

TENTATIVE RULINGS

FOR: August 10, 2017

The Court may exercise its discretion to **disregard** a late filed paper in law and motion matters. (Cal. Rules of Court, rule 3.1300(d).)

Unlawful Detainer Cases – Pursuant to the restrictions in Code of Civil Procedure section 1161.2, no tentative rulings are posted for unlawful detainer cases and appearances are required.

Court Reporting Services – The Court does not provide official court reporters in proceedings for which such services are not legally mandated. These proceedings include civil law and motion hearings. If counsel want their civil law and motion hearing reported, they must arrange for a private court reporter to be present. Go to <http://napacountybar.org/court-reporting-services/> for information about local private court reporters. Attorneys or parties must confer with each other to avoid having more than one court reporter present for the same hearing.

PROBATE CALENDAR – Hon. Diane Price, Dept. F (Criminal Courts Bldg.-1111 Third St.)

Conservatorship of Brandon Sakata

16PR000082

REVIEW HEARING

TENTATIVE RULING: After a review of the matter, the Court finds the co-conservators are acting in the best interest of the conservatee. Thus, the case is set for a biennial review hearing in two years, on August 8, 2019, at 8:30 a.m. in Dept. F. The court investigator shall prepare a biennial investigator report for the next hearing date. The clerk is directed to send notice to the parties.

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Conservatorship of Riley Eve Hanson-Jerrard

16PR000085

REVIEW HEARING

TENTATIVE RULING: After a review of the matter, the Court finds the co-conservators are acting in the best interest of the conservatee. Thus, the case is set for a biennial review hearing in two years, on August 8, 2019, at 8:30 a.m. in Dept. F. The court investigator shall prepare a biennial investigator report for the next hearing date. The clerk is directed to send notice to the parties.

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In the Matter of the Charles K. Marshall Revocable Trust

17PR000070

STATUS HEARING

APPEARANCE REQUIRED

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In the Matter of the Howard and Anna Nunn Unitrust

17PR000140

FIRST AND FINAL ACCOUNT AND REPORT AND PETITION FOR FINAL DISTRIBUTION, FOR INSTRUCTIONS, AND FOR ALLOWANCE OF COMPENSATION TO TRUSTEE

TENTATIVE RULING: GRANT Petition, including fees as prayed.

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Conservatorship of Stefano, Lee

26-07080

REVIEW HEARING

TENTATIVE RULING: After a review of the matter, the Court finds the Conservator is acting in the best interest of the Conservatee. Thus, the case is set for a biennial review hearing in two years, on August 13, 2019 at 8:30 a.m. in Dept. F. The court investigator shall prepare a biennial investigator report for the next hearing date.

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Conservatorship of Chad Thomas Schimmer

26-61788

PETITION TO TRANSFER VENUE OF CONSERVATORSHIP OF CHAD THOMAS SCHIMMER TO NEVADA COUNTY

TENTATIVE RULING: The Petition is GRANTED. The Court finds it is in the best interest of the Conservatee to transfer the proceedings to Nevada County because the Conservator and Conservatee now reside in Nevada County. (See Prob. Code, § 2215(b).) The case is set for a review hearing on October 10, 2017 at 8:30 a.m. in Dept. F, at the Napa County Superior Court. The hearing is to confirm receipt of the notification from the Nevada County Superior Court that it has received the transferred case. (*Id.*, § 2217 [requiring a review hearing within two months].) If the notification has not been made, this Court will make a reasonable inquiry into the status of the matter. (*Id.*)

The Conservator is instructed to contact the Civil Filing Division at the Napa County Superior Court to pay, subject to any applicable fee waiver, the: (1) transfer fees from the Napa County Superior Court; and (2) the filing fee for the Nevada County Superior Court. (*Id.*, § 2216, subd. (b) [providing that the estate will pay all expenses incurred by the clerk of court for Napa County for the removal; also stating that the clerk of court for Nevada County is entitled to such fees as are payable on the filing of a like original proceeding].)

