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JAN 03 2025
K. BEKER CLERK OF THE COURT
SUPERIOR COURT OF CALIFORNIA
COUNTY OF CONTRA COSTA
By M. Macapinlac, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

In re	)	Case no. P23-01010
	)	
THE PETER AND JOAN E. AVENALI LIVING TRUST dated April 19, 1988, as restated on March 3, 2006.	)	***NUNC PRO TUNC* ORDER RE: MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, SUMMARY ADJUDICATION**

The "Motion for Summary Judgment or, in the Alternative, Summary Adjudication" (the "Motion") came regularly for hearing on December 3, 2024, in Department 30 of the above-captioned court, the Hon. Virginia M. George, presiding. Benjamin K. Riley, Esq., appeared on behalf of Respondents Marianna A. Schaefer ("Marianna")[1] and Michael C. Avenali ("Michael") (collectively, the "Respondents"). Azita Rahim, Esq.,[2] appeared on behalf of Petitioner Hillary Avenali Cash ("Petitioner"). After reading the papers and considering the argument of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED AS FOLLOWS:

I.

STATEMENT OF FACTS

A. Family Data.

Peter Avenali ("Peter") was born on November 5, 1918, and died July 30, 2014. Peter's wife, Joan Avenali ("Joan") was born on September 12, 1918, and died on February 9, 2023. (Peter and Joan are collectively referred to herein as the "Settlors"). The Settlors had three children of their marriage. The oldest child, Peter J. Avenali ("Cado") was born on October 31,

[1] First names are used in this Order for convenience only. No disrespect is intended.
[2] As indicated more fully below in the recitation of the procedural history of this matter, Petitioner retained new counsel after this matter was taken under submission

1946, and died on December 27, 2008. The Settlors' second child is Marianna, who was born on June 23, 1948. The Settlors' youngest child is Michael, who was born on April 29, 1956.

The Settlors also had four grandchildren. Two of their grandchildren are Cado's children, namely Petitioner and Joshua Avenali ("Joshua"). Joshua died in August of 2005. The Settlors' other two grandchildren are Marianna's children, namely Christopher and Katherine, neither of whom are involved in this matter as parties at all.

B. The Avenali Living Trust.

1. *The Original Trust and First Restatement.*

The Settlors originally executed the Peter and Joan E. Avenali Living Trust (the "Original Trust") on April 18, 1988, the terms of which are not pertinent to this Motion. They subsequently executed a First Amendment and Complete Restatement of Trust (the "First Restatement") on September 7, 1993. The Settlors then executed four amendments to the First Restatement on January 26, 1995, September 12, 2001, December 19, 2001, and December 15, 2003, respectively.[3] As amended, the most relevant terms of the First Restatement are as follows:

- The Settlors were the original co-trustees of the Trust, followed by the survivor of them. After the death of the surviving Settlor, Marianna and Michael are appointed as successor co-trustees, followed by the survivor of them (First Restatement, Art. 8.1).
- The Settlors were the original lifetime beneficiaries of the Trust during their joint lifetimes.
- Following the death of the first Settlor to die, the Trust assets are to be divided and allocated into two subtrusts. The surviving Settlor's share of the community property is to be allocated to Trust A (First Restatement, Art. 2.1). Upon the death of the first Settlor to die, Cado and his wife Ruth Avenali, Mariana and her husband Edward, Michael and his wife Marilyn, and all of the Settlors' grandchildren are each to receive assets valued at 2% of the value of the deceased spouse's share of the community property, provided that the spouses of the

[3] The First, Second and Third Amendments to the First Restatement were all revoked by the Fourth Amendment to the First Restatement (executed on December 15, 2003).

Settlors' children must still be married to a child in order to receive a distribution (Fourth Amendment to First Restatement, Art. 2.2.a). Thereafter, Trust B is to be funded with the deceased Settlor's assets having a value equal to the unused balance of the Federal Generation Skipping Tax exemption (First Restatement, Art. 2.2.b). Any balance remaining of the deceased Settlor's community property interest is to be funded into Trust A (First Restatement, Art. 2.2.c).

- Upon the death of the surviving Settlor, the remaining assets of Trust B are to be distributed in equal shares to each of the Settlors' grandchildren except for the share allocated to Cado's son, Joshua Avenali, which shall be held in further trust for his benefit (Fourth Amendment to First Restatement, Art. 3.3).
- After the death of the surviving Settlor, the assets of Trust A are to be distributed as follows: (a) all personal property is to be distributed equally among the Settlors' children (Fourth Amendment to First Restatement, Art. 4.1.a); (b) real property located in Napa Valley is to be distributed in equal shares to Marianna and Michael (Fourth Amendment to First Restatement, Art. 4.1.b); (c) the rest of the Trust A estate is to be divided into as many shares as there are living and deceased children of the Settlors. If Cado, Marianna or Michael are then living, their shares are to be distributed outright. If any of the children predecease the surviving Settlor, then that child's share is to be distributed to their surviving issue by right of representation (Fourth Amendment to First Restatement, Art. 4.1.b).
- The Trust remained revocable during the joint lifetimes of both Settlors. After the death of the first Settlor to die, Trust A remained revocable, while Trust B became irrevocable (First Restatement, Art. 7.1). After the death of the surviving Settlor, all trusts became irrevocable (First Restatement, Art. 7.2).

2. *The Second Restatement.*

On March 3, 2006, the Settlors executed the Second Complete Amendment and Restatement of Trust Agreement (the "Second Restatement"). It is important to note that the Second Restatement was executed while Cado was still alive, but after Joshua's death. The Second Restatement was amended twice by the Settlors on October 14, 2011, and February 8,

2012, respectively. The Second Restatement and its two amendments were also drafted by Attorney Roosevelt at the Settlor's instruction. The most relevant terms of the Second Restatement are as follows:

- The Settlors were the original co-trustees of the Trust, followed by the survivor of them. After the death of the surviving Settlor, Marianna and Michael are appointed as successor co-trustees, followed by the survivor of them (Second Restatement, Art. 7.2-7.3).
- The Settlors were the original lifetime beneficiaries of the Trust during their joint lifetimes (Second Restatement, Art. 1).
- Following the death of the first Settlor to die, the Trust assets are to be divided and allocated into two subtrusts. The surviving Settlor's separate property and her share of the community property (known as Share One) is to be allocated to Trust A (Second Restatement, Art. 2.1.a). The remaining Trust property, made up of the deceased Settlor's separate property and his share of the community property, is known as Share Two.
- From Share Two, any interest in real property located in Napa Valley is to be allocated to Trust A, unless the surviving settlor disclaims the property, in which case the property is to be distributed outright to Marianna and Michael (Second Restatement, Art. 2.1.b.1). The trustee is then directed to allocate an amount equal to the deceased settlor's unused Federal Generation Skipping Transfer Tax exemption and use that allocation to fund Trust B. (Second Restatement, Art. 2.1.b.2). Anything remaining from Share Two that does not fund Trust B is to be added to Trust A. (Second Restatement, Art. 2.1.b.3).
- Following the death of the surviving Settlor, all of the Settlors' tangible personal property is to be distributed to their surviving children equally (Second Restatement, Art. 3.5.a). Any interest in the Napa Valley real property owned by Trust A is to be distributed equally to Marianna and Michael (Second Restatement, Art. 3.5.b). 4% of the remaining value of Trust A is to be distributed each to the California Academy of Science and the University of California Berkeley Foundation. (Second Restatement, Art. 3.5.c-3.5.d). The rest

of Trust A is to be divided into as many equal shares as there are living children of the Settlors and one share for a predeceased child of the Settlors. If Cado, Marianna or Michael are then living, then their shares are to be distributed outright. If either Marianna or Michael predecease the surviving Settlor, then that predeceased child's share is to be distributed outright to their children by right of representation. If Cado predeceased the surviving Settlor, then his share is to be further divided into two shares, with one share distributed equally to Cado's children and one share distributed equally to Michael and Marianna. (Second Restatement, Art. 3.5.e).

