

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

Department 1, Honorable Jacqueline Duong, Presiding
Mai Jansson, Courtroom Clerk

191 North First Street, San Jose, CA 95113
Telephone 408.882-2120

**To contest the ruling, call (408) 808-6856 Or Email at
Department1@scscourt.org before Noon**

PROBATE LAW AND MOTION TENTATIVE RULINGS

DATE: November 12, 2024 TIME: 1:30PM

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	20PR187498	Soyla M. Farrell Living Trust	Click on LINE 1 or scroll down for attached Tentative Ruling.

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PROBATE LAW AND MOTION TENTATIVE RULINGS

LINE 2			Click on LINE 2 or scroll down for attached Tentative Ruling.
LINE 3			Click on LINE 3 or scroll down for attached Tentative Ruling.
LINE 4			
LINE 5			
LINE 6			

Line 1

Case Name: *In re: The Soyla M Farrell Living Trust*

Case Nos: 20PR187498

Petitioner Michael J. Farrell (“Petitioner”) filed this action against Respondents Stefan Farrell and Donald Farrell regarding amendments to the will and trust of Soyla Farrell (“Decedent”) that were allegedly fraudulently induced. Respondent Donald Farrell (“Respondent”) now brings a motion for judgment on the pleadings (“JOP”) as to Petitioner’s first amended petition¹ (“FAP”).

I. BACKGROUND

According to the allegations in the FAP, Petitioner and Respondent are two of Decedent’s four sons. (FAP, ¶ 3.) On May 28, 2014, Decedent executed the Soyla M. Farrell Living Trust (the “Trust”) and a pour-over Last Will and Testament (“2014 Will”). (*Id.* at ¶ 5.) On May 13, 2016, Decedent executed the first amendment to the Trust (the “First Amendment”). (*Id.* at ¶ 7.) After the execution of the First Amendment, Decedent confirmed a promise to Petitioner in a document (the “Document”) granting Petitioner a one-half interest in real property located at 14731 Nelson Way in San Jose, California, a one-quarter ownership interest in real property located at 14310 Lenray Lane in San Jose, California, half of Decedent’s personal belongings, and the return of Petitioner’s personal property that had been in Decedent’s possession. (*Id.* at ¶¶ 8, 9.) On June 22, 2016, Respondent showed Decedent a letter, that included Decedent and Petitioner’s forged signatures, demanding that Respondent pay Decedent \$650,000 for Respondent’s one-half interest in real property located at 14310 Lenray Lane, San Jose, California. (*Id.* at ¶ 11.) On June 30, 2016, Decedent executed a second amendment to the Trust (the “Second Amendment”) and another pour-over Last Will and Testament (the “2016 Will”) that made no provisions for Petitioner. (*Id.* at ¶ 12.) On June 26, 2017, Decedent passed away. (*Id.* at ¶ 13.)

On January 13, 2020, Petitioner filed his original petition (the “Original Petition”). On December 9, 2021, Petitioner filed the FAP, asserting the following causes of action: (1) invalidation of the Second Amendment (2) declaration that the Document constituted a valid amendment to the Trust; (3) fraud by disparagement; (4) fraud by intentional misrepresentation; (5) fraud by negligent misrepresentation; (6) mistake; (7) financial elder abuse; (8) financial elder abuse (undue influence); (9) wrongful taking of property; (10) request for finding that Respondent predeceased Decedent; (11) conversion; (12) unjust enrichment; (13) breach of contract; and (14) restitution. On November 30, 2022, Respondent filed an opposition to the FAP. Respondent filed this JOP motion on August 21, 2024. Petitioner filed an opposition to Respondent’s JOP motion on October 28, 2024. Respondent filed a late reply on November 5, 2024.²

¹ The court notes that the parties also refer to the first amended petition as “amended petition” in certain pleadings. The court therefore refers to the first amended petition as “FAP,” “first amended petition,” or “amended petition” interchangeably.

² Although late-filed, the court exercises its discretion in considering Respondent’s reply.

