and as such, the Amended  
25 Complaint somehow loses its statutory priority.

26 First and foremost, the Amended Complaint contains no such cause of action for breach  
27 of contract on the Guaranty, as the Second Demurrer states. Rather, the Amended Complaint  
28 claims that Dr. Von Maur, through executing the Guaranty which was attached to and

1 incorporated into the Sublease, became responsible, in addition to the Corporation, for the  
2 payment of rent under the lease. C.C.P. Section 1174 explicitly states that recovery of rent is  
3 allowed under the summary nature of an unlawful detainer proceeding. Furthermore, Section  
4 1174 anticipates that the responsibility for the payment of rent may not be confined solely to the  
5 four corners of a lease, in that Section 1174 makes reference to “the lease *or agreement* under  
6 which the rent is payable...” (emphasis added).

7 Furthermore, the Second Demurrer cites two cases in support of this argument, that are  
8 also entirely irrelevant to this argument. The Second Demurrer states that both Chinese Hosp.  
9 Found. Fund v. Patterson (1969) 1 CA3d 627, 632, and Baugh v. Consumers Associates, Ltd.  
10 (1966) 241 CA2d 672, 675, stand for the premise that a claim on a guaranty is “impermissible  
11 and result[s] in the loss of statutory priority.” See Second Demurrer at p. 6, line 26. Dr. Von  
12 Maur also claims that both Chinese Hosp. and Baugh stand for the premise that including a claim  
13 on a guaranty justifies sustaining a demurrer. Neither Chinese Hosp. nor Baugh deal, even  
14 remotely, with the premises ascribed to them in the Second Demurrer. Instead, both cases, and  
15 indeed both pinpoint cites, deal solely with the ability to treat an unlawful detainer action as an  
16 action for ejection. This is yet another unfortunate instance of Dr. Von Maur attempting to  
17 invent law in his favor where non exists.

18 Dr. Von Maur's argument that his Guaranty is grounds to sustain a demurrer is wholly  
19 without merit and must be dismissed. The Guaranty is part of the Sublease and names Dr. Von  
20 Maur as an additional responsible party for the rent due thereunder. The allegation related to Dr.  
21 Von Maur's execution of the Guaranty is solely for the purpose of naming the parties responsible  
22 for unpaid rent, not to bring unrelated causes of action into a summary proceeding. Accordingly,  
23 the Second Demurrer must be overruled.

24 **VIII. A DETAILED ACCOUNTING IS NOT REQUIRED IN A NOTICE, NOR IS THE LACK**  
25 **THEREOF GROUNDS TO SUSTAIN A DEMURRER**

26 The second of the two new arguments made by Dr. Von Maur in the Second Demurrer is  
27 that the Notice was deficient, and a demurrer must be sustained, because the notice “does not  
28 detail the Base Rent and CAM due nor does it provide or state the period over which such

1 amounts accrued.” Dr. Von Maur has submitted only two case citations in support of this  
2 argument. The first, Bevill v. Zoura (1994) 27 CA4<sup>th</sup> 694, 697, simply states that a notice is  
3 defective if it requires the payment of more than one year's worth of past-due rent. The second  
4 case, Lydon v. Beach (1928) 89 Cal.App 69, 74, states only that a notice is defective if it asks for  
5 rent that has already been paid. Dr. Von Maur offers no support for his contention that the Notice  
6 needed to breakdown the amounts owed into Base Rent and CAM charges, or that the Notice  
7 was required to state the period of time over which the delinquency occurred.

8 As stated above, for the purpose of a Demurrer, all well plead allegations in the Amended  
9 Complaint are taken as true. The Amended Complaint, at Paragraph 16, alleges that the defaults  
10 in the payment of rent began on or about January 1, 2011. The Notice was sent, initially, on June  
11 29, 2011, and then again on July 25, 2011. Each time the Notice was sent, all of the amounts  
12 detailed therein as being due under the Sublease had started to accrue no earlier than six to seven  
13 months prior. Dr. Von Maur is free to produce, if he is able, evidence showing that he owes less  
14 than the amounts claimed in the Notice and the subsequent Amended Complaint. Because,  
15 however, the statutory presumption is that all well plead allegations are true for the purpose of a  
16 demurrer, the Second Demurrer cannot be sustained merely by alleging that the Notice did not  
17 specify the dates of the defaults or a breakdown of the amounts owed. As such, the Second  
18 Demurrer must be overruled.

19 **IX. MISSION IS NOT ENGAGING IN “SELF HELP”**

20 While this argument is not made for the purpose of sustaining a demurrer, the Second  
21 Demurrer makes a final, albeit odd, argument that Mission is somehow in violation of the law for  
22 engaging in “self help.” Mission has complied with every applicable statute and rule related to  
23 Dr. Von Maur's and the Corporation's continuing unlawful detainer.

24 The Second Demurrer makes reference to “Plaintiff's proposed action in furtherance of  
25 the deficient Notice...” See Second Demurrer at page 5, line 15. The Notice states that “Mission  
26 may pursue any remedy available to it under the Lease Documents and California Law.” The  
27 Notice goes on to state that “[s]uch remedies include, but are not limited to, the commencement  
28 of an action for possession of the Premises and recovery of past-due rent.”

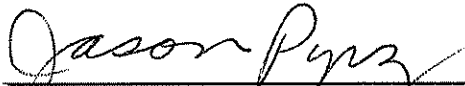
1 It is unclear how the filing of a complaint for unlawful detainer and engaging the Court to  
2 intervene is the same as engaging in "self help." Dr. Von Maur goes to great lengths to argue that  
3 Mission must observe the very legal process that has brought the parties to this point. The very  
4 simple fact that Mission filed the Complaint, and then the Amended Complaint, demonstrates  
5 that Mission has no intention of resorting to self help. Whether this argument was placed in the  
6 Second Demurrer solely in an attempt to color the Court's perception of the Plaintiff in this  
7 matter, or to confuse the issues, the fact of the matter is that this argument is wholly irrelevant.

8 **X. CONCLUSION**

9 The Corporation has no right to defend itself in this action and Dr. Von Maur has failed  
10 to raise any issues that could result in a sustaining of his Second Demurrer. Despite this Court's  
11 sustaining the First Demurrer solely on the technical default with the process server's affidavit of  
12 service of the three-day notice, Dr. Von Maur has repeated, verbatim, four of the same  
13 arguments that were already heard and dismissed. The two new arguments raised in the Second  
14 Demurrer are equally without merit. As such, the Second Demurrer must be denied, the  
15 Defendants must be prohibited from delaying this action by filing any further demurrers, and the  
16 Defendants must be ordered to answer the Amended Complaint. In the alternative, Mission  
17 requests that it be granted leave to file an amended complaint.

18 DATED: November 17, 2011

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