- Following the death of the surviving Settlor, any assets remaining in Trust B are to be distributed outright to the Settlors' grandchildren. (Second Restatement, Art. 4.3).
- The Trust remained fully revocable and amendable during the lifetimes of both Settlors. (Second Restatement, Art. 8.1). After the death of the first Settlor to die, the terms of Trust A remained revocable (Second Restatement, Art. 3.4) while the terms of Trust B became irrevocable (Second Restatement, Art. 8.2).

As relevant here, the First Amendment to the Second Restatement (which was executed after Cado's death) modified Article 2.1.b.1 to provide that any interest in the Napa Valley real property allocated to Share Two is to be distributed outright to Marianna and Michael instead of adding it to Trust A. (First Amendment to Second Restatement, Art. 2.1.b.1). It also modified Article 3.5.c to change the percentage gifts to the California Academy of Sciences and to the University of California Berkeley Foundation following the surviving Settlor's death. (First Amendment to Second Restatement, Art. 3.5.c-3.5.d).

Finally, the Second Amendment to the Second Restatement amended Trust A to provide that, upon the death of the surviving Settlor, the assets of Trust A are to be divided into three equal shares, one for each of Cado, Marianna and Michael. (Second Amendment to Second Restatement, Art. 3.5.e). Marianna's and Michael's shares are to be distributed to them outright. (Second Amendment to Second Restatement, Art. 3.5.e.i-3.5.e.ii). Cado's share is to be further divided into two equal subshares, with one subshare distributed outright to Cado's children and one subshare distributed outright and equally to Marianna and Michael. (Second Amendment to

Second Restatement, Art. 3.5.3.iii). In addition, Trust B was amended so that, after the death of the surviving Settlor, the assets of Trust B are to be distributed outright to Marianna's children, Christopher Schaefer and Katherine Roberts. (Second Amendment to Second Restatement, Art. 4.3).

It is important to note that the residual distribution of Trust A is identical in substance between the original Second Restatement and the Second Amendment to the Second Restatement. In other words, as operative here, upon Joan's death, Petitioner is entitled to a one-sixth remainder interest in the assets of Trust A, which Marianna and Michael split the remaining five-sixths of those assets, under both the Second Restatement and the Second Amendment to the Second Restatement. It is also important to note that all of the above-described documents were executed by *both* Settlors while they were both alive. Joan never amended Trust A after Peter's death as she was allowed to do.

3. *Summary of Facts Related to the Execution of the Trust Documents*.

During his life, Peter was a longtime partner and chairman of Dodge & Cox, a leading San Francisco investment and wealth management firm. During his time at Dodge & Cox, Peter was an expert in investing and managing financial resources. Peter retired as chairman of Dodge & Cox in 1993 at the age of 75.

Both the Original Trust and First Restatement were drafted by the Settlors' counsel at the Heller Ehrman firm. Following the execution of the First Restatement and sometime in approximately 1993, attorney Michael Roosevelt, who at the time was also an attorney at Heller Ehrman, became the Settlors' regular estate planning attorney. He remained the Settlors' estate planning attorney throughout the remaining years of their lives. Mr. Roosevelt drafted all four amendments to the First Restatement; the Second Restatement and its three amendments, all of which are described above.

Petitioner and Respondents submit a litany of facts, some material, some not, some admissible, some not, in support of and in opposition to this Motion. Those facts put together would make this Statement of Facts far too complicated to make this Order meaningful to the parties. Therefore, the court will discuss the material facts submitted by the parties in the context of each cause of action alleged by Petitioner in the court's legal analysis of this Motion.

4. *Procedural History*.

Petitioner filed her "Verified Petition for Order to Invalidate Second Restatement and Amendments Thereto" (the "Petition") on June 1, 2023. The Petition "only seek[s] to invalidate the Portion of the Trust related to [Joan's] interest. The interest related to Peter Sr. is irrevocable and cannot be challenged at this time." Petition, ¶ 17. The primary overall claim made by Petitioner is that the Second Restatement and its two subsequent amendments are all invalid. Petitioner's primary allegation is that the Settlors intended to leave for her a full one-third interest in the residue of Trust A following Joan's death rather than a one-sixth interest, as it currently stands under both the Second Restatement and its Second Amendment. The Petition alleges five causes of action: (1) undue influence; (2) fraud; (3) intentional interference with right to inherit; (4) mistake; and (5) lack of mental capacity.

Respondents filed the instant Motion on February 26, 2024. On May 30, 2024, Petitioner filed her Opposition to the Motion. As part of that Opposition, Petitioner requested a continuance of the original June 13, 2024, hearing on the Motion pursuant to Code of Civil Procedure § 437c(h) so that Petitioner could procure additional evidence from Petitioner's step-mother, Ruth Avenali, concerning the receipt of an equalizing cash gift to Cado in lieu of an interest in property located in Napa County. The court granted this continuance request to September 26, 2024, with briefing limited to newly-discovered evidence to be filed by September 12, 2024. At the same time, the court requested briefing from the parties concerning the court's intent to dismiss on its own motion the Third Cause of Action for intentional interference (see Part II.C., *infra*).

Thereafter, on June 28, 2024, Petitioner's counsel moved to be relieved as counsel. That Motion was originally scheduled to be heard on December 10, 2024, well after the date that the hearing on this Motion was rescheduled at Petitioner's request. On July 29, 2024, Petitioner's counsel, Mr. Rueppel, applied *ex parte* for an order advancing his firm's Motion to be Relieved as Counsel to a date *before* continued September 26, 2024, hearing on this Motion. Respondents opposed this Application. The court denied this Application on August 2, 2024.

Thereafter, on September 12, 2024, Petitioner's counsel, Mr. Rueppel, filed a Declaration requesting an additional continuance pursuant to Code of Civil Procedure § 437c(h), this time in order to obtain documents pursuant to a subpoena directed to Charles Schwab that was attached

to the Declaration. Respondents objected to this request for a further continuance. The court ultimately granted this request. The tentative ruling stated, among other things, that the hearing on this Motion would be continued to December 3, 2024. The tentative ruling required Petitioner to submit further briefing on the issue described in Mr. Rueppel's Declaration not later than November 1, 2024. The tentative ruling also stated, "THE COURT DOES NOT CONTEMPLATE ANY FURTHER CONTINUANCES OF THIS MATTER [capitalization in original]."

On October 31, 2024, Mr. Ruppel filed a Declaration notifying the court that no further documents would be forthcoming in opposition to the Motion because the custodian of records for Charles Schwab submitted an affidavit of no records in response to the subpoena. In response, Respondents filed a Declaration from their counsel on November 1, 2024, requesting that this matter be heard on the current record and that the Motion be granted.

This Motion was regularly heard as previously continued at Petitioner's request on December 3. There were no filings concerning anything in this matter between November 1, 2024, and the date of the hearing. Petitioner's counsel, Ms. Rahim, indicated that she was prepared to argue the merits of the Motion. Attorney Seth Skootsky, Esq., appeared at the hearing as an "observer", apparently contemplating that he might replace Petitioner's then-current counsel at some future date. However, at that time, Petitioner's counsel of record was the Johnston, Kinney & Zulaica LLP firm, and their Motion to be Relieved as Counsel was still pending a decision on December 10. Argument on this Motion took place, and the matter was taken under submission for decision by the court.