If the Conservator seeks to have any fees waived in the Nevada County Superior Court, she must submit to the Civil Filing Division at the Napa County Superior Court a new completed fee waiver application for transmittal.

The clerk is directed to transmit to the clerk of the court in Nevada County a certified or exemplified copy of this order, together with all papers in the proceeding on file. (*Id.*, § 2216, subd. (a).) The clerk is directed to send notice to the parties.

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Guardianship of Amber Joanne Monteleone

26-67736

ACCOUNT AND REPORT OF GUARDIAN

APPEARANCE REQUIRED by Annie Tang Monteleone.

CIVIL LAW & MOTION CALENDAR – Hon. Diane Price, Dept. F (Criminal Courts Bldg.-1111 Third St.)

Terry Dal Porto, et al. v. Craig Dal Porto, et al.

26-65978

MOTION IN AID OF ENFORCEMENT OF JUDGMENT RE: APPOINTMENT OF ELISOR TO EXECUTE DOCUMENTS ON BEHALF OF JUDGMENT DEBTOR TERRY DAL PORTO

TENTATIVE RULING: Judgment creditor Craig Dal Porto’s motion for appointment of an elisor is DENIED WITHOUT PREJUDICE.

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Roy Powell, et al. v. Steven Belmont, et al.

26-64868

ORDER TO SHOW CAUSE RE: PETITION TO COMPEL NAPA COUNTY DISTRICT ATTORNEY TO DISCLOSE PUBLIC RECORDS

TENTATIVE RULING: Defendants Cynthia Y. Hester and Don Marzetta’s petition to compel the Napa County District Attorney to disclose the 911 tape is GRANTED. Defendants are admonished for failing to comply with the notice requirements, but the failure has not prohibited respondent from filing a substantive opposition. Respondent does not have good cause for failing to produce the 911 recording under the California Public Records Act. There is no privacy interest here. The tape already has been utilized and entered as evidence in the criminal trial. Even if plaintiff Jennifer Powell had a privacy interest, she waived that interest by making the 911 call and filing this civil suit. Thus, the public interest served by not disclosing the tape does not outweigh the public interest served by disclosure of the recording. (Gov. Code, § 6255, subd. (a).) Respondent shall immediately make the tape available to defendants’

attorneys for inspection and copying. The tape and its contents are to be used for purposes of this litigation only and are not to be disseminated.

**CIVIL LAW & MOTION CALENDAR – Hon. Mark Boessenecker, Dept. H
(Criminal Courts Bldg.-1111 Third St.)**

Brian R. Silver v. Steven G. Hasty, et al.

26-67005

MOTION TO CHANGE VENUE

APPEARANCE REQUIRED

**PROBATE CALENDAR – Hon. Rodney Stone, Dept. I (Criminal Courts Bldg.-1111
Third St.)**

Conservatorship of Jeffrey Weyand

26-04569

REVIEW HEARING

TENTATIVE RULING: The matter is continued to September 19, 2017, at 8:30 a.m. in Dept. I to allow the conservator to file: (1) Notice of Conservatee’s Rights (Judicial Council form GC-341) mailed to relatives of the proposed conservatee within the second degree; and (2) Determination of Conservatee’s Appropriate Level of Care (GC-355).

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In the Matter of Gertrude Ann Caldwell Trust

26-35822

SEVENTH ACCOUNT AND REPORT OF TRUSTEE AND PETITION FOR SETTLEMENT OF ACCOUNT AND FOR APPROVAL OF TRUSTEE FEES

TENTATIVE RULING: GRANT Petition, including fees as prayed.

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In the Matter of the Donna Mae Cox Irrevocable Special Trust

26-48777

SEVENTH ACCOUNT AND REPORT OF TRUSTEE AND PETITION FOR ITS SETTLEMENT AND FOR FEES

TENTATIVE RULING: GRANT petition, including fees as prayed.
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In the Matter of Runyon Family Trust

26-56652

SEVENTH ACCOUNT AND REPORT OF TRUSTEE AND PETITION FOR SETTLEMENT OF ACCOUNT AND FOR APPROVAL OF TRUSTEE FEES

TENTATIVE RULING: GRANT Petition, including fees as prayed.

