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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

METROPOLITAN LIFE INSURANCE  
COMPANY,

Plaintiff,

v.

CONCEPCION FLORES MOLINA,

Defendant/Cross-Plaintiff,

v.

LUPE C. FLORES,

Defendant/Cross-Defendant.

Case No. 1:23-cv-01553-CDB

ORDER DENYING CROSS-DEFENDANT'S  
RENEWED MOTIONS FOR APPOINTMENT  
OF GUARDIAN AD LITEM AND COUNSEL

(Doc. 58)

AMENDED ORDER FINDING CROSS-  
DEFENDANT INCOMPETENT TO PURSUE  
THIS ACTION PURSUANT TO FED. R. CIV.  
P. 17<sup>1</sup>

ORDER STAYING PROCEEDINGS AND  
DIRECTING PERIODIC CASE  
MANAGEMENT REPORTS

**90-Day Deadline**

On January 17, 2025, the Court held a competency hearing as to Cross-Defendant Lupe C. Flores. Thereafter, the Court took the matter under submission. On March 10, 2025, the Court issued its order finding Cross-Defendant Lupe C. Flores incompetent to pursue this action and staying the case. The Court hereby issues an amended order finding Lupe C. Flores incompetent

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<sup>1</sup> This order amends and replaces the Court's order dated March 10, 2025 (Doc. 61).

1 to pursue this action under Federal Rule of Civil Procedure 17, staying the case, and directing  
2 periodic case management reports.

### 3 I. GOVERNING LAW

4 The standard for determining competency is supplied by the law of the individual's  
5 domicile. *See* Fed. R. Civ. P. 17(b)(1). The complaint provides that Cross-Defendant Lupe Flores  
6 is domiciled in North Carolina. (Doc. 1 at 2). Additionally, her correspondence with the Court  
7 contains an address located in North Carolina (Docs. 31 at 3; 39 at 1) as do medical records she  
8 has attached to her filings with the Court (*see, e.g.*, Doc. 58 at 3). Accordingly, for purposes of  
9 evaluating competency, the Court concludes Lupe Flores is domiciled in North Carolina. *See*  
10 *Tarlton v. Town of Red Springs*, No. 5:15-CV-451-BO, 2017 WL 4782641, at \*3 (E.D.N.C. Oct.  
11 23, 2017) (“Although the record is limited on this issue, the Court will presume for the purposes  
12 of its determination that at the time this suit was filed in 2015 McCollum was domiciled in North  
13 Carolina where he was living at the time.”).

14 North Carolina law defines an incompetent adult as someone “who lacks sufficient  
15 capacity to manage the adult’s own affairs or to make or communicate important decisions  
16 concerning the adult’s person, family, or property whether the lack of capacity is due to mental  
17 illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury,  
18 or similar cause or condition.” *Matter of M.S.E.*, 378 N.C. 40, 44 (quoting N.C. Gen. Stat. § 35A-  
19 1101(7)). To find an individual incompetent, “the finder of fact in a state court incompetency  
20 adjudication must find by clear, cogent, and convincing evidence that the individual is  
21 incompetent.” *Nicholson v. Zimmerman*, No. 1:19CV585, 2020 WL 5518701, at \*5 (M.D.N.C.  
22 Sept. 14, 2020) (quotations omitted; citing N.C. Gen. Stat. § 35A-1112(d)).

23 The North Carolina Supreme Court interprets “the word [a]ffairs to encompass a person’s  
24 entire property and business and recognizes that [i]ncompetency to administer one’s property  
25 obviously depends upon the general frame and habit of mind ... it is not enough to show that  
26 another might manage a man’s property more wisely or efficiently than he himself.” *Id.*  
27 (quotations omitted).

