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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ELENA DEL CAMPO on behalf of herself and all others similarly situated, **Plaintiffs,** **v.** **GEORGE KENNEDY, AMERICAN CORRECTIVE COUNSELING SERVICES, INC., BRUCE RAYE, DONALD R. MEALING, LYNN R. HASNEY and DOES 1 through 20.** **Defendants.**	**Civ. No. 01-21151 JW** **CLASS ACTION** **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR LEAVE TO FILE CONSOLIDATED COMPLAINT** **Date: April 10, 2006** **Time: 9:00 a.m.** **Courtroom 8**
AND CONSOLIDATED ACTION	**Civ. No. 03-02691 JM**

I. INTRODUCTION

On February 1, 2006, the Court granted plaintiffs' motion to consolidate the *del Campo* and *Medina* actions and directed the plaintiffs to move for leave to file a Consolidated Complaint. Over defendants' objections, the Court deferred consideration

of defendants' suggestion that the plaintiffs, including Ms. del Campo, should be barred from raising any new constitutional claims. *Consolidation Order*, p. 5.

In the proposed Consolidated Complaint, plaintiffs challenge defendants' policies and practices on statutory, constitutional, and common law grounds, including challenges under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The constitutional challenges are substantially different from the skeletal due process allegations in Elena del Campo's original complaint and rely on new information—acquired only after this Court had already dismissed Ms. del Campo's constitutional claims. This new information reveals that the key factual assumptions upon which the dismissal order was based no longer hold true.

II. PROCEDURAL BACKGROUND

A. The May 8, 2002 Dismissal Order

In her original complaint, filed in December 2001, Ms. del Campo brought two constitutional claims, one under the U.S. Constitution and one under the California Constitution, each containing general allegations that defendants' Bad Check Restitution Program violates due process. The defendants moved to dismiss these claims under Rule 12(b)(6). In no more than three pages of argument, their brief advanced two contentions with respect to the substance of the claims. *Def's Mtn. to Dismiss*, pp. 9-11. First, they argued that Ms. del Campo did not meet the threshold requirement for a due process claim: "she was not deprived of any liberty or property interest by virtue of Defendants' actions" because she "does not allege that she paid any fees or charges in response to the bad check diversion materials that were sent to her . . . The only money she paid was $95.02–the amount of the check she bounced–which she admits was owed." *Def's Mtn. to Dismiss*, p. 9. Second, defendants characterized Ms. del Campo's participation in the program as entirely voluntary: "she did not have to participate in bad check diversion and, if she preferred, she could take her chances with criminal prosecution." *Id.* at 11.

In its May 8, 2002 Order, the Court agreed with the defendants' contention that Ms. del Campo "suffered no constitutional harm because she did not pay any fees to Defendants to enroll in the Bad Checks Program. Plaintiff only paid the amount of the bounced check, which was outstanding prior to the involvement of Defendants." *Order*, pp. 4-5. The Court also agreed with defendants' characterization of the program as "of an optional and voluntary nature" because defendants informed Ms. del Campo that she had the choice of either paying the fees or facing criminal prosecution by the District Attorney, in which case she would be "entitled to a hearing before a court of law." *Id.* at 5. The Court dismissed the claims with prejudice, but did not enter judgment. The plaintiffs in the *Medina* action, which has now been consolidated with Ms. del Campo's case, also alleged constitutional violations, but those claims were never adjudicated.

III. PLAINTIFFS' MOTION SHOULD BE GRANTED IN THE INTERESTS OF JUSTICE.

A. Leave to Amend A Complaint Should Be Freely Granted When Justice So Requires.

Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be freely given when justice so requires." The Supreme Court has stated "this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). "[A] court must be guided by the underlying purpose of Rule 15 to facilitate decision on the merits, rather than on the pleadings or technicalities. Accordingly, Rule 15's policy of favoring amendments to pleadings should be applied with extreme liberality." *Price v. Kramer*, 200 F.3d 1237, 1250 (9th Cir. 2000); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir.2000) (en banc). The party opposing amendment bears the burden of showing prejudice. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987).

