TENTATIVE RULINGS

FOR: June 6, 2019

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. Parties are responsible for either making the appropriate request in advance or arranging for their own private court reporter. 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. Monique Langhorne, Dept. B (Historic Courthouse) at 8:30 a.m.

Conservatorship of Raul Ochoa Mendoza **16PR000042**

REVIEW HEARING

TENTATIVE RULING: After a review of the matter, the Court finds the Conservators are acting in the best interest of the Conservatee. Thus, the case is set for a biennial review hearing in two years, on June 3, 2021, at 8:30 a.m. in Dept. A. The court investigator shall prepare a biennial investigator report for the next hearing date. The clerk is directed to send notice to the parties.

Conservatorship of Shirley Harris **17PR000141**

ACCOUNT AND REPORT OF CONSERVATOR AND PETITION FOR ITS SETTLEMENT AND FOR FEES

TENTATIVE RULING: The Petition is GRANTED IN PART and DENIED IN PART.

The request for approval of attorney's fees is GRANTED IN PART. The Court finds that the amount of fees and costs requested for Petitioner's attorney is unreasonable, in the community, for the preparation of a First Accounting and Report of Conservator and Petition for Settlement and Fees for a conservatorship estate of this size. The Court finds that the conservatorship estate exhibits no complexity justifying the size of the fees. The Court notes that significant time was spent reproducing documents that were found by the Court to have been incomplete, inadequate, or improperly prepared, and that the explanations for the cause(s) of such inadequacies do not justify payment, by the conservatorship estate, for the duplication of

effort. The Court approves payment to Conservator's attorney in the amount of $4,296.72, representing the total requested attorneys' fees and costs less the amount itemized for work performed on March 7, 2019 preparing the first Accounting and related documents.

Conservator's request for an order allowing the consolidated accounting of the conservatorship accounts and the Harris Family Trust Accounts is DENIED. First, the Court notes that the Trust res appears to consist of two items: an annuity and the contents of a deposit account. Conservator has not convinced the Court that continuing independent accounting of these items constitutes an undue burden. There is no evidence in the file that the Trust res has been properly and formally transferred into the conservatorship estate. Moreover, the Court has not been presented with the Trust documents and does not otherwise have sufficient information to determine whether such consolidation is proper, and/or whether there are additional beneficiaries who are entitled to notice of such consolidation.

Related to the foregoing, because the trust assets are not part of the conservatorship estate, the Court finds no grounds for increasing the bond amount at this time. This analysis would change if the trust assets are properly transferred into the conservatorship estate.

Except as provided herein above, the petition is GRANTED. After a review of the matter, the Court finds the Conservator is acting in the best interest of the Conservatee. Thus, the matter is set for further review hearing and an accounting in one year on March 19, 2020, at 8:30 a.m. in Dept. B. All accounting documents must be filed at least 30 days prior to the hearing. The court investigator shall prepare a biennial investigator report for the next hearing date. The clerk is directed to send notice to the parties.

Finally, the Court notes that mail sent by the Court to the Conservator at the address on file has been returned as undeliverable. Counsel for Conservator is to review the address for Conservator in the Court's file and update as necessary.

In the Matter of the Fahey Family Living Trust **18PR000247**

PETITION TO COMPEL ACTIONS BY TRUSTEE; AND TO REMOVE TRUSTEE

APPEARANCE REQUIRED

In the Matter of Janice A. Beard Durable Power of Attorney **19PR000110**

FIRST AND FINAL ACCOUNT AND REPORT OF ATTORNEY-IN-FACT AND PETITION FOR SETTLEMENT OF ACCOUNT

TENTATIVE RULING: GRANT petition.

Conservatorship of Brian Richard Youngblood **26-58904**

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 June 8, 2021, at 8:30 a.m. in Dept. A. The court investigator shall prepare a biennial investigator report for the next hearing date. The clerk is directed to send notice to the parties.

CIVIL LAW & MOTION CALENDAR – Hon. Monique Langhorne, Dept. B (Historic Courthouse) at 8:30 a.m.