Thereafter on December 6, 2024, *after the Motion had been taken under submission*, Petitioner filed (1) a Substitution of Attorney, substituting Mr. Rueppel's firm for Mr. Skootsky's firm (Skootsky & Der LLP); and (2) "Hillary Avenali Cash's Proposed Sur-Reply in Opposition to Motion for Summary Judgment/Summary Adjudication". In addition, on December 9, 2024, Petitioner filed "Declaration of Hillary Avenali Cash in Support of Proposed Sur-Reply in Opposition to Motion for Summary Judgment/Summary Adjudication". Petitioner's documents filed on December 6 and 9 request that the court withdraw its order that the Motion is under submission, that the hearing be continued so that Petitioner's new counsel can come up to speed on this matter, and that the court consider the Sur-Reply and authorize

Respondents' counsel to file responsive briefing. Respondents filed their Objection to these documents on December 9, 2024. The court's ruling on these requests is set forth immediately below.

II.

LEGAL DISCUSSION

A. Petitioner's Late Requests are Denied.

A hearing on the status of the Petition took place as previously scheduled on December 10, 2024. At that hearing, the court ordered that Petitioner's late requests in connection with this Motion are denied. That order is confirmed here. The court does not consider any of Petitioner's filings submitted on December 6 or 9 (other than to note the existence of the Substitution of Attorney) or Respondents' response thereto.

B. Evidentiary Objections.

1. *Petitioner's Objections*.

Petitioner submitted objections to Respondents' evidence submitted in support of the MSJ. The court's rulings on those objections are as follows:

Compendium of Exhibits, Exh. 2: OVERRULED.

Compendium of Exhibits, Exh. 6: OVERRULED.

Compendium of Exhibits, Exh. 8: OVERRULED.

Compendium of Exhibits, Exh. 9: OVERRULED.

Compendium of Exhibits, Exh. 10: OVERRULED.

Compendium of Exhibits, Exh. 12: SUSTAINED.

Declaration of Marianna A. Schaefer, p.3:1-9: SUSTAINED.

Declaration of Marianna A. Schaefer, ¶ 12, p.3:19-28: OVERRULED IN PART as to the phrase "I was not asked for my input on or suggestions about the trust documents or their provisions and provided no such input and suggestions." The objection is otherwise SUSTAINED.

Declaration of Marianna A. Schaefer, ¶ 13, p.4:1-6: OVERRULED.

Declaration of Marianna A. Schaefer, ¶ 17, pp.4:24-5:1: OVERRULED.

Declaration of Marianna A. Schaefer, p.5:3-4: SUSTAINED.

Declaration of Marianna A. Schaefer, p.5:16-18: OVERRULED.

Declaration of Marianna A. Schaefer, p.5:23-26: SUSTAINED.

Declaration of Marianna A. Schaefer, pp.5:27-6:2: OVERRULED.

Declaration of Michael A. Roosevelt, p.3:1-2: OVERRULED.

Declaration of Michael A. Roosevelt, p.7:17-22: OVERRULED.

Declaration of Michael A. Roosevelt, p.3:20-25: OVERRULED.

Declaration of Michael A. Roosevelt, p.4:1-5: OVERRULED.

Declaration of Michael A. Roosevelt, p.4:20-22: OVERRULED.

Declaration of Michael A. Roosevelt, p.5:1-2: SUSTAINED.

Declaration of Michael A. Roosevelt, p.5:19-21: OVERRULED.

Declaration of Michael A. Roosevelt, p.6:3-4: OVERRULED.

Declaration of Michael A. Roosevelt, p.6:4-7: SUSTAINED.

Declaration of Michael A. Roosevelt, p.6:9-10: OVERRULED.

Declaration of Michael A. Roosevelt, p.6:12-22: OVERRULED.

Declaration of Michael A. Roosevelt, p.6:23-26: OVERRULED.

Declaration of Michael A. Roosevelt, p. 6:27-7:2: OVERRULED.

Declaration of Michael A. Roosevelt, p.7:6-14: OVERRULED.

Declaration of Michael A. Roosevelt, p.8:1-6: OVERRULED.

Declaration of Michael A. Roosevelt, ¶¶ 29-30, p.8:11-22: OVERRULED.

Declaration of Michael A. Roosevelt, p.8:26-28: OVERRULED.

Pursuant to Code of Civil Procedure § 437c(q), the court does not rule on the evidentiary objections not specifically stated above as they are not material to the court's ruling.

2. *Respondents' Objections*.

In their Reply, Respondents raised objections to the evidence submitted by Petition in opposition to the MSJ. The court's rulings on those objections are as follows:

Objection no. 1: SUSTAINED.

Objection no. 2: SUSTAINED (irrelevant).

Objection no. 3: SUSTAINED (irrelevant).

Objection no. 4: SUSTAINED.

Objection no. 5: SUSTAINED (irrelevant).

Objection no. 6: SUSTAINED.

Objection no. 7: SUSTAINED IN PART as to the sentence "If he had received a cash payment related to his share of the Napa Valley property, he wouldn't have been shocked and sad when he heard Michael's story." Otherwise, OVERRULED.

Objection no. 8: SUSTAINED (insufficient foundation).

Objection no. 9: SUSTAINED (irrelevant). The conversation at issue was too remote in time (sometime in 2021) in relation to the execution date of the last amendment to the Second Restatement, which was in 2012.

Objection no. 10: SUSTAINED (irrelevant). The conversation at issue was too remote in time (sometime in 2021) in relation to the execution date of the last amendment to the Second Restatement, which was in 2012.

Objection no. 11: SUSTAINED.

Objection no. 12: OVERRULED.

Objection no. 13: OVERRULED.

Objection no. 14: SUSTAINED.

Objection no. 15: SUSTAINED as to "In 2011, my grandfather suffered a serious fall, likely because of a stroke. Medical records indicate that he was mentally incompetent . . ." Otherwise, OVERRULED.

Objection no. 16: SUSTAINED.

Objection no. 18: SUSTAINED IN PART as to "I assumed she was frustrated at the amount of care they required. Marianna lived close to my grandparents and visited them regularly, to pay their bills, open their mail, and other chores while keeping me and the rest of the family apprised of their health. My grandparents relied on Marianna for all financial chores such as bill paying." Otherwise, OVERRULED.

Objection no. 19: SUSTAINED (irrelevant).

Objection no. 20: SUSTAINED.

Objection no. 21: OVERRULED.

Objection no. 22: SUSTAINED. There is no dispute between the parties as to what the terms of Second Restatement and its two amendments are. Furthermore, no party alleges the existence of any ambiguity in the Second Restatement or its two amendments that would require the admission of extrinsic evidence in order to interpret them. Therefore, the court will interpret

those documents on its own and as a matter of law. Gardenhire v. Superior Court (2005) 127 Cal. App. 4th 882, 888 ("The interpretation of a written instrument, even though it involves what might properly be called questions of fact [citation], is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect.").

Objection no. 23: SUSTAINED.

Objection no. 24: SUSTAINED.

Objection no. 25: SUSTAINED.

Objection no. 26: SUSTAINED.

Objection no. 27: SUSTAINED.