B. The Constitutional Claims in the Consolidated Complaint are Based on New Facts and Theories.

1. The Consolidated Complaint Is Based on New Facts.

In the Consolidated Complaint, plaintiffs raise claims based on events that occurred, and evidence that was obtained, *after* plaintiff del Campo filed her complaint in December 2001. Plaintiffs have obtained evidence since the May 2002 dismissal order

showing that plaintiffs del Campo, Medina, and Johnston have suffered financial harm because defendants took money from them, without their knowledge or consent, using coercive threats, even when they did *not* agree to participate in the ACCS program.

The factual premise on which the Court's 2002 order relied most heavily was the proposition that Ms. Del Campo "suffered no constitutional harm because she did not pay any fees to Defendants" and that she "only paid the amount of the bounced check, which was outstanding prior to the involvement of Defendants." *Order*, p.5. That proposition no longer holds true. Specifically, the Consolidated Complaint makes the following allegations with respect to Ms. del Campo:

> **ACCS extracted $90 in unlawful fees from Ms. del Campo and converted an additional $116.01 from her in July 2002:** In July 2002, in connection with two returned checks—one for $81.99 and another for $240.00—that were not discussed in her original complaint, ACCS demanded a total of $536.99, consisting of the check amounts, charges of $35.00 in administrative fees per check, $10.00 in bank charges per check, and a "class fee" of $125.00. In July 2002, Ms. del Campo paid ACCS $411.99 in payment of the check amounts, the bank service charge fees, and the administrative fees. Rather than paying the merchant the check amount, and keeping only the $90.00 in unlawful fees it had demanded, ACCS kept half of Ms. del Campo's payment, without notifying the merchants or Ms. del Campo of its actions. The result is that ACCS converted $116.01 that Ms. del Campo sent in to pay the checks, in addition to the $90.00 in unlawful fees that ACCS collected. *Consolidated Complaint*, ¶¶ 43-48.
>
> **ACCS converted $47.51 from Ms. del Campo's payment of $95.02 to cover her June 11, 2001 check to Fry's:** In October 2001, in connection with a returned check in the amount of $95.02, ACCS demanded that Ms. del Campo pay. Instead, she mailed ACCS $95.02 as payment of the returned check amount only, and not for any fees, Without any notice to Fry's or Ms. del Campo, ACCS converted 50% of the $95.02 that Ms. del Campo sent for its own use. ACCS sent Fry's $47.51, representing 50% of the amount paid by Ms. del Campo, and reported to Fry's that Ms. del Campo had paid only $47.51. As a result of ACCS's conversion of these funds, Ms. del Campo still has an unsatisfied debt to the merchant of $47.51, the amount that

> ACCS converted without her permission. *Consolidated Complaint*, ¶¶ 34-42.

In other words, the Consolidated Complaint alleges that Ms. del Campo *was* deprived of her property in excess of the amounts she owed—including deprivations that either occurred after the 2002 dismissal order or the circumstances of which were not fully understood prior to the 2002 dismissal order. The Consolidated Complaint also makes similar allegations concerning the other named plaintiffs:

> **ACCS converted money that Lisa Johnston paid and deducted fees without her knowledge or consent:** Lisa Johnston made a series of payments to ACCS, in an attempt to pay off the money it claimed she owed. While she was making periodic payments, ACCS added fees, without Ms. Johnston's knowledge or consent, and deducted its fees from the amount paid to cover her check, without her knowledge or consent. *Consolidated Complaint*, ¶¶ 60-68.
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> **ACCS converted $105 of the $210 payment made by Ashorina Medina:** In 2003, Ashorina Medina paid $210 towards a $250 returned check she had written to the Santa Clara Humane Society. Rather than credit that to her check, ACCS' policy is to take half of that for its fees, and notify the merchant that Ms. Medina had paid only $210. As a result, Ms. Medina still owes $145.00 to the Humane Society. *Consolidated Complaint*, ¶¶ 49-54.