Nicole Riedel et al. v. Patrick Elliott-Smith et al. **18CV000524**

TENTATIVE RULING: The Court, on its own motion, cancels the filing of the Second Amended Cross Complaint. The motion to strike is GRANTED. Cross-Defendant's request for attorneys' fees is GRANTED in the amount of $750. The demurrer is SUSTAINED WITH 10 DAYS' LEAVE TO AMEND.

SECOND AMENDED COMPLAINT

In response to the present motions, Cross-Complainants filed, without leave of Court, a Second Amended Cross-Complaint (SACC). Through their opposition, they claim that both demurrer and motion to strike are rendered moot by their filing (the SACC). (Opposition Brief at 2:7-25.) The SACC was improperly filed, and therefore the matters raised by the present motions remain at issue.

Cross-Complainants claim they were entitled to file the SACC, without leave, pursuant to Code of Civil Procedure section 472. That section provides that, "a party may amend its pleading once without leave of the court at any time before the answer, demurrer, or motion to strike is filed, or after a demurrer or motion to strike is filed but before the demurrer or motion to strike is heard if the amended pleading is filed and served no later than the date for filing an opposition to the demurrer or motion to strike." (Code Civ. Proc. § 472.) That section, however, cannot be relied upon by a party to *further* amend an already amended pleading. (*Hedwall v. PCMV, LLC* (2018) 22 Cal.App.5th 564, 575. "[U]nder section 472, the right to amend a cross-complaint as a matter of right is…limited to the original version of the cross-complaint.") Cross-Complainants filed the original cross-complaint in October, 2018, which Cross-Defendant answered in December, 2018. Cross-Complainants then obtained leave of Court and filed a First Amended Cross-Complaint on March 15, 2019. Pursuant to the holding in *Hedwell v. PCMV, LLC*, section 472 does not provide the right to further amend the Cross-Complaint without leave of court.

Because Cross-Complainants did not obtain the Court's leave to file the SACC, it was not filed in conformity with the law. The Court hereby exercises its discretion pursuant to Code of Civil Procedure section 436, subdivision (b) and cancels the filing of the SACC, thereby striking it entirely.

BACKGROUND

This case arises out of a dispute between neighboring residential property owners. The moving party here, Cross-Defendant Nicole Riedel, filed the initial complaint against her neighbors Patrick and Linda Elliot-Smith asserting causes of action relating to the properties, including trespass, breach of contract, and negligence. The Elliot-Smiths filed a cross-complaint against Ms. Riedel, asserting claims for trespass, negligence, nuisance, and intentional and negligent infliction of emotional distress. The dispute relates, in part, to Ms. Riedel's use of an alleged easement over the Elliot-Smith's property, and in additional part, to the Elliot-Smith's allegedly improper application of water on their uphill property, and its (alleged) drainage onto Ms. Smith's property.

Following Ms. Riedel's filing of an answer to the Cross-Complaint, the parties stipulated to, and the court granted the Elliot-Smith's leave to file an amended cross-complaint. It is this "First Amended Cross-Complaint," filed March 15, 2019 (FACC), that is at issue in the present motions.

[1] SPECIAL MOTION TO STRIKE PURSUANT TO ANTI-SLAPP STATUTE

As an initial matter, a party may not evade a special motion to strike pursuant to the anti-SLAPP statute, by filing an amended pleading while the motion is pending. (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1294.) The Court therefore rejects the Elliot-Smith's contention that the present motion is rendered moot by the filing of the SACC.

The FACC sets forth claims that, while somewhat vague, center on allegations that Ms. Riedel made "unfounded and false allegations and complaints to Napa County and the California Water Board regarding Cross-Complainants' vineyards and ponds." (FACC at 8:13-20.)

Cross-Defendant moves for an order, pursuant to California's anti-SLAPP statute, striking each of the Elliot-Smiths' claims that are based on the above-alleged activity (communications with Napa County and/or the California Water Board.)