Pursuant to Code of Civil Procedure § 437c(q), the court does not rule on the evidentiary objections not specifically stated above as they are not material to the court's ruling.

C. General Rules Governing Summary Judgment and Summary Adjudication.

Summary judgment is governed by Code of Civil Procedure section 437c (applicable to Probate matters by Probate Code section 1000). "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843. A party may move for summary judgment in an action where it is contended that the action as a whole has no merit. Code of Civ. Proc. § 437c(a)(1). The ultimate result of the granting of a summary judgment motion is a final, appealable judgment.

Alternatively, a party may move for summary adjudication as to one or more causes of action within an action if it is contended that there is no merit to the cause of action. Code of Civ. Proc. § 437c(f)(1). Summary adjudication will only be granted if it completely disposes of a cause of action. *Id.* Summary adjudication motions proceed in all procedural respects as a motion for summary judgment. Code of Civ. Proc. § 437c(f)(2).

Respondents may move for summary judgment or summary adjudication if they claim that the petitioner's action (or a cause of action stated therein) lacks merit and that they are entitled to judgment as a matter of law. Code of Civ. Proc. § 437c(a). The moving parties meet their burden to show that the action lacks merit if they show "that one or more elements of the

cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action." Code of Civ. Proc. § 437c(o), (p)(2).[4]

If the respondents seek to demonstrate that the action or a cause of action cannot be established, they must produce evidence that conclusively negates an essential element of the cause of action as a matter of law. Aguilar, *supra* at 853; Teselle v. McLoughlin (2009) 173 Cal. App. 4th 156, 176. Alternatively, they may produce evidence showing that the petitioner cannot establish at least one element of the cause of action by demonstrating that they do not have and cannot reasonably obtain evidence to support the claim. Aguilar, *supra* at 254; Gaggero v. Yura (2003) 108 Cal. App. 4th 884, 891; Teselle, *supra*. Respondents show that the petitioner does not have and cannot reasonably obtain evidence to support her claim by propounding extensive discovery and discovers nothing. Aguilar, *supra* at 855; Gaggero, *supra*.

The moving parties carry the initial burden to make a *prima facie* showing of the absence of a triable issue. Aguilar, *supra* at 850. The evidence submitted in support of the motion must be admissible evidence. Code of Civ. Proc. § 437c(d). However, the court does not consider evidence to which an objection has been made and sustained. Code of Civ. Proc. § 437c(c). Once the initial burden of production is met by the moving parties, the burden shifts to the petitioner to show that a triable issue of one or more material facts exists as to the cause of action. Code of Civ. Proc. § 437c(p)(2).

The court must view all evidence presented in a summary judgment motion in the light most favorable to the non-moving party. Aguilar, *supra* at 843. When examining the sufficiency of the evidence, the court must strictly construe the moving party's evidence and liberally construe the non-moving party's evidence. D'Amico v. Board of Med. Examiners (1974) 11 Cal.3d 1, 21; Grant-Burton v. Covenant Care, Inc. (2002) 99 Cal. App. 4th 1361. However, a party may not rely on their own pleadings on summary judgment, even if verified. See College Hospital, Inc. v. Superior Court (1994) 8 Cal.4th 704, 720.

All admissible declarations and testimony must be accepted as true and the court may not deny summary judgment or summary adjudication based on the credibility of witnesses. Code of

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[4] Petitioner argues in Opposition to the MSJ that any argument as to the existence of any affirmative defenses is waived because no such argument is contained in the Motion. The MSJ does not argue that any affirmative defense renders any cause of action without merit, but instead argues that Petitioner cannot establish at least one element of the causes of action in the Petition. Therefore, Petitioner's argument on this point is moot.

Civ. Proc. § 437c(e); Trujillo v. First American Registry, Inc. (2007) 157 Cal. App. 4th 628, 632 (disapproved on other grounds). Furthermore, the assertion that the moving party's declarations are self-serving is not enough to prevent summary judgment in the absence of controverting evidence. *Id.* at 636.

The trial court on a motion for summary judgment applies the following three-step analysis in reaching its decision: (1) the court first identifies the issues framed by the pleadings; (2) the court determines whether the moving party has established facts sufficient to negate the opponent's claim and justify a judgment in the moving party's favor; and (3) if so, the court determines whether the opposition demonstrates that a triable issue of material fact exists. Tahoe Vista Concerned Citizens v. County of Placer (2000) 81 Cal. App. 4th 577, 587-588.

D. The Third Cause of Action is Dismissed With Prejudice.

The Third Cause of Action alleges a cause of action for Intentional Interference with Expectation of Inheritance pursuant to Beckwith v. Dahl (2012) 205 Cal. App. 4th 1039. This MSJ was originally scheduled for hearing on June 13, 2024. Petitioner's original Opposition to the MSJ included a request to continue the hearing pursuant to § 437c(h) in order to obtain further discovery in support of her Opposition, which the court granted pursuant to the court's tentative ruling. At the same time, the court made the following further tentative ruling:

> In addition, on its own motion pursuant to Code of Civil Procedure § 436(b) and Probate Code §§ 17202 and 17206, the court intends to dismiss with prejudice Petitioner's Third Cause of Action for Intentional Interference with Expectation of Inheritance. Before the court dismisses this cause of action, Petitioner is ordered to file a supplemental brief explaining why this cause of action should not be dismissed. In briefing this issue, Petitioner is directed to focus her attention to the language in Beckwith v. Dahl (2012) 205 Cal. App. 4th 1039, 1052, 1056, that the tort of intentional interference is only available "if it is necessary to afford an injured plaintiff a remedy." It appears clear that Petitioner has an adequate remedy under the Probate Code: the standing to seek to invalidate the Trust at issue here. Petitioner's supplemental brief on this issue shall be filed and served not later than September 12, 2024. Respondents' response to the supplemental briefing is due to be filed and served not later than September 20, 2024. Supplemental briefing on this issue is limited to 5 pages for both parties.

On September 12, 2024, Petitioner's counsel submitted a further Declaration that requested a further continuance of the hearing on the MSJ pursuant to § 437c(h), which the court again granted. However, Petitioner did not provide any supplemental briefing concerning the Third Cause of Action by the deadline required by the court. As reflected above, the issue concerning the Third Cause of Action was purely legal and independent of any additional discovery that could shed any light on the validity of Petitioner's claim. Therefore, in the absence of any briefing by Petitioner, the court finds that Petitioner has an adequate remedy under the Probate Code for redress of her claims (i.e., she has the legal standing to petition to invalidate the Second Restatement, as amended, pursuant to Probate Code § 17200)[5], making a cause of action for Intentional Interference unavailable to her. Therefore, pursuant to Code of Civil Procedure § 436(b) and Probate Code §§ 17202 and 17206, Petitioner's Third Cause of Action is DISMISSED WITH PREJUDICE.

E. As a Matter of Law, the Petition May Be Fatally Flawed.

Before addressing the arguments in the Motion, the court must at least discuss and consider an issue that was not directly raised by the parties, but may, as a matter of law, be determinative of the Petition. There is across-the-board agreement on all sides that (1) the Second Amendment to the Second Restatement was the last trust instrument executed by the Settlors, either individually or collectively (see UMF no. 21); both settlors signed the Second Restatement and its two amendments; (Respondents' Exh. 3-5; Opp'n Exh. 38-39); Trust B became irrevocable upon Peter's death in 2014 (Petition, ¶¶ 17, 49); Petitioner actually received her distribution from Trust B in 2015 (UMF 185); and Trust B is now incontestable (Petition, ¶¶ 17, 49).