1           Although a district court must use the law of an individual’s domicile when determining  
2 their capacity, it need not adopt any procedures required by state law and must meet only the  
3 requirements of due process. *In re Ivers*, No. 19-20026-E-13, 2019 WL 6033198, at \*8 (Bankr.  
4 E.D. Cal. Nov. 8, 2019); *see Tarlton*, 2017 WL 4782641, at \*5 (“As discussed above, this Court  
5 need not use North Carolina’s procedures for determining competency, so long as its procedures  
6 comport with due process.”). Under Rule 17(c), a district court must hold a competency hearing  
7 “when substantial evidence of incompetence is presented.” *Allen v. Calderon*, 408 F.3d 1150,  
8 1153 (9th Cir. 2005); *see Ferrelli v. River Manor Health Care Ctr.*, 323 F.3d 196, 203 (2d Cir.  
9 2003) (explaining that “due process considerations attend an incompetency finding and the  
10 subsequent appointment of a guardian ad litem”); *Thomas v. Humfield*, 916 F.2d 1032, 1034 (5th  
11 Cir. 1990) (observing that the appointment of a guardian ad litem implicates due process concerns  
12 because it deprives a litigant of the right to control litigation and subjects them to possible  
13 stigmatization).

14           The Ninth Circuit has not clearly stated what constitutes “substantial evidence” of  
15 incompetence warranting such a hearing. *See Hoang Minh Tran v. Gore*, No. 10cv464–GPC  
16 (DHB), 2013 WL 1625418, at \*3 (S.D. Cal. April 15, 2013). However, the Ninth Circuit has  
17 indicated that sworn declarations from the allegedly incompetent litigant, sworn declarations or  
18 letters from treating psychiatrists or psychologists, and medical records may be considered in this  
19 regard. *See Allen*, 408 F.3d at 1152–54; *see also Hoang Minh Tran*, 2013 WL 1625418, at \*3.  
20 Such evidence must speak to the court’s concern as to whether the person in question is able to  
21 meaningfully take part in the proceedings. *See AT&T Mobility, LLC v. Yeager*, 143 F. Supp. 3d  
22 1042, 1042 (E.D. Cal. 2015).

23           “A[n] incompetent person who does not have a duly appointed representative may sue by  
24 a next friend or by guardian ad litem. The court must appoint a guardian ad litem—or issue  
25 another appropriate order—to protect a minor or incompetent person who is unrepresented in an  
26 action.” Fed. R. Civ. P. 17(c)(2). As opposed to a determination of competency, “a district court’s  
27 decision whether to appoint a guardian ad litem is purely procedural and wholly uninformed by  
28 state law.” *In re Ivers*, 2019 WL 6033198, at \*9.

1           Within its obligation of assessing competency, a district court has broad discretion to  
2 determine the suitability of appointing a guardian ad litem. *See United States v. 30.64 Acres of*  
3 *Land*, 795 F.2d 796, 805 (9th Cir. 1986). Thus, “[if] the court determines that a pro se litigant is  
4 incompetent, the court generally should appoint a guardian ad litem under Rule 17(c).” *Davis v.*  
5 *Walker*, 745 F.3d 1303, 1310 (9th Cir. 2014). “If another order would sufficiently protect the  
6 incompetent person’s interests in the litigation in lieu of a guardian, the court may enter such an  
7 order.” *Id.*

8           “[N]otwithstanding the incompetency of a party, the guardian may make binding contracts  
9 for the retention of counsel and expert witnesses and may settle the claim on behalf of his ward.”  
10 *30.64 Acres of Land*, 795 F.2d at 805. However, a guardian ad litem who is not an attorney must  
11 be represented by counsel in order to litigate a case on another’s behalf. *See Johns v. Cnty. of San*  
12 *Diego*, 114 F.3d 874, 877 (9th Cir. 1997); *Stoner v. Santa Clara Cnty. Office of Educ.*, 502 F.3d  
13 1116, 1127 (9th Cir. 2007) (explaining the right to proceed pro se is personal to the litigant).

## 14           **II. DISCUSSION**

### 15           **a. Cross-Defendant Lupe Flores’ Filings and Declarations**

16           On March 25, 2024, Lupe Flores filed a motion for appointment of guardian ad litem.  
17 (Doc. 31). The motion attached a letter, dated January 15, 2024, from physician Peter Thomas  
18 Leistikow in Winston Salem, North Carolina, explaining that Lupe Flores was seen on December  
19 22, 2023, in regards to memory changes from a “possible neurocognitive disorder. She is pending  
20 additional testing and workup.” *Id.* at 5. On April 19, 2024, the Court denied the motion without  
21 prejudice on three grounds: (1) the motion failed to provide substantial evidence of incompetence;  
22 (2) the motion failed to show efforts to confer with Cross-Plaintiff Concepcion Molina and  
23 indicate in the application whether Concepcion Molina concurs or objects to the proposed  
24 appointment; and (3) the motion failed to identify potential candidates willing to be appointed as  
25 guardian ad litem and include their sworn attestations that they did not have conflicts of interest,  
26 as required by Local Rule 202. *See* (Doc. 33).