CIVIL LAW & MOTION CALENDAR – Hon. Rodney Stone, Dept. I (Criminal Courts Bldg.-1111 Third St.)

Robert Day v. Pacific Retirement Services, Inc., et al.

16CV000777

MOTION FOR LEAVE TO FILE A FIRST AMENDED COMPLAINT

TENTATIVE RULING:

Defendants Pacific Retirement Services, Inc. (dba The Meadows of Napa Valley), Odd Fellows Homes of California, and Wayne Panchesson’s request for judicial notice of an order granting a motion for judgment on the pleadings from the Alameda County Superior Court is GRANTED.

Plaintiff Robert Day’s motion for leave to file a first amended complaint is GRANTED. The parties are to appear to discuss a new trial date and any other relevant matters. Day shall file and serve his proposed first amended complaint within 5 calendar days.

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Rebecca Rowan v, Richard Klein, et al.

17CV000389

RENEWED MOTION FOR CHANGE OF VENUE

TENTATIVE RULING:

Defendants Richard Klein and Dot429, Inc.’s renewed motion for change of venue came on for hearing on July 18, 2017. The Court posted a tentative ruling granting the motion since Klein is a Los Angeles resident and Dot429, Inc. is a corporation with its principal place of business in Los Angeles. (Klein Decl., ¶¶ 3-4.) At the hearing, plaintiff Rebecca Rowan raised *Lebastchi v. Super. Ct.* (1995) 33 Cal.App.4th 1465.¹ The Court indicated in its July 17, 2017 Order that based on this new authority, the Court was inclined to deny the motion. The parties

¹ Rowan raised the authority in opposition to the original motion to change venue, but failed to raise the case again until the hearing on the renewed motion to change venue.

subsequently submitted supplemental briefing on the issue “to respond to the new authority raised at the hearing.”² (July 17, 2017 Order at p. 1.)

Defendants’ renewed motion for change of venue is DENIED. *Lebastchi, supra*, 33 Cal.App.4th at pp. 1470-71, states the effect of the alter ego allegations in the first amended complaint places Klein under the expanded venue provisions for breach of contract under Code of Civil Procedure sections 395.5 and 395, subdivision (a). That is, Klein is “in the same position” as Dot429. (*Id.* at p. 1470.) Such actions are triable in the county where the contract is made or is to be performed. (Code Civ. Proc., § 395.5.) Rowan alleges the contracts were entered in Napa County and also is the place of performance of the obligations breached. (First Amended Compl., ¶ 12; Rowan Decl., ¶¶ 3-5, Exs. A-B.) Klein attempts to controvert Rowan’s alter ego allegations via his supplemental declaration. But his declaration consists of legal conclusions unsupported by evidence. (See, e.g., Klein Supp. Decl., ¶ 7 [“At all relevant times, Dot429 was not, and has not been, my alter-ego.”].)

Putting that issue aside, Klein does not dispute he agreed to personally guaranty Rowan’s bridge loan to Dot429. (First Amended Compl., ¶ 7; see *Quick v. Corsaro* (1960) 180 Cal.App.2d 831, 836 [“[T]he averments of the complaint are to be deemed true upon a motion for change of venue, at least to the extent they are not controverted. [Citation].”].) As Rowan explains, such a guaranty is strongly indicative of an alter ego relationship. (See *Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 811 [providing the “alter ego test encompasses a host of factors,” including “the holding out by an individual that he is personally liable for the debts of the corporation”].) Moreover, Rowan presents other evidence to support the alter ego theory. (*Id.* at p. 811-12 [outlining the factors considered in applying the alter ego test]; see Rowan Decl., ¶¶ 6-8, Exs. C-D [Dot429 is undercapitalized as evidenced by its inability to pay its employees], ¶ 9 [Dot429 could not provide adequate corporate financial records when requested].) These allegations and the supporting evidence are sufficient to confer venue in Napa County under *Lebastchi*.