There are two larger issues that face the court that may tend to make the Petition entirely unsupportable. The first issue is whether or not Petitioner's burden on her remaining claims for undue influence, fraud, mistake and lack of capacity requires her to prove that *both* Settlors were unduly influenced by Marianna into executing the three documents at issue; were defrauded into executing those documents; mistakenly executed all three documents; or lacked the requisite mental capacity to execute all three documents. As stated above, *both* Settlors executed all three documents. Joan did not amend Trust A after Peter's death, as she was allowed to do. The terms

[5] See also Barefoot v. Jennings (2020) 8 Cal.5th 822.

of Trust A also do not depend on who died first. In other words, the challenged residuary clause in Trust A applies regardless of which Settlor died first. Therefore, because the Trust instruments at issue here were *joint* instruments in the truest sense of the word, it stands to reason that it would require proof related to *both* Settlors, not just Decedent, in order for Petitioner to be successful in any of her remaining claims.

The second related issue is the impact of the admitted facts that Trust B became irrevocable after Peter's death in 2014, is now incontestable and that Petitioner has received her distribution from Trust B. The particular fact that Trust B is now incontestable leads to the more-than-reasonable inference that Peter validly executed not just Trust B, but the *entire* Second Restatement and both amendments thereto. For Petitioner to allege, for example, as she does in this Motion, that Peter lacked the mental capacity to execute *any* document at issue here (see, e.g., UMF no. 189) is impermissibly inconsistent with the notion that Trust B is incontestable. Furthermore, for example, *if* Petitioner is required to prove that *both* Settlors lacked capacity in order to be successful, and *if* Peter's mental capacity is presumed by virtue of the incontestability of Trust B, then under no circumstances can Petitioner successfully demonstrate a triable issue of fact in this Motion or prevail in any case at trial as a matter of law.

However, for purposes of this Motion, the court does not need to rely on or even resolve these unraised issues in order to make its ruling. The facts as set forth in the moving and opposition papers provide a sufficient basis to rule.

F. The Petition Only Alleges Wrongdoing Against Marianna.

The pleadings frame the issues that are to be decided by the court. Tahoe Vista Concerned Citizens v. County of Placer, *supra*. In fact, the court's first duty is to determine the issues to be decided by reviewing the petition itself. *Id.* In opposition to the MSJ, Petitioner states: "All of Respondents' arguments, for whatever reason, relate only to Marianna's actions, but the Motion for Summary Judgment purports to ask for judgment regarding Michael as well. Because Respondents have not argued that Michael was uninvolved in the actions alleged in the petition, summary judgment cannot be granted." Opp'n MPA, ¶ 32. This argument misconstrues the substance of the Petition, which *only* alleges wrongdoing against Marianna.

To begin, only the first three of the five causes of action (namely undue influence, fraud and intentional interference, respectively) depend on proving wrongdoing by someone. The

fourth and fifth causes of action for mistake and lack of mental capacity, respectively, require proof of facts related to one or both Settlors' states of mind at the time the challenged documents were executed separate from any action taken by any other person. Thus, allegations of wrongdoing by anyone in connection with the fourth and fifth causes of action are not material at all to the outcome of this MSJ. See R. of Ct. 3.1350(a)(2) ("'Material facts' are facts that relate to the cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion and that could make a difference in the disposition of the motion.")

The allegations of wrongdoing in the Petition are very specific. They state that "On information and believe [*sic.*], Marianna actively participated in the preparation and execution of the Second Restatement and later amendments." Petition, p.8:9-11. The language of the first two causes of action is more explicit:

> 54. On information and belief, the Purported Second Restatement and amendments thereto were executed **as a direct result of undue influence exerted by Marianna.** On information and belief, **Marianna was in confidential relationship with Decedent and Peter Sr. Decedent relied on Marianna to handle her bills and her day-to-day activities.**
>
> 55. On information and belief, **Marianna actively participated in the preparation of the Purported Second Restatement and amendments thereto.** At the time of the execution of Purported Second Restatement and amendments thereto, Decedent and Peter Sr. were of extremely advanced age. They lived at the Towers and were in constant need of assistance and care due to their declining age. Consequently, both Decedent and Peter Sr. were extremely susceptible to the undue influence of others.
>
> . . .
>
> 57. Under the common law of undue influence, these allegations are sufficient to raise a presumption of undue influence, **and Marianna now bears the burden of proving that the Purported Second Amendment was not the product of undue influence exerted by them over Decedent**.
>
> . . .
>
> 60. As is noted above, on information and belief, **Marianna was in a confidential relationship with the Decedent, actively**

> **participated in the procurement of the Purported Second Restatement, and unduly profited from its execution**. As such, a presumption arises that the purported Trust was the result of fraud.

Petition, ¶¶ 54-55, 57, 60, 63-65 (emphasis added, citations omitted).[6] There is nothing alleging wrongdoing by Michael anywhere in the Petition. In construing a pleading, the court looks to the substance of the allegations, not the headings or titles, with a view towards substantial justice between the parties. Code of Civ. Proc. § 452; McDonald v. Filice (1967) 252 Cal. App. 2d 613, 622 ("It is an elementary principle of modern pleading that the nature and character of a pleading is to be determined from its allegations, regardless of what it may be called, and that the subject matter of an action and issues involved are determined from the facts alleged rather than from the title of the pleadings or the character of the damage recovery suggested in connection with the prayer for relief. [Citations omitted.]"). The fact that the causes of action may have been against "All Respondents" in the headings does not mean that there was any wrongdoing alleged against Michael, as argued by Petitioner in opposition to this Motion.

Furthermore, substantial justice, fundamental fairness and due process considerations require that Petitioner make allegations *against Michael* in her Petition (even upon information and belief) so that he has basic notice of any claims against him. Absent such allegations, Michael has no basis upon which to even answer the Petition and conduct discovery, much less to present evidence to support any summary judgment motion. Therefore, the court rejects this argument and will look to whether a triable issue of material fact exists as to Marianna's conduct only, to the extent that her conduct is relevant to the analysis of any individual cause of action.

G. The Motion is Granted as to the Undue Influence Cause of Action.

A common law presumption of undue influence attaches when a contestant proves that: 1) the person actively participated in the actual preparation or execution of the will; 2) a confidential relationship existed between the testator and the person alleged to have exerted influence; and 3) the person unduly profited by virtue of the testamentary instrument. Rice v. Clark (2002) 28 Cal.4th 89, 96-97; Estate of Sarabia (1990) 221 Cal. App. 3d 599. Conversely, in order to succeed on summary judgment, Respondents need only to demonstrate the absence of a triable issue of material fact as to *any one* of those elements. In establishing proof of undue

[6] Petitioner's allegations in connection with her (now dismissed) third cause of action for Intentional Interference also has allegations of wrongdoing against Marianna only. See Petition ¶¶ 64-65, 68-69.

influence in the absence of direct evidence, circumstantial evidence is permitted "so long as the evidence raises more than a mere suspicion that undue influence was used." Estate of Franco (1975) 50 Cal. App. 3d 374, 382. Furthermore, in order for Petitioner to prevail at trial on her undue influence cause of action, she must demonstrate facts to support all three elements "at the very time the will was made." Estate of Lingenfelter (1952) 38 Cal.2d 571, 586.