27           On July 8, 2024, Lupe Flores filed a renewed motion for appointment of guardian ad  
28 litem. (Doc. 39). The motion attached progress notes from Dr. Leistikow, dated June 27, 2024,

1 representing that a neuropsychological assessment done on Lupe Flores on June 10, 2024, showed  
2 “moderate deficits across multiple cognitive domains,” including learning, retrieval, speed  
3 processing, and language, consistent with “mild vascular neurocognitive disorder.” *Id.* at 4. Dr.  
4 Leistikow provides that he suggested they pursue formal legal representation in the instant action,  
5 but Lupe Flores stated it was not financially possible at the time. *Id.* at 4. On July 19, 2024, Lupe  
6 Flores filed a supplement to her motion stating that she has moderate vascular dementia and  
7 dyslexia. (Doc. 45). It is signed by both Lupe Flores and Dawn Harris. *Id.* at 1. A durable power  
8 of attorney, consisting of 21 pages, attached to the supplemental filing represents that Dawn  
9 Harris is Lupe Flores’ attorney-in-fact. *Id.* at 2-22. It is stamped and signed by notary public Julie  
10 R. Whatley. *Id.* at 22. On August 1, 2024, the Court denied the motion without prejudice on the  
11 grounds that points (2) and (3) above still had not been remedied. (Doc. 46). The Court directed  
12 that its order be served on Dawn Harris. *Id.* at 4.

13           On August 26, 2024, Lupe Flores filed a second renewed motion for appointment of  
14 guardian ad litem and motion for appointment of counsel. (Doc. 48). This motion was signed by  
15 both Lupe Flores and Dawn Harris. *Id.* at 1. The motion attached a one-page undated and  
16 unsigned letter from Victoria R. Shada. It did not establish Dr. Shada’s status as a healthcare  
17 professional, lacking any title for her, nor her relationship to Lupe Flores. The letter stated that  
18 Lupe Flores has “logopenic primary progressive aphasia,” a type of dementia that affects  
19 language abilities and makes it “incredibly difficult, and ultimately impossible, for someone to  
20 articulate his or herself clearly and accurately ... She has had this condition for a minimum of  
21 three years, if not longer.” *Id.* at 2. Also attached to the motion was a two-page pamphlet  
22 published by the Judicial Council of California regarding accommodations under the Americans  
23 With Disabilities Act for court activities, programs, and services. *Id.* at 3-4. The Court denied the  
24 motion without prejudice on the grounds that Lupe Flores had again failed to remedy the  
25 deficiencies of the prior motion, namely points (2) and (3) above. In that same order, the Court set  
26 a mandatory status conference for October 23, 2024, invited Dawn Harris to appear, invited the  
27 parties to confer and notify the Court of any conflicts of availability to attend the conference, and  
28 directed service of the order on Dawn Harris. (Doc. 49).

1 In advance of the noticed hearing, on October 10, 2024, Lupe Flores filed a third renewed  
2 motion for appointment of guardian ad litem and a renewed motion to appoint counsel. (Doc. 50).  
3 Like her prior motion, this third motion was signed by both Lupe Flores and Dawn Harris. The  
4 motion attached a one-page undated letter from Victoria R. Shada, substantially similar to the one  
5 attached to the previous motion (*see supra*). *Id.* at 3. In the motion, neither Lupe Flores nor Dawn  
6 Harris represented they were unable to attend the mandatory status conference scheduled for  
7 October 23, 2024. On October 23, 2024, Concepcion Molina and her counsel Eric Leroy appeared  
8 for the conference. Neither Lupe Flores nor Dawn Harris, nor any representative acting on their  
9 behalf, appeared for the status conference. (Doc. 51).