Pursuant to the anti-SLAPP statute, "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech…shall be subject to a special motion to strike, unless the court determines…there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1).) Analysis of an anti-SLAPP special motion to strike involves a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 669.) The moving party bears the burden of demonstrating that the complained of act or acts were taken "in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue." (Code Civ. Proc. § 425.16, subd. (b)(1), *Peregrine Funding, Inc.*, *supra* at 669.) Where the court finds the moving party has made such a showing, the burden then shifts to the pleading party to show a probability of prevailing on the claim. (*Id.*)

The California Supreme Court has clearly articulated how the Court is to undertake the foregoing analytical approach in cases, like this one, in which one or more numbered "causes of action" asserted in the pleading at issue contain both claims that are and claims that are not based on protected activity. (*See Baral v. Schnitt* (2016) 1 Cal.5th 376, 396.)

> "At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the [pleading party] to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the [pleading party's] showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the [pleading party] has shown a probability of prevailing." (*Id*.)

The anti-SLAPP statute "shall be construed broadly" so that "abuse of the judicial process" does not chill "continued participation in matters of public significance." (Cal. Code Civ. Proc. § 425.16, subd. (a).) Claims based on communications with public agencies seeking, "official investigations into perceived wrongdoing, which might culminate in…official proceedings" are activities protected pursuant to the statute. (*Salma v. Capon* (2008) 161 Cal.app.4th 1275, 1286.)

The Cross-Complaint alleges as follows:

> "Cross-Complainants are informed and believe and thereon allege that, as recently as November 2018, Ms. Riedel has and continues to make unfounded and false allegations and complaints to Napa County and the California Water Board regarding Cross-Complainants' vineyards and ponds. These false allegations have and continue to interfere with Cross-Complainants' water rights applications made to the California Water Board, preventing the approval of said applications and causing Cross-Complainants further financial and emotional distress." (FACC at 8:13-20.)

> "Since 2006 and continuing, Cross-Defendants, and each of them, have caused Cross-Complainants severe emotional distress by her acts, including but not limited to those acts described in paragraphs 12-24 above. Cross-Defendants' intentional harassment is ongoing and relentless. For example, as recently as November 2018, Cross-Defendant made false and unfounded allegations to the California Water Board with the intent to interfere With Cross-Complainants' pending water rights applications, thereby preventing said applications' approval,

and intentionally causing Cross-Complainants undue emotional and financial distress." (FACC at 13:18-26.)

The Court finds that Ms. Riedel has met her burden of showing that the complained of activity, "complaints to Napa County and the California Water Board," are communications with public agencies seeking "official investigations into perceived wrongdoing, which might culminate in…official proceedings," and therefore activities protected pursuant to the statute. (*See Salma v. Capon*, *supra*, 161 Cal.App.4th at 1286.)

Based on such showing, the analysis switches to the second phase in which the Elliot-Smiths bear the burden of showing a probability of prevailing on their claims. (*See Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, *supra*, 133 Cal.App.4th at 669.) They must do so by demonstrating that "each challenged claim based on protected activity is legally sufficient and factually substantiated." (*Baral v. Schnitt*, *supra*, 1 Cal.5th at 396.)

The Elliot-Smiths fail to make such a showing. They argue that "unfounded and false" accusations and complaints are not protected by the anti-SLAPP statute, and as a result, Ms. Riedel's motion fails. (Opposition Brief at 3:25-4:8.) However, they fail to produce evidence sufficient to show that the communications were "unfounded and false." The only evidence submitted is a statement in the Declaration of Cross-Complainant Patrick Elliott-Smith asserting, "Ms. Riedel's reports to the California Water Resources Control Board that I had diverted water to or from my ponds to the West of her Easement was and is absolutely false." (Elliott-Smith Decl. at 2:15-16.) Cross-Complainant's conclusory statement does not constitute evidence sufficient "to sustain a favorable judgment" on the claims based on the protected activity. (*See Peregrine Funding, Inc. v. Sheppard Mulling Richter & Hampton LLP*, *supra*, 133 Cal.App.4th at 669.)

The Elliot-Smiths contend that because their *allegation* in the FACC is that the complaints were unfounded and false, it is therefore the moving party's burden to show that they were not. The Court does not find any support for the argument that an artfully crafted pleading can in this manner shift to the moving party the burden of showing a likelihood of proving that the complained-of-communications were true. Especially where, as here, the pleading does not clearly identify the communications and complaints that are alleged to be wrongful.