In this case, Respondents argue that no triable issue of material fact exists as to whether Marianna actively participated in the preparation of the Second Restatement and its two amendments. The proof needed to establish active participation in connection with undue influence was described in Estate of Fritschi (1963) 60 Cal.2d 367, 376 (emphasis added), as follows:

> The procurement of a person to witness the will or of an attorney to draw it does not itself constitute active participation in the preparation of the will. Thus the court in Estate of Bould (1955) 135 Cal.App.2d 260, states: "That activity must be in the preparation of the will. Estate of Lombardi, 128 Cal.App.2d 606, 612, quotes Estate of Burns, 26 Cal.App.2d 741, as follows: '". . . where one who unduly profits by the will as a beneficiary thereunder sustains a confidential relation to the testator, and has actually participated in procuring the execution of the will, the burden is on him to show that the will was not induced by coercion or fraud. . . . However, the confidential relation alone is not sufficient. **There must be activity on the part of the beneficiary in the matter of the preparation of the will.'" Some incidental activity in the execution, rather than the preparation of the will, is not enough to swing the burden**. . . ." (P. 275.) (To the same effect: Estate of Holloway (1925) 195 Cal. 711; Estate of Hull (1944) 63 Cal.App.2d 135; Estate of Ausseresses (1960) 178 Cal.App.2d 487.)

The following facts in this MSJ are undisputed: The Settlors executed the Original Trust on April 18, 1988. UMF 14. They then executed the First Restatement on September 7, 1993. UMF 15. The Original Trust and the First Restatement were drafted for the Settlors by a previous attorney at the Heller Ehrman firm. UMF 16. From 1993 onwards, attorney Michael Roosevelt drafted all of the Settlors' subsequent trust documents. UMF 17. Mr. Roosevelt drafted the amendments to the First Restatement. UMF 18. Mr. Roosevelt drafted the Second Restatement as instructed by the Settlors. UMF 19. Mr. Roosevelt then drafted the First

Amendment of the Second Restatement and Second Amendment to the Second Restatement. UMF 20. There were no subsequent amendments to the Second Restatement. UMF 21. As described in detail above, the Second Restatement, as twice amended, provides that the residue of Trust A is to be allocated and distributed one-third to Michael, one-third to Marianna, one-sixth to Petitioner, and one-sixth equally to Michael and Marianna. UMF 31.[7] In addition, Respondents' discovery requests concerning this cause of action produced factually devoid responses. UMF 74-76.

Most importantly, however, are the undisputed facts that Attorney Roosevelt received his drafting instructions for the Second Restatement and both amendments thereto solely from the Settlors (see, e.g., UMF no. 36) and that Marianna affirmatively denies any effort to provide any terms to those documents (see UMF nos. 65, 67, 68). While Petitioner asserts that those facts are "disputed", the evidence provided in support of those purported disputes are either largely inadmissible (see e.g., UMF no. 67) or do not amount to a genuinely disputed fact (see UMF no. 65).

Petitioner claims that there are material disputes of material fact concerning how many meetings Marianna attended concerning the estate plan. See UMF nos. 57-60. Petitioner argues that a material disputed fact exists because, while Mr. Roosevelt states that Marianna attended one meeting concerning the Settlors' estate plan before Peter died, Marianna contradicts that statement by testifying during her deposition that she attended one meeting before Peter died and another meeting after Peter died.[8] This purported disputed fact does not make it "material" and sufficient to justify denying this Motion as to this claim. There is nothing in this excerpt from Marianna's deposition that tends to demonstrate or even allow for a reasonable inference that she actively participated in the drafting of any of the challenged Trust documents. Furthermore, none of Petitioner's evidence demonstrates that this fact is material at all because, assuming that there were two meetings as alleged by Petitioner, the first meeting took place in May of 2014, approximately two years *after* the Second Amendment to the Second Restatement was executed.

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[7] While there is a detailed description of the dispositive terms of Trust B, those terms are not material to this issue. As discussed above, Petitioner expressly states in her Petition that she does not contest the terms of Trust B.

[8] Petitioner's response to Respondents' Separate Statement cites Marianna's deposition transcript p.28:18-22 in support of the purported dispute to UMF 57-60. In point of fact, the cited excerpt from Marianna's deposition does not support Petitioner's claim. All this excerpt states is that the purpose of a meeting at the Towers before Peter's death was to clarify what would happen after Peter's death. There is no contradiction between Marianna's testimony and the facts stated at UMF 57-60.

There is no reasonable inference that Marianna could have actively participated in the drafting of the Second Amendment (or any other Trust document) based on this meeting because the document *was already drafted.* Any other meeting subsequent to that meeting before Peter died is entirely inconsequential to the issue of undue influence because none of the terms of the Trust ever changed after 2012.

With regard to purported disputes concerning Mr. Roosevelt's declaration at UMF no. 36 that he took drafting instructions from the Settlors, Petitioner states "It is unknown at this stage of litigation if the instructions for the Second Restatement were provided by Peter and Joan to Mr. Roosevelt or the level of Marianna's involved [*sic.*]." Apparently, this statement refers to Paragraph 15 Mr. Rueppel's Declaration (Opp'n Exhibit 43) which states: "At this stage of litigation, discovery is ongoing. Petitioner has yet to depose Michael Roosevelt the estate planning attorney." The fact that Petitioner has not yet deposed Mr. Roosevelt (particularly without any cogent reason as to why) has no bearing on the evaluation of the MSJ, and she fails to take that deposition at her own peril. Pursuant to Code of Civil Procedure § 437c(e), "summary judgment shall not be denied. . .for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment". To put it bluntly, if Petitioner wanted to challenge Mr. Roosevelt's statements submitted in support of the MSJ, she should have deposed him before filing her Opposition or at least *immediately* requested a continuance to do so by the time her Opposition was initially due. She did neither, again, at her own peril.

Finally, Petitioner argues generally (and more specifically with regard to her mistake cause of action) that the court should exercise its discretion to deny the Motion pursuant to Code of Civil Procedure § 437c(e) if the only proof of a material fact offered in support is a declaration made by an individual who was the sole witness to that fact. While Petitioner does not argue that summary judgment or adjudication should be denied on this basis on the undue influence cause of action, it bears mention that the court would not exercise this discretion if requested. First, the undisputed fact that Mr. Roosevelt received his instructions from the Settlors is not solely established by him. Marianna also declares without dispute that she did not provide any direction, guidance or input to the creation of the Second Restatement or either of its amendments. Therefore, the discretion provided by § 437c(e) is not available.

Furthermore, assuming for the sake of argument that Mr. Roosevelt's Declaration was the only evidence provided in support of this fact, the court still would not exercise this discretion and deny the Motion in the absence of facts provided by Petitioner as to *why* Mr. Roosevelt was not deposed to support the Opposition. Even though the court is prohibited from assessing credibility of witnesses on summary judgment (see Code of Civ. Proc. § 437c(e)), it has long been the rule that the drafting attorney's testimony concerning the execution of a testamentary instrument is entitled to great weight, though is not conclusive on this issue. Wilkin v. Nelson (2020) 45 Cal. App. 5th 802, 811 (quoting Estate of Goetz (1967) 253 Cal. App. 2d 107, 114). To request that the court deny summary judgment or summary adjudication pursuant to § 437c(e) where no effort was made to depose Mr. Roosevelt prior to the hearing on this Motion strikes the court as an example of procedural unclean hands that cannot be condoned.

Thus, for these reasons, the Motion is granted as to the undue influence cause of action.