10 Following her failure to appear at the mandatory status conference, the Court ordered  
11 Lupe Flores to show cause in writing why she should not be sanctioned. (Doc. 52). Lupe Flores  
12 filed her response to the order to show cause on November 6, 2024, signed by both her and Dawn  
13 Harris. (Doc. 54). In her response, she stated that she cannot speak in front of other people  
14 because of anxiety and that her daughter (presumably her power of attorney, Dawn Harris) was  
15 on honeymoon and out of state. She stated that, due to her medical diagnosis, she did not know  
16 what the video link was and what to do. She also sought leave for additional time to file medical  
17 documentation from her neurologist. *Id.* at 1-2. The response attaches a one-page undated letter  
18 from Victoria R. Shada, substantially identical to the prior such letters, only with what appear to  
19 be highlights on text naming the medical condition and its effects. *Id.* at 3. The response also  
20 attaches a document from the Social Security Administration, titled “Program Operations Manual  
21 System,” with contains information relating to “primary progressive aphasia.” *Id.* at 4-15.

22 On November 25, 2024, Lupe Flores filed a fourth renewed motion for appointment of  
23 guardian ad litem and a second renewed motion for appointment of counsel. (Doc. 55). This  
24 motion, too, was signed by both Lupe Flores and Dawn Harris. The motion attached a letter from  
25 physician assistant Abbie Connoy Eaton, detailing a condition of logopenic primary progressive  
26 aphasia and discussing an abnormal cognitive test score by Lupe Flores, as well as identifying the  
27 impacts her diagnosis may have on her ability to speak, comprehend, and retrieve words. The  
28 letter states Lupe Flores “has had this condition for a minimum of three years, if not longer, and it

1 will continue to get worse over time ... she is not able to represent herself in court.” *Id.* at 55.

2 On December 12, 2024, the Court denied Lupe Flores’ fourth renewed motion for  
3 appointment of guardian ad litem and second renewed motion for appointment of counsel for  
4 reasons substantially similar to prior denials. Additionally, the Court set a mandatory hearing to  
5 determine Lupe Flores’ competency, directing Lupe Flores to make available Dawn Harris, her  
6 treating neurologist or another medical provider who can testify regarding her diagnosis, and any  
7 other individual she chooses to nominate as guardian ad item, if not Dawn Harris. In advance of  
8 the hearing, the Court directed Lupe Flores to file a motion for appointment of guardian ad litem  
9 that complies with the Local Rules of the Court. (Doc. 56).

10 On January 16, 2025, Lupe Flores filed her fifth renewed motion for appointment of  
11 guardian ad litem and third renewed motion for appointment of counsel. (Doc. 58). Substantially  
12 similar to prior motions, it is signed by both Lupe Flores and Dawn Harris. It attaches a letter  
13 from Victoria R. Shada, representing her as a physician with a specialty in geriatrics, and  
14 provides that Lupe Flores has been under Dr. Shada’s care since August 2024, that she “has a  
15 diagnosis of dementia due to primary progressive aphasia” that has “progressed to the stage  
16 where *she can no longer understand even simple questions nor one-step instructions,*” and that it  
17 is Dr. Shada’s professional opinion that Lupe Flores cannot make “*informed and independent*  
18 *medical, legal and financial decisions.*” *Id.* at 3 (emphasis added).

19 The letter is marked as “[e]lectronically signed” on December 13, 2024. *Id.* Also attached  
20 to the motion is a form from the Central District of California requesting accommodations for  
21 trial participants with disabilities (form G-122). The form is signed by both Lupe Flores and  
22 Dawn Harris and seeks appointment of a guardian ad litem. *Id.* at 6. Additionally, the motion  
23 attaches a scanned printout of an email from dawnharris347@gmail.com to “access\_coordinator,”  
24 appearing to attach the aforementioned Central District form and Dawn Harris’ power of attorney;  
25 hand-written on the document are the words “Sent 9 Jan 25.” *Id.* at 7. Lastly, the motion attaches  
26 the same two-page pamphlet published by the Judicial Council of California regarding  
27 accommodations under the Americans with Disabilities Act as was attached to Lupe Flores’  
28 second renewed motion. *Id.* at 8-9.