II. MOTION FOR JUDGMENT ON THE PLEADINGS

A. General Legal Standards

Code of Civil Procedure section 438 provides the statutory framework for a JOP motion. (Code Civ. Proc., § 438, subd. (b)(1).) “The motion provided for in this section may only be made on one of the following grounds: . . . (B) If the moving party is a defendant, that either of the following conditions exist: . . . (i) the court has no jurisdiction of the subject of the cause of action alleged in the complaint. . . . (ii) The complaint does not state facts sufficient to constitute a cause of action against that defendant.” (Code Civ. Proc., § 438, subd. (c)(1)(B).) “The grounds for motion provided in this section shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice.” (Code Civ. Proc., § 438, subd. (d).)

A JOP motion is the functional equivalent of a general demurrer made after the time to demur has expired and more than 30 days before trial. (See Code Civ. Proc., § 438; see also *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999 (*Cloud*); *Shea Homes Limited Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1254 (*Shea*).) “The court accepts as true all material factual allegations, giving them a liberal construction, but does not consider conclusions of fact or law, opinions, speculation, or allegations contrary to law or judicially noticed facts. [Citations.]” (*Shea, supra*, 110 Cal.App.4th at p. 1254.)

As with a demurrer, facts appearing in exhibits attached to the complaint are given precedence over inconsistent allegations in the complaint. (See *Barnett v. Fireman’s Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505 [“[T]o the extent the factual allegations conflict with the content of the exhibits to the complaint, we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader’s allegations as to the legal effect of the exhibits.”].) Also, just as with a demurrer, the court may not consider extrinsic evidence when ruling on a motion for JOP. (See *Sykora v. State Dept. of State Hospitals* (2014) 225 Cal.App.4th 1530, 1534 (*Sykora*), quoting *Cloud, supra*, 67 Cal.App.4th at p. 999 [“Presentation of extrinsic evidence . . . is not proper on a motion for judgment on the pleadings.”].)

B. Discussion

a. Timeliness of the JOP

To the extent that Petitioner argues that the JOP motion itself is untimely, the court disagrees. Petitioner provides no legal support for his argument that Respondent “has waived any argument about the procedural requirements of the Amended Petition” because Respondent “waited until the 11th hour to bring this motion. The Amended Petition has been pending since December 9, 2021, almost 3 years ago.”³ (Opposition, p. 5:5-8.) A JOP motion

³ The court does not find persuasive Petitioner’s cite to California Civil Code section 3513. (See Opposition, p. 1:21.) As noted by Respondent on reply, this code section appears to apply as a defense to enforcement of a contract. (See Reply, p. 2:6-16; Civ. Code § 3513 [“Any one

is the functional equivalent of a general demurrer made after the time to demur has expired and more than 30 days before trial. (See Code Civ. Proc., § 438; see also *Cloud, supra*, 67 Cal.App.4th at p. 999.)

b. California Rule of Court 3.1113

Petitioner correctly notes that a “memorandum that exceeds 10 pages must include a table of contents and a table of authorities.” (See Opposition, p. 2:11-14; Cal. Rules of Court, rule 3.1113(f).) The Court admonishes Respondent for failing to comply with the California Rules of Court but does not find non-compliance in this instance to be a sufficient basis for the court to exercise its discretion and disregard Respondent’s motion in its entirety. Both parties are advised that the court may exercise such discretion in the future if either party fails to comply with the California Rules of Court.

c. Extrinsic Evidence

Petitioner argues that Respondent’s JOP motion “is a disguised motion for summary judgment, violative of the rules regarding notice.” (Opposition, p. 2:15-16.) According to Petitioner, the motion “refers to [two] documents that are not attached to the underlying pleadings” and therefore “Respondent is attempting to turn this motion into one for summary judgment, outside the pleadings.” (*Id.* at p. 2:17-19.)