In sum, plaintiffs allege that in a variety of ways, whether through they way ACCS credits payments for those who had been frightened into trying to meet defendants' demands through false threats of criminal prosecution, or, in the case of Ms. del Campo's checks, simply by taking money without her consent, ACCS deprived them of their protected interests in both liberty and property.

The second premise on which the 2002 order relied was defendants' representation that the "Bad Checks Program . . . is of an optional and voluntary nature" and that, if Ms. Del Campo "chose to exercise her right not to participate in the program," she could be prosecuted and would then be "entitled to a hearing before a court of law." Again, facts discovered since 2002 undermine these conclusions. First, as discussed

above, discovery has revealed that even when a consumer such as Ms. del Campo declines to "participate" in the ACCS scheme and sends only the amounts owed to her creditors, ACCS converts 50% of those amounts for its own use, without notice to, or consent from, the consumer or the creditor, leaving both with an unsatisfied debt between them.[1] There is nothing voluntary about such a deprivation of property.

More broadly, the complaint alleges that the Bad Check Program delegates one of the most coercive powers of the state–the ability to threaten criminal prosecution–to a private party that uses that power to extract money from people, like the plaintiffs, who will *never* actually be prosecuted, regardless of whether they pay the funds or not, and for whom there is no probable cause to believe a crime has been committed. Most merchants are referring checks for collection, without intending to allege that their customer has violated the law. *Consolidated Complaint*, ¶ 71. Nonetheless, once a check is referred to ACCS, it begins sending threatening letters, demanding large fees. The threats, all on very official looking district attorney letterhead, are repeated and unequivocal. The following threats are set forth verbatim from the letters ACCS sent to the named plaintiffs:

> Your failure to respond may now result in the filing of this incident report by the District Attorney in MUNICIPAL COURT! *Consolidated Complaint*, 41.¶
>
> **Failure to contact this office may now result in criminal prosecution proceedings being pursued.** *Consolidated Complaint,* ¶¶ 42, 51, 57*.*
>
> IF YOU WISH TO AVOID POTENTIAL ARREST AND PROSECUTION, YOU NEED TO CALL THIS OFFICE IMMEDIATELY! *Consolidated Complaint,* ¶ 46*.*

1. ACCS, in the guise of the district attorney, orders both check writer and the merchant not to contact each other. *Consolidated Complaint*, ¶¶ 72-73. Then, when a check writer sends ACCS the check amount only, to pay the merchant, ACCS secretly takes up to 50% of the check amount for itself and the district attorney, and deceives the merchant about the amount the check writer paid.

> PLEASE CONTACT THIS OFFICE TO AVOID CRIMINAL PROSECUTION. *Consolidated Complaint,* ¶ 54.

> Your failure to respond NOW may result in the referral of this crime report for CRIMINAL PROSECUTION. *Consolidated Complaint,* ¶ 67.

> Due to your failure to complete the requirements of the District Attorneys' Bad Check Restitution Program . . . we are now initiating formal prosecution proceedings against you. Criminal charges of PC 476(a) . . .are being prepared. . . . *Consolidated Complaint,* ¶ 68.

In addition, the Consolidated Complaint makes the following allegations, based on new evidence, concerning the lack of legal basis for defendants' threats of prosecution and for the collection of bank fees:

> **Merchants refer checks for collection and usually do not intend to claim that the check writer committed a crime:** Merchants refer checks for collection. They do not intend to claim that the check writer has committed a crime. Many merchants transmit check information only, and do not provide defendants with any information that is not on the face of the check. Defendants commence collection procedures ***knowing that there is no probable cause*** to conclude that the check writer has written a returned check with criminal intent. *Consolidated Complaint*, ¶¶ 71, 74.

> **Defendants are knowingly violating Penal Code § 1001.65, which limits the amount collected to reimburse a merchant to the amount of the bank charge actually incurred:** Despite knowing that merchants have not incurred a $10 bank charge as a result of the returned check, ***defendants always demand*** that the check writer pay a $10 bank charge. *Consolidated Complaint*, ¶ 76.