For the foregoing reasons, Cross-Defendant's special motion to strike is GRANTED. The Court orders the following stricken from the FACC (and, subject to the order on Demurrer, any subsequent amended cross-complaint): Paragraph 24 at 8:13-20 in its entirety; and the following language in paragraph 56 at 13:20-25, "For example, as recently as November 2018, Cross-Defendant made false and unfounded allegations to the California Water Board with the intent to interfere with Cross-Complainants' pending water rights applications, thereby preventing said applications' approval, and intentionally causing Cross-Complainants undue emotional and financial distress." The Court further orders stricken from the FACC, and any subsequent amended cross

complaint, each and every claim for relief, by Cross-Complainants, based on the facts alleged in the stricken passages. To clarify, as noted above, the Court finds that each of the enumerated "causes of action" involve multiple claims. As such, the Court is not striking any of the numbered causes of action. Rather, the Court orders that no cause of action in the FACC or any subsequent cross-complaint may be based on the foregoing, stricken allegations.

Because Cross-Defendant has prevailed on her motion to strike, she is entitled to her reasonable attorneys' fees and costs. (Code Civ. Proc. § 425.16, subd. (c).) The Court finds the hourly rate of $150.00 and the time spent (5 hours) reasonable, denies Cross-Defendant's request for a lodestar multiplier, and awards Cross-Defendant attorneys' fees in the amount of $750, plus costs incurred in bringing the motion to strike.

[2] DEMURRER

A demurrer is treated as "admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Comm. on Children's Television, Inc. v. Gen. Foods Corp.* (1983) 35 Cal.3d 197, 213-14.) In reviewing a demurrer, the court must "construe the allegations of a complaint liberally in favor of the pleader." (*Skopp v. Weaver* (1976) 16 Cal.3d 432, 438.)

The Court finds that the grounds for demurrer asserted by Cross-Defendant are meritorious. Cross-Complainants effectively concede by failing to raise any substantive opposition to the demurrer, and further through their improper effort to file a Second Amended Cross-Complaint. Based on the foregoing, Cross-Defendant's demurrer to the Second, Third, Fourth, Fifth and Eight Causes of Action in the FACC is SUSTAINED.

It is generally an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The Court finds, based on the totality of circumstances that it is reasonably possible for Plaintiffs to cure the defects through amendment. Therefore, Cross-Defendant's demurrer is SUSTAINED WITH 10 DAYS' LEAVE TO AMEND.

Manuel Torres v. Rodolfo Daquioag, et al. **18CV001429**

DEMURRER TO THE COMPLAINT

TENTATIVE RULING: The notice of motion does not provide notice of the Court's tentative ruling system as required by Local Rule 2.9. Defendant's counsel is directed to contact plaintiff's counsel forthwith and advise plaintiff's counsel of Local Rule 2.9 and the Court's tentative ruling procedure. If defendant's counsel is unable to contact plaintiff's counsel prior to the hearing, defendant's counsel shall be available at the hearing, in person or by telephone, in the event plaintiffs' counsel appears without following the procedures set forth in Local Rule 2.9.

Defendant Rodolfo Daquioag's demurrer to the first cause of action for negligence and second cause of action for premises liability on the ground of uncertainty is OVERRULED. An uncertainty demurrer is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures. (See *Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.) A demurrer for uncertainty should only be sustained when the complaint is so bad that the defendant cannot reasonably respond. (*Id*.) Here, the complaint is certain enough to allow defendant to understand the nature of the allegations, and the theory of liability in order to fashion an appropriate response.

Defendant Rodolfo Daquioag's demurrer to the first cause of action for negligence and second cause of action for premises liability on the ground of failure to state sufficient facts is SUSTAINED WITH LEAVE TO AMEND. Plaintiff Manuel Torres has not alleged a duty or breach of that duty to maintain the claims. Moreover, factual allegations regarding defendant's relationship, if any, to the corporate defendant are necessary. The Court disagrees with defendant that additional factual allegations are required as to the condition of the property. Plaintiff specifically alleges the step he fell on had "poor lighting conditions that were not properly maintained," and the step was "poorly lit."

If plaintiff elects to do so, he shall file his first amended complaint within 10 calendar days of service of notice of entry of order.