The court may not consider extrinsic evidence when ruling on a motion for JOP. (See *Sykora, supra*, 225 Cal.App.4th at p. 1534, citing *Cloud, supra*, 67 Cal.App.4th at p. 999 [“Presentation of extrinsic evidence . . . is not proper on a motion for judgment on the pleadings.”].) To the extent Respondent relies on extrinsic evidence in supporting his arguments, the court will not consider it.

d. Meet and Confer

Petitioner contends that Respondent failed to meet and confer in good faith. (Opposition, p. 2:7-9.) Before filing a statutory motion for judgment on the pleadings, the moving party shall meet and confer with the party who filed the pleading “for the purpose of determining if an agreement can be reached that resolves the claims to be raised in the motion . . .” (See Code Civ. Proc., § 439, subd. (a).) The moving party must file and serve a meet and confer declaration stating “the means by which the moving party met and conferred with the party who filed the pleading subject to the motion for judgment on the pleadings, and that the parties did not reach an agreement resolving the claims raised by the motion” or “[t]hat the party who filed the pleading subject to the motion for judgment on the pleadings failed to respond to the meet and confer request of the moving party or otherwise failed to meet and confer in good faith.” (See *ibid.*) However, “[a] determination by the court that the meet and confer process was insufficient shall not be grounds to grant or deny the motion . . .” (See *id.* at subd. (a)(4).)

may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.”].)

Here, Respondent's counsel attests that they "attempted to meet and confer four times by telephone (twice by phone) and by email (thrice by email) with Petitioner's counsel before filing the motion. Petitioner's counsel only responded by email, but did not continue meaningful discussions to resolve the issues raised in the motion before the time file the motion became imminent." (See Declaration of Demurring or Moving Party Regarding Meet and Confer, p. 1:20-23.) The court finds Respondent's meet and confer efforts questionable – Respondent's counsel first reached out to Petitioner's counsel on Thursday, August 15, 2024, Petitioner's counsel appeared to be out of the office until "mid-next week," Petitioner's counsel responded to messages and emails from Petitioner's counsel on Monday, August 19 upon returning to "SF," Respondent's counsel replied on Tuesday, August 20, 2024, and then Respondent filed the JOP on Wednesday, August 21, 2024. (See *id.* at pp. 2-4.)

Nevertheless, "[a] determination by the court that the meet and confer process was insufficient shall not be grounds to grant or deny the motion," and counsel for Respondent attests to the efforts made to meet and confer pursuant to Code of Civil Procedure section 439, subdivision (a)(3), stating that the parties did not continue "meaningful discussions to resolve the issues raised in the motion before the time to file the motion became imminent" after an email exchange and Respondent's counsel's attempts to contact counsel for Petitioner by phone. (See *id.* at subd. (a)(4).) For these reasons, the court declines to deny Respondent's JOP motion on the basis of any purported failures to abide by the meet and confer requirements outlined in Code of Civil Procedure section 439.

e. Timeliness of the FAP

Respondent argues that Petitioner did not timely file the FAP. According to Respondent, on April 16, 2020, Respondent Stefan Farrell filed an objection to the Original Petition before Petitioner filed the FAP on December 9, 2021. (Memorandum of Points and Authorities in Support of Motion for Judgment on the Pleadings ("MPA"), pp. 14:11-12.) Pursuant to Code of Civil Procedure sections 472 and 430.10, Respondent argues that at "the time of the filing of the Amended Petition, there was an Objection filed against the Original Petition. The court docket does not indicate any motion to allow the filing or a consent by the parties. Therefore, the Amended Petition was untimely filed without leave from the court." (*Id.* at pp. 13:25-14:16.)

Petitioner argues in response that "Respondent waited until the 11th hour to bring this motion. The Amended Petition has been pending since December 9, 2021, almost 3 years ago." (Opposition, p. 5:5-6.) Thus, Respondent "has waived any argument about the procedural merits of the Amended Petition" pursuant to California Rule of Court 3.1322, subdivision (b). (*Id.* at p. 5:7-11.) "Respondent could have filed a motion to strike, and had 30 days to do so, but did not. Thus, Respondent lulled Petitioner into believing that the Amended Petition was timely and/or that this was the operative pleading. Indeed, Respondent admits that Stefan Farrell filed an objection to the Amended Petition on November 11, 2022 [citation] almost 2 years ago. Then, the motion indicates that on November 30, 2022, another objection [citation] was filed by the moving party. That is two objections to the same Amended Petition." (*Id.* at p. 5:13-18.)