1                   **b. Competency Hearing**

2                   On January 17, 2025, the Court held the aforementioned competency hearing. (Doc. 59).  
3 Lupe Flores and Dawn Harris appeared by videoconference from North Carolina. Concepcion  
4 Molina appeared by telephone and her counsel Eric Leroy appeared by videoconference. The  
5 Court directed its inquiries to Lupe Flores and sought additional information from her concerning  
6 her medical diagnosis and symptoms and affects, particularly in regards to her ability to represent  
7 herself in this action. The Court also examined Dawn Harris regarding her willingness and ability  
8 to serve as guardian ad litem. Ms. Harris informed the Court that she would not serve as guardian  
9 ad litem for Lupe Flores for various personal reasons, which are preserved on the record.

10                  Finally, the Court sought input from Concepcion Molina and her counsel. The Court  
11 informed the parties that the matter was submitted, with an order to follow.

12                   **c. Analysis**

13                  The Court has considered the declarations of Lupe Flores, the medical letters proffered,  
14 and the testimony elicited from her and Dawn Harris during the competency hearing and  
15 concludes that the showing supports a finding of incompetency. Lupe Flores’ diagnosis of  
16 logopenic primary progressive aphasia is a mental impairment that significantly limits her  
17 communication skills and, as represented by her medical providers in the proffered letters,  
18 adversely impacts her ability to understand and make informed decisions as to her own affairs.  
19 *See, e.g., Tarlton*, 2017 WL 4782641, at \*6 (holding numerous factors evidenced incompetence  
20 under North Carolina law, including frontal lobe impairment and doctor’s report finding plaintiff  
21 “generally needing support to make health and legal decisions”); *Byrd on behalf of Byrd v. United*  
22 *States*, No. 1:20-CV-03090-LMM, 2021 WL 5033826, at \*5 (N.D. Ga. July 19, 2021) (finding  
23 plaintiff incompetent where physician’s letter represented that plaintiff “continues to experience  
24 aphasia, memory deficits, and impaired comprehension” and that the aphasia “affects all language  
25 modalities with severely impaired comprehension” and that plaintiff “lacks sufficient ability to  
26 comprehend and communicate responsible decisions concerning his person”).

27                  The Court has inquired with the Pro Bono Coordinator for the Eastern District of  
28 California regarding this action – particularly as to availability of individuals for appointment of



1 guardian ad litem or counsel, including as to pro bono attorneys, law school programs, bar  
2 associations, or other relevant organizations. Additionally, the Court has contacted the Ninth  
3 Circuit Pro Bono Program Coordinator, the North Carolina Pro Bono Resource Center, a  
4 statewide legal aid organization within North Carolina, a law school clinical program within the  
5 state, as well as state and county-level government services. To date, the Court has been unable to  
6 locate any individuals willing serve to as guardian ad litem or as counsel.

7 For the foregoing reasons, the Court will stay the action and require periodic case  
8 management reports. Upon locating any individual willing and able to serve as guardian ad litem  
9 or counsel, the Court will appoint them. Lupe Flores may renew her motion for appointment of  
10 guardian ad litem at any time if she identifies an individual willing to serve as such.<sup>2</sup>

### 11 **III. CONCLUSION AND ORDER**

12 Accordingly, the Court HEREBY ORDERS that:

- 13 1. The renewed motion of Cross-Defendant Lupe Flores for appointment of counsel of  
14 guardian ad litem (Doc. 58) is DENIED;
- 15 2. This action is STAYED;
- 16 3. Cross-Defendant Lupe Flores SHALL RE-FILE a motion for appointment of guardian  
17 ad litem upon her identification of a suitable individual willing to serve as guardian ad  
18 litem, with any such application complying with Local Rule 202 and this Court's prior  
19 orders denying her earlier applications; and
- 20 4. Cross-Defendant Lupe Flores is DIRECTED to file a status report **every 90 days** from  
21 the date of service of this order addressing the status of her medical condition and  
22 diagnoses, her search for a guardian ad litem, and any other relevant matters.

23 IT IS SO ORDERED.

24 Dated: March 11, 2025

25   
UNITED STATES MAGISTRATE JUDGE

26  
27 <sup>2</sup> For substantially the same reasons set forth herein and in the Court's prior orders (*see*  
28 *supra*), the Court will deny the renewed motion of Cross-Defendant Lupe Flores for appointment  
of counsel and guardian ad litem.