The question of whether these practices, particularly the use of false threats of imminent criminal prosecution, make the consequent payments by check writers sufficiently involuntary to constitute a "deprivation" under the Due Process Clause because of misrepresentation, coercion, or duress is a complex question that should not be resolved on the bare pleadings. Rather, courts must conduct a "factual inquiry into voluntariness" based on an examination of the totality of the circumstances surrounding the deprivation.

Stone v. University of Maryland Medical System Corp., 855 F.2d 167, 172-73 (4th Cir. 1988) ("The answer to that factual inquiry is dispositive of the constitutional 'deprivation' issue."). Indeed, the question of voluntariness is sufficiently fact-intensive that it often cannot be resolved even on summary judgment. *See*, *e.g.*, *Wolford v. Angelone*, 38 F.Supp.2d 452 (W.D.Va. 1999) (denying summary judgment based on genuine issue of material fact as to whether deprivation "was involuntary and obtained by coercion or duress"). Thus far, this question has not been addressed at all, let alone on the basis of a developed factual record.

Finally, the Consolidated Complaint includes some allegations that are unrelated to the question whether plaintiffs were deprived of property or liberty interests within the meaning of the Due Process Clause. For example, the complaint alleges that the ACCS defendants have a routine practice of obtaining check writers' bank records by masquerading as the District Attorney and that this practice violates plaintiffs' rights, pursuant to the California Constitution, to maintain the privacy of their bank records. *Consolidated Complaint*, ¶¶ 116-126. These claims, too, have yet to be addressed.

2. The Newly Alleged Facts Support New Constitutional Challenges.

Based on the new facts alleged in the Consolidated Complaint, plaintiffs can assert new theories supporting their constitutional claims. Without delving into the merits, plaintiffs offer the following brief, non-exhaustive descriptions in order to illustrate the nature of these new constitutional challenges:

- **Violation of Equal Protection and Due Process "Equal Justice" Requirements:** The plaintiffs allege that the Bad Check Program violates both the Equal Protection and Due Process Clauses of the Fourteenth Amendment because it extracts fees from people accused of writing bad checks, under the threat of prosecution, without regard for the individual's ability to pay. *See*, *e.g.*, *Moody v. State*, 716 So.2d 562, 563 (Miss. 1998) (holding that the Equal Protection Clause does not permit "a standard practice of extracting a set fine from persons accused of writing bad checks on the pain of suffering a full criminal prosecution for failure to do so"); *Bearden v. Georgia*, 461 U.S. 660, 665 (1983) (explaining that "[d]ue process and equal protection principles converge" in the Court's "equal justice" jurisprudence).
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- **Violation of Financial Disinterestedness Requirement**: The plaintiffs allege that defendants' Bad Check Program violates the Due Process Clause of the Fourteenth Amendment because it impermissibly injects a financial interest into the enforcement process. In particular, plaintiffs allege that all of the defendants are liable for violations of the Due Process Clause because they are complicit in an arrangement under which the ACCS defendants have a direct, personal, substantial pecuniary interest in maintaining a high rate of collections and thus, have a vested interest in extracting payments through threats of prosecution. *See Marshall v. Jerrico*, 446 U.S. 238, 249-251 (1980) (explaining that the Due Process Clause imposes limitations on a "scheme injecting a personal interest, financial or otherwise, into the enforcement process" and that an arrangement in which "the enforcing agent [is] financially dependent on the maintenance of a high level of penalties" is impermissible).

- **Lack of Pre-Deprivation Hearing**. The plaintiffs allege that the Bad Check Program violates the most basic command of the Due Process Clause—that the state or entities cloaked in its authority may not take property without providing some process, i.e. a pre-deprivation or post-deprivation hearing. *See, e.g.*, *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985) (describing "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.") (internal citations omitted; emphasis in original); *McBride Cotton and Cattle Corp. v. Veneman*, 290 F.3d 973, 982 (9th Cir. 2002) ("Generally, the Due Process Clause requires that individuals receive notice and a meaningful opportunity to be heard before the government deprives them of property.").