"The general rules of the Code of Civil Procedure do not apply when the Probate Code provides special rules. In the absence of a special rule, the general rules of practice apply to

matters of procedure in the probate court.” (*Swaithes v. Superior Court* (1989) 212 Cal.App.3d 1082, 1088-1089.) “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. A party may amend the pleading after the date for filing an opposition to the demurrer or motion to strike, upon stipulation by the parties.” (Code Civ. Proc., § 472, subd. (a).)

Petitioner seems to suggest that the proper procedural mechanism to contest the procedural timeliness of the FAP is a motion to strike, and the court agrees. (See Opposition, p. 5:13-14 [“Respondent could have filed a motion to strike . . .”].) A defendant may make a motion for judgment on the pleadings when “(i) the court has no jurisdiction of the subject of the cause of action alleged in the complaint. . . . (ii) The complaint does not state facts sufficient to constitute a cause of action against that defendant.” (Code Civ. Proc., § 438, subd. (c)(1)(B).) Respondent’s timeliness challenge under Code of Civil Procedure section 472 is neither a jurisdictional challenge nor an argument that any of the FAP’s causes of action fail to state sufficient facts. Under Code of Civil Procedure section 436, outlining the grounds for a motion to strike, a court may “strike out any irrelevant, false, or improper matter inserted into any pleading” or “*strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court.*” (See Code Civ. Proc., § 436, emphasis added.)

“Any party, within the time allowed to respond to a pleading may serve and file a notice of motion to strike the whole or any part thereof . . .” (Code Civ. Proc., § 435, subd. (b)(1).) “The term ‘pleading’ means a demurrer, answer, complaint, or cross-complaint.” (*Id.* at subd. (a)(2).) If the court read this motion for judgment on the pleadings as a motion to strike, the motion to strike would be untimely. Petitioner filed the FAP on December 9, 2021, almost three years ago. Respondent filed this motion for judgment on the pleadings on August 21, 2024, well after the “time allowed to respond to a pleading.” Moreover, Respondent filed an objection to the FAP on November 30, 2022.⁴ (See Objection to First Amended Petition to Invalidate Second Amendment to the Soyla M. Farrell Living Trust, filed Nov. 30, 2022.) Respondent has had three years to file a motion to strike and cannot argue that it lacked either the means or awareness to do so, having filed an objection to the FAP two years ago in November 2022.

f. Sham Pleading

Respondent argues that the sham pleading doctrine applies to the FAP for several reasons. First, Respondent argues that the FAP redefines the “Signed Agreement” as a “codicil,” a change from the Original Petition that omits that the Document “could be qualified as an agreement or contract between the Decedent and the Petitioner.” (MPA, p. 8:21-23.) Respondent contends that Petitioner made this change to circumvent the applicable statute of limitations. (*Id.* at p. 8:24-26.) Second, Respondent argues that the FAP “fails to provide a plausible explanation for [this] change in facts.” (*Id.* at p. 9:9-10.) Third, the FAP’s use of the term “codicil” “calls into question the Petitioner’s trustworthiness” and Petitioner “should not be rewarded for abuse of the legal process.” (*Id.* at p. 9:15-20.) Fourth, “although the Original

⁴ The court may take judicial notice of its own records. (Evid. Code § 452, subd. (d).)

Petition is not verified by Petitioner, he signed his declaration under penalty of perjury, where he claims that the Purported Document is a signed agreement, promising repayment, and a written promise . . .” (*Id.* at p. 9:20-22.)