H. The Motion is Denied as to the Fraud Cause of Action.

At trial on the issue of whether a testamentary instrument is to be invalidated based on fraud, the Petitioner has the same burden of proof as she would if she were seeking to invalidate a contract in a civil matter. Estate of Newhall (1923) 190 Cal. 709, 719. In a fraud cause of action, Petitioner bears the burden of proving (1) a false representation or concealment of a material fact susceptible of knowledge; (2) made with knowledge of its falsity or without sufficient knowledge on the subject to warrant a representation; (3) with the intent to induce the person to whom it is made to act on it; (4) and an act by that person in justifiable reliance on the representation; (5) to that person's damage. South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 Cal. App. 3d 750, 765. For purposes of summary judgment litigation, a respondent need only negate one of those elements in order to obtain a favorable order.

Respondents' Motion with respect to this cause of action is problematic for two reasons. First, as stated above, the court's first duty in evaluating a summary judgment motion is to review the Petition and determine the issues. In reviewing the Petition in this case, Petitioner's cause of action is facially-defective. Fraud is one of the few causes of action that must be pled with particularity. Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 216; Philipson & Simon v. Gulsvig (2007) 154 Cal. App. 4th 347, 363; Estate of

Streeton (1920) 183 Cal. 284. There are no allegations in the Petition that recite any specific facts in support of any element of the fraud cause of action. The only allegation of substance is at Paragraph 59, which states:

> On information and belief, after a reasonable opportunity for further investigation and discovery, it will be found that the Purported Second Restatements and amendments thereto were obtained as a result of fraud.

While Respondents could have challenged this cause of action by demurrer or motion for judgment on the pleadings, they chose not to, which is their right. However, on this Motion, where all inferences are to be indulged in favor of the non-moving party, the court must assume *for purposes of this MSJ only* that there is a triable issue of fact that the Second Restatement and its two amendments were obtained as a result of fraud.

Second, with regard to the Motion itself, both the Separate Statement and the Points and Authorities treat the first and second causes of action as a single issue. Fraud and undue influence causes of action are distinct, each with different essential elements. Notwithstanding the fact that the pleading of the fraud cause of action is defective, it is still up to the moving party on a summary judgment motion to demonstrate that the Petitioner does not have and cannot obtain evidence to support at least one essential element of *each* cause of action. Code of Civ. Proc. § 437c(p)(2). While the Separate Statement and Points and Authorities effectively demonstrate the absence of a triable issue on the undue influence cause of action, it does not even discuss any of the elements of a fraud cause of action. In the face of an obviously defective pleading, the moving parties must still, for example, provide proof of extensive discovery directed specifically to Petitioner's support for her fraud cause of action (e.g., the statement(s) that Marianna allegedly made to the Settlors that was false) and, to be successful, provide factually devoid discovery responses. In other words, just because the court finds the absence of a triable issue on the undue influence claim does not necessarily mean that the fraud claim also fails. Each claim must be evaluated individually. Because Respondents failed to demonstrate the inability of Petitioner to support an essential element on the fraud claim necessarily means that Respondents failed to meet their initial burden of proof on this Motion. Therefore, the Motion is denied as to this cause of action.

I. The Motion is Granted as to the Mistake Cause of Action.

The Fifth Cause of Action in the Petition for mistake alleges, in pertinent part, that

> Decedent and Peter Sr. could not and did not understand and fully comprehend that the Second Restatement and Amendments thereto would result in an unequal distribution to all their children, and they did not intend said results. To the extent that Decedent and Peter Sr. believed that the Second Restatement and Amendments thereto would benefit Marianna and Michael over Peter Jr., they executed the Amendments as a result of mistake in fact and/or law. Given Decedent and Peter Sr.'s cognitive deficit and age, it is highly unlikely that they were aware of the effects of the Second Restatement and Amendments thereto.

Petition, ¶ 71. In order to prevail at trial on her mistake cause of action, Petitioner must prove by clear and convincing evidence (1) the existence of a mistake in the drafting of the instrument *and* (2) the testator's actual and specific intent at the time the instrument was drafted. Wilkin v. Nelson (2020) 45 Cal. App. 5th 802, 810 (quoting Estate of Duke (2015) 61 Cal.4th 871, 890).

In this case, Respondents have established that there is no triable issue of material fact as to the mistake cause of action. As with the undue influence cause of action, there is no triable issue of material fact as to Mr. Roosevelt's taking drafting instructions from the Settlors at all times. It also bears noting that the dispositive provisions for the residue of Trust A in the Second Restatement (which was executed while Cado was still alive) and the Second Amendment to the Second Restatement (executed after Cado's death) are *functionally identical*. There is nothing presented by Petitioner to indicate that the Settlors' consistent decision to distribute the residue of Trust A with one-sixth going to Petitioner was anything other than a knowing, conscious decision over a six-year period.

Petitioner's Opposition to the MSJ misses the mark as to this cause of action on multiple fronts. First, Petitioner argues that the court should exercise its discretion pursuant to Code of Civil Procedure § 437c(e) and deny the MSJ because it is based solely on the observations of a single witness, namely Mr. Roosevelt. Opp'n MPA, ¶ 48. The court expressly declines to exercise that discretion, particularly where Petitioner made the apparently conscious decision to not depose Mr. Roosevelt, who is arguably the most important non-party witness in this case (see Wilkin, *supra* at 811), and present evidence that could undermine his testimony.

Second, Petitioner references Peter's (but not Joan's) mental condition as evidence of a mistake. Opp'n MPA, ¶ 49. As is referenced above and is more fully discussed below, the court cannot and will not consider the CPMC medical records because those records are inadmissible. See Respondents' Evidentiary Objection nos. 25-27, *supra*; see also Code of Civ. Proc. § 437c(c) ("the court shall consider all of the evidence set forth in the papers, *except the evidence to which objections have been made and sustained by the court* [emphasis added]"). Thus, to the extent that Petitioner's Opposition is based on Peter's mental condition, Petitioner has failed to raise a triable issue.

Third, the MSJ and, consequently, Petitioner's Opposition focuses in part on Marianna's involvement (or lack thereof) in the creation of the Second Restatement and its two amendments. See UMF nos. 135-141. Candidly, Marianna's involvement is not at all material to evaluating whether the Second Restatement and its two amendments were the product of mistake *by Peter and Joan*. Specifically, none of the facts presented by Petitioner in response to Respondents' Separate Statement give rise to a triable issue of fact by clear and convincing evidence of either a mistake in the drafting of the instrument or of Peter's and Joan's specific intent that differed from that contained in the residuary clause of Trust A in either the Second Restatement or the Second Amendment thereto.

Finally, Petitioner raises the fact that she was given annual gifts from her grandparents during the period from 2002 through 2012 as evidence of a mistake. Opp'n Exh. 1-22; Opp'n MPA ¶ 49. As stated above, Petitioner's burden of proof at trial is to demonstrate not only the existence of a mistake, but also facts to demonstrate the *actual specific intent* of the Settlors at the time of execution of the challenged instrument, all by clear and convincing evidence. While undisputed, the fact that these annual gifts were made to Petitioner does not raise a triable issue as to whether a mistake was made in the drafting or execution of the documents at issue. At best, this evidence demonstrates the Settlors' specific intent to make *inter vivos* gifts, not testamentary gifts.

Furthermore, in the absence of additional, far more compelling, evidence, no inference (reasonable or otherwise) can be drawn to indicate the existence of any mistake in the drafting of the Trust instruments. To the contrary, the fact that the Settlors made these cash gifts to Petitioner during this period, and at the same time executed the Second Restatement (which

includes the residual clause in Trust A, *confirms* a conscious decision to make a testamentary gift to Petitioner of one-sixth of the residue of Trust A.