- **Baseless Threats of Prosecution**. The plaintiffs allege that the defendants, in violation of the Due Process Clause, are engaging in a pattern of making baseless threats of prosecution—threats that in themselves constitute an affront to plaintiffs' liberty interests—solely to extract the payment of fees, knowing that the fees are unlawful, that no probable cause determination has been made, and that there is a negligible chance of prosecution. *See*, *e.g., Nollan v. California Coastal Comm.*, 483 U.S. 825, 836 (1987) (holding that "[w]hatever may be the outer limits of 'legitimate state interests,'" a policy that amounts "an out-and-out plan of extortion" is not within them).

These issues have not been litigated, and certainly not in the context of evidence discovered since May 2002. The proper time to test the ultimate merits of these claims is not now, but in a motion to dismiss or for summary judgment.

C. The "Law of the Case" Doctrine Is Inapposite to Plaintiffs Other than Ms. del Campo and, In Any Event, Does Not Preclude Ms. del Campo from Raising New Constitutional Challenges.

The "law of the case" doctrine refers to the principle that the relitigation of previously decided issues should generally be avoided. *See United States v. Houser*, 804 F.3d 565, 567 (9th Cir. 1986). The Ninth Circuit has described the doctrine as "a judicial invention designed to aid in the efficient operation of court affairs," and has stressed that, even where it fully applies, it is neither "an inexorable command" nor "a limit on the court's power." *United States v. Smith*, 389 F.3d 944, 949 (9th Cir. 2004). Rather, "application of the doctrine is discretionary" and "highly flexible." *Id.* For three reasons, this Court should not employ the doctrine to bar Ms. del Campo's new claims.

First, the May 2002 order dismissed only Ms. Del Campo's claims. In 2003, the three other plaintiffs filed a complaint that contained factual allegations similar to the proposed Consolidated Complaint. The May 2002 order cannot deprive the *Medina* plaintiffs, or the class they represent, of their right to bring any claims, because the basic requirements of *res judicata* or collateral estoppel—a final judgment on the merits, privity, identity of the claims or issues—are not satisfied. *See Hells Canyon Pres. Council v. U.S. Forest Serv.,* 403 F.3d 683, 686 (9th Cir. 2005). And, in any event, it would violate due process to deprive the *Medina* plaintiffs of their right to a "day in court" on their constitutional claims. *See Richards v. Jefferson County, Ala*., 517 U.S. 793, 801 (1996); *Headwaters, Inc. v. U.S. Forest Serv*., 399 F.3d 1047, 1050 (9th Cir. 2005).

Thus, even if this Court were to apply the law of the case doctrine in the most rigid fashion and preclude Ms. del Campo from pursuing due process claims, all of the new constitutional challenges would still go forward in the amended complaint because they will be asserted by the other named plaintiffs. Under these circumstances, the Court should not apply the law of the case doctrine—"a judicial invention designed to aid in the efficient operation of court affairs," *Smith*, 389 F.3d at 949—to preclude Ms. del Campo's claims, because there would be no benefit of efficiency or judicial economy. Similarly, under Rule 15, permitting Ms. del Campo to go forward with her new constitutional claims

will not prejudice the defendants, because they will have to defend against all of the other plaintiffs' constitutional claims anyway.

Second, the doctrine does not apply here at all because Ms. del Campo possesses newly-surfaced evidence that was not available in May of 2002 and because the Consolidated Complaint makes allegations that could not have been made when Ms. del Campo filed her initial Complaint more than four years ago. *Jenkins v. County of Riverside*, 398 F.3d 1093, 1094 (9th Cir. 2005). "When new evidence is available, the question has not really been decided earlier and is posed for the first time." *Bridge v. U.S. Parole Com'n*, 981 F.2d 97, 103 (3d Cir. 1992). This is particularly so because the new evidence calls into question the core assumptions on which the 2002 order was based. *See In re Benny*, 81 F.3d 91, 94 (9th Cir. 1996) (even questions conclusively decided by prior panel of Ninth Circuit may be decided anew where "new evidence has surfaced" that calls the prior ruling into question).