Respondent also argues that, assuming the court agrees with Respondent’s sham pleading argument, the one-year statute of limitations period outlined in Code of Civil Procedure section 366.2 applies here because the Original Petition alleges Decedent owed Petitioner funds in exchange for services allegedly provided by Petitioner. (MPA, pp. 10:1-11:14.) According to Respondent, it “appears that that the original claim would have been a breach of contract claim against the Decedent had she been alive, and the claim was brought timely. Therefore, the original claim in the original pleading is a claim involving the Decedent’s estate since the Decedent passed away when the claim arising in contract accrued or would have accrued. Therefore, the applicable statute of limitations for this claim is one year from the date of death. In this case, Decedent passed away on June 26, 2017. Petitioner filed his Original Petition on July 31, 2020. As such, more than a year passed barring the claim against the Decedent. This claim therefore would have been barred had the Amended Petition not been filed.” (*Id.* at p. 11:7-14.)

Petitioner responds that calling the Document an “agreement versus a codicil is not a ‘fact’ but rather a legal conclusion.” (Opposition, p. 4:18-19.) Furthermore, Petitioner argues that “there is no change in ‘facts’ – the document was attached to both pleadings.” (*Id.* at p. 4:19-20.) According to Petitioner, he “filed the Original Petition within the Section 16061.7 notice period, so this matter is timely. The Amended Petition relates back.” (*Id.* at p. 4:20-21.) Finally, Petitioner contends that “whether the Original Petition was verified or a declaration signed is a distinction without a difference as the Amended Petition was verified. Respondent never moved to strike the Original Petition for lack of verification.” (*Id.* at p. 4:22-24.)

Generally, after an amended pleading is filed, the original pleading is superseded. (*Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946.) Courts will assume the truth of the factual allegations in the amended pleading for purposes of demurrer. (*Owen v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383 (*Owen*).) However, under the sham pleading doctrine, “admissions in an original complaint . . . remain within the court’s cognizance and the alteration of such statements by amendment designed to conceal fundamental vulnerabilities in a plaintiff’s case will not be accepted. [Citations.]” (*Lockton v. O’Rourke* (2010) 184 Cal.App.4th 1051, 1061.) The purpose of the doctrine is to “enable the courts to prevent an abuse of process.” (*Hanh v. Mirza* (2007) 147 Cal.App.4th 740, 751.) “[W]here a party files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings,” the court may examine the prior complaint to ascertain whether the amended pleading is merely a sham. (*Owen, supra*, 198 Cal.App.3d at 384.) “In these circumstances, the policy against sham pleading permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If he fails to do so, the court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint. [Citation.]” (*Ibid.*)

The court does not find persuasive several of Petitioner’s arguments in response to Respondent’s “sham pleading” doctrine contention. The “sham pleading” doctrine does not apply only to “separate actions.” (See *Smyth v. Bennan* (2019) 31 Cal.App.5th 183, 196 (*Smyth*) [sham pleading doctrine applied when factual allegations in third and second amended

complaints were inconsistent with allegations in first amended complaint in same case].) Furthermore, Petitioner argues that the “sham pleading doctrine is not ‘intended to prevent honest complainants from correcting erroneous allegations . . . or to prevent correction of ambiguous facts.’” (Opposition, p. 4:14-16, citing *Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 426 (*Deveny*)). While this may be true, Petitioner provides no explanation as to how the FAP corrects ambiguous facts or erroneous allegations in the Original Petition, and, as Petitioner himself notes, the “party who made the pleadings must be allowed to explain the changes.” (*Id.* at pp. 3:28-4:2, citing *Deveny, supra*, 139 Cal.App.4th at p. 426.)