Defendants’ reliance on the sham pleading doctrine is misplaced. “Under the sham pleading doctrine, plaintiffs are precluded from amending complaints to omit harmful allegations, without explanation, from previous complaints to avoid attacks” (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 425.) The sham pleading doctrine only applies to inconsistent factual allegations. (*Lim v. The.TV Corp. Int’l* (2002) 99 Cal.App.4th 684, 691 [“The rule is aimed at averments of *fact* the pleading party attempts to avoid in a later pleading.”].) Rowan has not alleged inconsistent facts. The doctrine simply does not apply. First, the omitted venue allegation based on a contractual venue provision from the complaint is not inconsistent with or contradictory to the new allegations supporting the alter ego theory. The allegations are different in that they raise two different grounds for venue being proper in Napa County, but they are not inconsistent. As Rowan aptly proffers, “[i]t can be simultaneously true that venue is proper because of a contractual venue provision and pursuant to venue statutes.” (Opp. at p. 5:4-5.) Second, the new alter ego allegations are in no way inconsistent with or contradictory to the alter ego allegations in the original pleading. (Compl., ¶ 4.) The new

² *Lebastchi* is the authority upon which the Court sought supplemental briefing. To the extent the parties raised the sham pleading doctrine in their supplemental briefs, the Court strikes the material as not drawn in conformity with “an order of the court.” (See Code Civ. Proc., § 436.)

allegations simply expand on the previously pled theory. Third, as noted, alter ego is a legal theory. The additional allegations are not inconsistent with the original pleading because they are based on an alternative legal theory, not alternative facts. (See *Lim, supra*, 99 Cal.App.4th at p. 691.)

In addition, the sham pleading doctrine is not applicable because Rowan has not omitted “harmful allegations” to “avoid attacks.” (*Deveny, supra*, 139 Cal.App.4th at p. 425.) The contractual venue allegation from the complaint is not harmful to Rowan’s choice of venue as its omission does not save the pleading from attack. That is, the alter ego allegations from the first amended complaint serve as a basis for venue regardless of the omission of the contractual venue allegation.

Even if the sham pleading doctrine applied, the doctrine does not apply when a party corrects an erroneous allegation. To apply the sham pleading doctrine, “the party who made the pleadings must be allowed to explain the changes.” (*Id.* at p. 425; see *Blain v. Doctor’s Co.* (1990) 222 Cal. App. 3d 1048, 1058 [“[A]n unexplained suppression of the original destructive allegation will not, in the words of Lady MacBeth, wash out the ‘damned spot.’”].) The original complaint alleged venue was proper because the loan agreements giving rise to the dispute required the parties to submit to the exclusive jurisdiction of the Napa County Superior Court. (Compl., ¶ 5.) This allegation was removed in the subsequent pleading. Rowan now includes alter ego allegations to support the venue allegation in the first amended complaint. (FAC, ¶¶ 5-11.) Rowan explains she omitted the contractual venue allegation from the complaint because it was erroneous. (Seegal Decl., ¶ 2.) The sham pleading doctrine is not intended to prevent plaintiffs from correcting erroneous allegations. (*Deveny, supra*, 139 Cal.App.4th at p. 426.) There is no evidence before the Court that Rowan made the correction in bad faith or that she otherwise is engaged in an abuse of process. (See *Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 751 [“[T]here is no indication that omission was made in bad faith or that appellant was engaged in an abuse of process. Rather, read in context, it appears appellant was omitting an alternate factual allegation that had proven to be erroneous. The sham pleading doctrine was not applicable here.”].)

Defendants’ request for attorney’s fees and costs for making their motion is DENIED. (Code Civ. Proc., § 396b, subd. (b).) It appears Napa County was selected in good faith. (Seegal Decl., ¶ 2; First Amended Compl., ¶¶ 5-11.) Defendants did not make an offer to stipulate to change venue before filing the renewed motion.

Rowan’s request for attorney’s fees and costs for resisting the motion is DENIED.

The Court notes it did not receive courtesy copies from defendants despite requesting them in its June 1, 2017 Minute Order.