Therefore, the Motion is granted as to this cause of action.

J. <u>The Motion is Granted as to the Lack of Capacity Cause of Action</u>.

Finally, the Petition alleges that Joan lacked the requisite mental capacity to execute the Second Restatement and its two subsequent amendments. In this regard, Paragraph 73 of the Petition states "On information and believe [*sic*], *Decedent* lacked the mental capacity to understand the 2006 Restatement and later amendments. [Emphasis added.]" In addition, Paragraph 76.b. of the Petition states:

> On information and belief, *Decedent* did not have sufficient mental capacity to:
>
> i. Understand the consequences of the Second Restatement and Later Amendments;
>
> ii. Understand the nature of her actions;
>
> iii. Understand and recollect the nature and situation of her property; and/or
>
> iv. Remember and understand her relations to her family members. [Emphasis added.]

Before turning to the merits of the Motion on this cause of action, the court must first determine the appropriate legal standard to apply regarding Joan's mental capacity. Under <u>Anderson v. Hunt</u> (2011) 196 Cal. App. 4th 722, the applicable standard for requisite mental capacity to execute a trust depends on the nature of the document under attack. If the instrument under attack "closely resembles a will or codicil" (*id.* at 731), then the mental capacity standard set forth in Probate Code § 6100.5 applies. Otherwise, the higher measure of testamentary capacity of Probate Code §§ 810 *et seq*. applies.

The Motion argues that regardless of which standard applies, the Motion must be granted on this cause of action because Petitioner has not produced and cannot produce any evidence to demonstrate any triable issue as to Joan's mental capacity at the time she executed the Second

Restatement and its two amendments.[9] Surprisingly, Petitioner does not address the applicable standard at all in her Opposition brief, nor does her Petition take a position as to which standard applies, though the above-quoted language mirrors the legal standard for testamentary capacity. At the hearing on this Motion, Respondents' counsel argued that the proper legal standard is the standard for testamentary capacity. The court agrees, particularly because the specific provision that is challenged, namely the residuary bequest set forth in Trust A, is testamentary in nature.

Probate Code § 6100.5(a) states:

> (a) An individual is not mentally competent to make a will if, at the time of making the will, either of the following is true:
>
> (1) The individual does not have sufficient mental capacity to be able to do any of the following:
>
> (A) Understand the nature of the testamentary act.
>
> (B) Understand and recollect the nature and situation of the individual's property.
>
> (C) Remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will.

As quoted above, the Petition only alleges that Joan lacked the mental capacity to execute the Second Restatement and both of its amendments.

Of the 70 facts listed in the Separate Statement in connection with this cause of action (UMF nos. 151-221), Petitioner responded by claiming 33 of those facts are "disputed". Of those 33 "disputed" facts, twelve of Petitioner's responses mainly focused on *Peter's* mental capacity, not Joan's, making these facts immaterial. See Opp'n UMF nos. 154-155, 183, 187-189, 192-194, 198, 204, 205. Another 18 of Petitioner's "disputed" facts are not material to the issue of Joan's mental capacity under Probate Code § 6100.5 at all (e.g., Opp'n UMF nos. 169, 174, 181, 186, 190, 195, 202, 203, 206-210, 212, 213, 215-217).

The remaining three facts alleged by Petitioner, UMF nos. 191, 214 and 218, do not raise a triable issue of fact as to Joan's mental capacity to execute any of the documents at issue here.

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[9] The court agrees with Respondents that only Joan's mental capacity is relevant to this Motion and the Petition in general. See MPA, n.9. Since Trust B is now incontestable by Petitioner's own admission, Peter is presumed to be mentally competent at all relevant times.

As for UMF no. 191, Paragraph 26 of Petitioner's Declaration (Opp'n Exh. 41) is vague as to when the statements attributed to Joan took place. This is critically important because Petitioner carries the burden of proof at trial to demonstrate that Joan lacked the mental capacity to execute each document *at the time they were executed.* Estate of Fritschi (1963) 60 Cal.2d 367, 372. Furthermore, this fact is insufficient to create a triable issue of material fact because proof of isolated incidents of forgetfulness, foibles mental irregularities or departures from the normal is insufficient to demonstrate lack of capacity unless they bear directly on the testamentary act. Estate of Woehr (1958) 166 Cal. App. 2d 4, 17. In addition, Marianna's e-mail cited in response to UMF no. 191 (Opp'n Exh. 25) is far too remote in time in relation to the execution of the Second Amendment to the Second Restatement (more than two years, from February 2012 to March 2014) to be material. Furthermore, it bears noting that this e-mail is entirely irrelevant to whether Joan had the mental capacity to execute the Second Restatement, which was executed in 2006, but had the very same residual distribution scheme as the Second Amendment to the Second Restatement.

As for UMF no. 214, Petitioner's response does not raise a triable issue of material fact. Paragraph 28 of Petitioner's Declaration and Exhibit 28 calls into question *Peter's* mental capacity, which is not challenged in the Petition, making this fact immaterial. The same is true with regard to Petitioner's Exhibit 23, which is a short e-mail thread concerning *Peter's* admission to the skilled nursing facility at the Towers. It has no bearing on *Joan's* mental capacity, which is the only matter at issue in this cause of action. Thus, nothing alleged in response to UMF no. 214 by Petitioner raises any triable issue of material fact.

Finally, Petitioner's response to UMF no. 218 similarly fails to raise a triable issue. The primary gist of Petitioner's response is a conversation between Joan and Petitioner in 2021[10] to the effect that Joan believed that Cado received $8 to $10 million for a presumed interest in the Napa property. As mentioned above, this conversation, regardless of whether it took place in 2021 or 2023, is far too remote in time to be material as to whether Joan lacked the mental capacity to execute any of the contested documents, the last of which was executed *nine years* prior. This evidence becomes even less material if it is intended to demonstrate a lack of Joan's

[10] Petitioner's Response to UMF 218 states that this conversation occurred in 2023, but Paragraph 8 of Petitioner's Declaration (Opp'n Exh. 41) states that it took place "in June and July of 2021".

mental capacity to execute the Second Restatement, which was executed in 2006 (*fifteen* years prior to the date that this conversation apparently took place) and includes the very same residual disposition in Trust A that is included in the Second Amendment that Petitioner claims is invalid.

In the end, UMF nos. 192 through 194 by themselves establish the absence of a triable issue of material fact on this cause of action. Respondents' evidence supports the existence of first-hand, personal knowledge from Mr. Roosevelt that (1) "Joan…appeared to fully understand, share, and intend all foe financial and estate planning instructions they gave [him]"; (2) "Joan always seemed to understand exactly what assets they owned and what Mr. Roosevelt told him"; and (3) "Joan always appeared fully competent". All of Petitioner's evidence in response is either inadmissible or is focused on *Peter's* mental capacity, which is not material based on the allegations in the Petition. Therefore, the Motion will be granted as to this cause of action.

III.

CONCLUSION

Therefore, for the foregoing reasons, the Motion for Summary Judgment is DENIED. On the court's own motion, the Third Cause of Action in the Petition is DISMISSED WITH PREJUDICE. The alternative Motion for Summary Adjudication is GRANTED IN PART AND DENIED IN PART. As to the First, Fourth and Fifth Causes of Action, summary adjudication is GRANTED. As to the Second Cause of Action, summary adjudication is DENIED.

This Order is *nunc pro tunc* as of December 20, 2024.

IT IS SO ORDERED.

Date: 01/02/2025

Hon. Virginia M. George
Judge of the Superior Court