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September 29, 2014

COURT OF APPEAL-4TH DIST DIV 3

FILED

SEP 29 2014

The Honorable William W. Bedsworth
The Honorable William F. Rylaarsdam, Acting Presiding Justice
The Honorable Eileen C. Moore
Court of Appeal
Fourth Appellate District, Division 3
601 W. Santa Ana Blvd.
Santa Ana, California 92701

Deputy Clerk _____

Re: Request for Publication of *Bohm, Matsen, Kegel & Aguilera v. Jose Eulogio Bonilla, et al.*, Case No. G048212, Filed September 9, 2014

Dear Justices Bedsworth, Rylaarsdam and Moore:

The National Association of Consumer Advocates (NACA) respectfully requests that the Court certify for publication its recent decision in *Bohm, Matsen, Kegel & Aguilera v. Jose Eulogio Bonilla*, Case No. G048212, which was filed September 9, 2014. This request is made pursuant to the provisions of California Rules of Court, Rules 8.1105 and 8.1120.

NACA is a nationwide, non-profit corporation with over 1,500 members who are private and public sector attorneys, legal services attorneys, law professors, law students and non-attorney consumer advocates, whose practices or interests primarily involve the protection and representation of consumers. Its mission is to promote justice for all consumers. NACA is dedicated to the furtherance of ethical and professional representation of consumers. The current version of its Standards And Guidelines For Litigating And Settling Consumer Class Actions may be found at 299 F.R.D. 160 (2014).

More than 150 of NACA's members are California attorneys or non-attorney advocates who regularly represent or advocate for consumers residing in California. Many of these California advocates defend consumers in debt collection actions brought by debt purchasers and original creditors. The Court's decision in *Bohm* is of particular importance to such advocates because it explains, for the first time in an appellate decision, the requirements of Code of Civil Procedure section 585 for setting forth evidence when seeking a default judgment.

Defaults in debt collection litigation are frequent due to factors such as improper service, difficulties in reading or understanding the nature of papers actually served or the procedures required to respond to them, the relatively small dollar amounts at issue, and consumers' inability to locate or afford attorneys to advise them. Little reliable empirical data exists, but one study observed a rate of default of nearly 40% in such actions. Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 Va. L. & Bus. Rev. 257, 263 (2011). Often, debt collection defense attorneys are retained only after a default has already been entered.

Code of Civil Procedure section 585 generally sets forth the California requirements for obtaining a judgment by default. Section 585(d) permits the use of affidavits in default proceedings provided that the affidavits are made upon personal knowledge. Despite the frequency of the use of such affidavits in default proceedings, there is a dearth of guidance for trial courts as to what constitutes an admissible affidavit under Code of Civil Procedure section 585(d). Indeed, no citable case interprets or elucidates the requirements¹ of that subsection. Yet guidance in this area is of particular importance since – in almost every case – the trial court evaluates the sufficiency of a proffered affidavit as part of a one-sided proceeding, without the benefit of argument by the defaulting party. Moreover, in this era of drastic underfunding of our courts, the requirements for affidavits in this context should be made crystal clear to avoid the necessity of multiple hearings for those creditors who actually do possess admissible evidence to support the amounts requested as default judgments.

This Court's opinion in *Bohm* interprets the language of section 585(d) and applies its requirements to the facts of the case. The decision reaffirms the requirement that any affidavit submitted in support of a request for default be made upon personal knowledge. In *Bohm*, the declaration regarding the litigation costs sought as part of the default judgment recited as boilerplate that it was made upon personal knowledge but did not set forth any facts to support that assertion nor did it include any detail regarding the basis for the claimed amounts sought. This Court held that the declaration was insufficient given the requirements of section 585(d) and emphasized the trial court's independent duty to scrutinize the evidence in a default setting.

The Court's opinion *Bohm* meets the criteria for publication set forth in Rule 8.1105(c)(2), (3), (4) and (6). NACA respectfully urges the Court to certify its decision for publication to provide much needed guidance to both trial courts and litigants in this area of the law.

Very truly yours,

BRAMSON, PLUTZIK, MAHLER
& BIRKHAUSER, LLP



Daniel E. Birkhaeuser

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cc: Federico Castelan Sayre and Adam L. Salanoff, Sayre & Levitt,
counsel for Defendant and Appellant

A. Eric Aguilera and Raymond E. Brown, The Aguilera Law Group,
Counsel for Plaintiff and Respondent

¹ The only published opinion to cite Code of Civil Procedure section 585(d) that NACA has found is Justice Aronson's dissent in *Harbour Vista, LLC v. HSBC Mortg. Services Inc.* (2011) 201 Cal.App.4th 1496, 1515-16 (Aronson, J., Concurring and Dissenting) ("When the Legislature intends to allow litigants to offer evidence through declarations, it enacts a statute authorizing their use. For example, section 585, subdivision (d), provides that a trial court may accept evidence through declarations in lieu of live testimony when a plaintiff seeks to prove its case against a defaulted defendant in an ordinary civil action." [Footnote omitted]).

1 **PROOF OF SERVICE**

2 I am a resident of the State of California, over the age of eighteen years, and not a party to the
3 within action. My business address is Bramson, Plutzik, Mahler & Birkhaeuser, LLP, 2125 Oak
4 Grove Road, Suite 120, Walnut Creek, California 94598. On September 29, 2014, I served the
5 within documents:

6 **Letter dated 9/26/14 to Justices Bedsworth, Rylaarsdam and Moore re Request For**
7 **Publication of Bohm, Matsen, Kegel & Aguilera v. Jose Eulogio Bonilla,**
8 **et al., Case No. G048212, filed September 9, 2104**

9 by placing a copy of the document(s) listed above for collection and mailing
10 following the firm's ordinary business practice in a sealed envelope with postage
11 thereon fully prepaid for deposit in the United States mail at Walnut Creek,
12 California addressed as set forth below.

13 by facsimile transmission on that date. This document was transmitted by using a
14 Canon LC 710 facsimile machine that complies with California Rules of Court
15 Rule 2003(3), telephone number (925) 945-8792. The transmission was reported
16 as complete and without error.

17 By causing personal delivery of a copy of the document(s) listed above to the
18 person(s) as set forth below.

19 by depositing a true copy of the same enclosed in a sealed envelope with delivery
20 fees provided for an Overnite Express/Federal Express pick up box or office
21 designated for overnight delivery, and addressed as set forth below.


22 By pdf transmission on that date. These documents were transmitted via e-mail
23 to the following e-mail addresses as set forth below.

24 Abel Eric Aguilera
25 Raymond Earl Brown
26 The Aguilera Group
27 650 Town Center Drive, Suite 100
28 Costa Mesa, CA 92626

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Sol Levitt
Sayre & Levitt, LLP
333 Civic Center Drive West
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I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited 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 on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct, executed on September 29, 2014, at Walnut Creek, California.



Tracy Tappero