Nevertheless, as Petitioner points out, the sham pleading applies only to previously pled factual allegations, not to previously pled legal conclusions. (See *Duffey v. Tender Heart Home Care Agency, LLC* (2019) 31 Cal.App.5th 232, 242 fn. 7 [rejecting application of sham pleading doctrine because “whether Plaintiff was an employee is a legal conclusion, not a fact”]; *JPMorgan Chase Bank, N.A. v. Ward* (2019) 33 Cal.App.5th 678, 691 (*Ward*) [describing case law holding that the sham pleading doctrine did not apply when “[t]he allegation of willful misconduct in the earlier complaint was ‘but an allegation of a conclusion’ on a question that was ‘essentially a question of fact.’”].) In *Ward*, the Court of Appeal held that the sham pleading doctrine did not preclude plaintiff from “omitting its allegations of mistake in a reformulated action” and that the trial court erred in sustaining the demurrer on sham pleading grounds without leave to amend. (*Ward, supra*, 33 Cal.App.5th at p. 692.) The complaint in *Ward* “was drafted by prior counsel, and [plaintiff] immediately distanced itself from such allegations in responding to the demurrer. This is not a situation where the proposed amendment impugns the trustworthiness of the pleading; new counsel and further legal research presumably revealed the fallacy of the assumption” in the complaint. (*Ibid.*)

As discussed in *Ward*, the “sham pleading doctrine likewise did not apply in [*Avalon Painting Co. v. Alert Lumber Co.* (1965) 234 Cal.App.2d 178 (*Avalon*)].” (*Ward, supra*, 33 Cal.App.5th at p. 691, citing *Avalon, supra*, 234 Cal.App.2d at pp. 178-185.) “In its original cross-complaint, painting subcontractor Avalon alleged an agency relationship between the paint manufacturer and retailer. This allegation was fatal to its breach of warranty cross-claim against the retailer; a known agent of a disclosed principal could not be liable for warranty breach. [Citation.] Nevertheless, an amended pleading could omit that allegation and simply allege a manufacturer-retailer relationship without triggering the sham pleading doctrine. [Citation.] As the court explained, omitting reference to the agency relationship was not the sort of omission that ‘carries with it the onus of untruthfulness.’ [Citation.]” (*Ibid.*)

“[*Smyth, supra*, 31 Cal.App.5th at pp. 183, 196] offers a useful counterexample. There, the sham pleading doctrine prevented the plaintiffs from making a factually inconsistent allegation in their second and third amended complaints where there was no plausible explanation for the change. [Citation.] In earlier complaints the plaintiffs alleged they had not extended their lease; in later complaints they alleged they had. Their claim that recently located documents supported the change was not plausible; plaintiffs claimed to be present when the oral lease extension was made, and documentary evidence was unnecessary to allege an extension. [Citation.]” (*Ward, supra*, 33 Cal.App.5th at p. 291, citing *Smyth, supra*, 31 Cal.App.5th at p. 196.)

The court does not find Respondent’s sham pleading argument persuasive. Respondent invokes the sham pleading doctrine on the basis that Petitioner refers to the Document as the “Signed Agreement” in the Original Petition and as the “Codicil” in the FAP. (MPA, p. 8:21-

26.) Respondent redefining a term from “signed agreement” to “codicil” does not constitute an inconsistent pleading of facts. The court finds this change more analogous to a “legal conclusion,” as argued by Petitioner. (See Opposition, p. 3:19-20.) In the Original Petition, Petitioner alleged that Decedent confirmed an agreement between her and her son in a June 8, 2016 writing signed by Decedent that states: “[m]y son Michael Joseph Farrell was put into my Will and Trust to compensate him for paying my Bank of America credit cards monthly bill in the sum of \$300.00 from Feb. 1987 through Dec. 2003. Taking care of myself, Soyla Mary Farrell and his father, Robert Emmitt Farrell from 2006 – 2014 and giving up his nursing career.” (Original Petition, ¶¶ 13, 14.) The Original Petition further alleges that “the Signed Agreement specifically states ‘Should my trust be change[d], then it will revert to the pervious (sic) Will and Trust (Amendment ‘A’).’” (*Id.* at ¶ 13.)