Third, the Ninth Circuit has described the law of the case doctrine as "wholly inapposite" to the question of whether a district court may reconsider of its own orders prior to judgment. *Smith*, 389 F.3d at 949. "The doctrine simply does not impinge upon a district court's power to reconsider its own interlocutory order provided that the district court has not been divested of jurisdiction over the order." *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9th Cir. 2001). Thus, "[a]t the trial court level, the doctrine of the law of the case is little more than a management practice to permit logical progression toward judgment." *Gillig v. Advanced Cardiovascular Sys.*, 67 F.3d 586, 589 (6th Cir. 1995). "When a court applies the law of the case doctrine to its own prior decisions . . . the traditional formulations of the doctrine must be conceived as rules of thumb and not as straightjackets on the informed discretion and sound practical judgment of the judge." *Smith*, 389 F.3d at 949 (quoting Moore's Federal Practice § 134.21[1] (3d ed. 2003)). Ultimately, although "[c]ourts differ on the question whether to apply the 'law-of-the-case' label to the policies that regulate reconsideration of earlier rulings as an action proceeds through a trial court," "[t]he most important concern is that a trial court,

acting through one judge or successive judges, have power to achieve the best disposition possible." Wright and Miller, *Federal Practice & Procedure* 2d § 4478.1 (2002).

D. Plaintiffs Should Be Allowed to Assert the Claims and Parties from *Medina v. Mealing* and Other Related Claims,

1. Addition of New Defendants

In *Medina v. Mealing*, plaintiffs asserted claims similar to those now asserted in the Consolidated Complaint. Plaintiffs are including the defendants from *Medin*a—Inc. Fundamentals, Fundamental Performance Strategies, and Fulfillment Unlimited, Inc. —all of which plaintiffs allege are alter egos and agents of each other, and participate in the conduct that is the subject of the lawsuit. Plaintiffs are adding ACCS Administration, Inc. and individual collectors on the same basis. *Consolidated Complaint*, ¶¶ 11–14, 18.

2. Right of Privacy under the California Constitution

As discussed above, ACCS had a practice of unlawfully obtaining check writer financial information from banks pursuant to Cal. Gov't. Code § 7480(b), by falsely representing that it is a law enforcement agency. Bank records are protected by the right of privacy expressly set forth in the California Constitution, Art. I, § 1. Plaintiffs believe that ACCS unlawfully sought their bank records. *Consolidated Complaint*, ¶¶ 116-126.

3. Conversion, Fraudulent Misrepresentation, and Negligent Misrepresentation

These class-wide tort claims are aimed at some of ACCS' standard practices. When a check writer sends in payment for the check amount only, or any payment that does not include all the fees that ACCS charges, ACCS withholds up to 50% of the payment for its own profit. This is done without the knowledge of either the check writer or the merchant. This constitutes conversion. *Consolidated Complaint*, ¶¶ 138-140. Plaintiffs allege that the ACCS defendants intentionally made numerous materially false statements, upon which plaintiffs and the class relied in paying money to defendants. *Consolidated Complaint*, ¶¶ 141-147. Finally, to the extent that ACCS' false statements are unintentional, it is liable for negligent misrepresentations. *Consolidated Complaint*, ¶¶ 148-152.

E. Defendants Will Not Be Unduly Prejudiced If This Court Grants Leave To File the Consolidated Complaint.

Although defendants presumably would prefer not to have to defend new claims, they will not be unduly prejudiced by the filing of an amended complaint. Plaintiffs are moving quickly, after being unable to proceed in either *del Campo* or *Medina* until September 2005.

IV. CONCLUSION

For the reasons stated above, plaintiffs respectfully request that their motion be granted.

DATED: March 2, 2006

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