The FAP includes this language when discussing the Document but also adds the following statement to the language allegedly included in the Document: “He [Petitioner] is to get half of my house at 14731 Nelson Way, San Jose, CA 95124, 1/4 of the house I co-own with my son Donald Patrick Farrell at 14310 Lenray Lane, San Jose, CA 95124 and half of all my belongings.” (FAP, ¶ 9.) The Original Petition further alleges that the Document “was signed after the First Amendment, but before the Second Amendment to the Trust”. (See Original Petition, ¶ 13.) The FAP changes the wording of this factual allegation to: “Soyla signed the Codicil after she executed the First Amendment but before she was fraudulently induced to amend the Trust again, having been deceived into reneging on her promise to Michael and disinheriting him.” (FAP, ¶ 10.) There is nothing inconsistent between any of the factual allegations in the Original Petition and the FAP regarding facts underlying what the Document states and when Decedent executed it.

What has changed is how Petitioner defines the legal effect of the Document.⁵ Yet, the “sham pleading rule should not be applied in a case . . . where the plaintiff seeks to change his legal theory of recovery and the legal conclusions he seeks to draw from underlying factual events, and also seeks to omit factual allegations that are irrelevant and immaterial to the new legal theories asserted.” (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 949.) “It is irrelevant that new legal theories are introduced as long as the proposed amendments ‘relate to the same general set of facts.’” (*Id.* at pp. 945 [reversing trial court’s decision denying leave to amend a complaint because, in part, the proposed third amended complaint was not a sham pleading where it attempted to allege “different legal theories based on the same set of general facts as set out in the superseded pleadings” and prior factual allegations, “even if true and even if read into the third amended complaint,” were immaterial to the legal theories set out in the third amended complaint.].)

In Respondent’s late-filed reply brief, Respondent argues that Petitioner has failed to give an explanation as to the changing of factual allegations, and therefore the sham pleading doctrine applies. (See Reply to Opposition to Motion for Judgment on the Pleadings, pp. 4:20-5:24.) The court agrees that Petitioner fails to provide an explanation for any purported

⁵ Relatedly, Respondent also claims that Petitioner “omits the fact that [the Document] could be qualified as an agreement or contract between the Decedent and the Petitioner.” (MPA, p. 8:22-23.) Respondent seems to suggest that Respondent failed to plead that a party could apply differing legal interpretations as to what the Document is – a codicil or a contract – but this is not an omission of a factual allegation.

changes, but, as discussed, it does not appear to the court that the FAP omits or makes any inconsistent factual allegations. The FAP still describes the document as a “signed agreement” between Decedent and Petitioner, just as in the Original Petition, but adds that Decedent intended this “signed agreement” to “have the same legal effect as a ‘codicil’” and thereafter refers to the Document as a codicil. (See FAP, ¶ 9.) “Generally, if a verified complaint contains allegations fatal to a cause of action, a plaintiff cannot cure the defect by simply *omitting those allegations* in an amended pleading without explanation.” (*Ward, supra*, 33 Cal.App.5th at p. 690, emphasis added, citing *Hendy v. Losse* (1991) 54 Cal.3d 723, 742.)

Nor does the court find Respondent’s argument regarding the statute of limitations under Code of Civil Procedure section 366 persuasive. (See *Ward, supra*, 33 Cal.App.5th at p. 687, fn. 7 [“Relying on sections 366.1, 366.2, subdivision (a), and 366.3, subdivision (a), David contends the probate limitations period prevents Chase from reformulating its claim against Walter’s estate. This argument fails because an action against Walter is not ‘lost by reason of [his] death.’ [Citation.] Chase’s amended complaint would seek recovery ‘on the same general set of facts’ and therefore relate back to the original for statute of limitations purposes. [Citation.]”].) Under Code of Civil Procedure section 366.2, subdivision (a), if “a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, and whether accrued or not accrued, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply.” (Code Civ. Proc., § 366.2, subd. (a).) Respondent argues that Code of Civil Procedure section 366.2, subdivision (a), applies here because the Original Petition brought a claim that would have sought liability under a breach of contract cause of action against Decedent had she been alive. (Opposition, pp. 10:1-11:14.) The court disagrees. The Original Petition sought to “invalidate the Second Amendment to the Trust because the [trustor] Soyla M. Farell’s acquiescence to the First Amendment to the Trust was the result of undue influence and duress” and also sought to further invalidate the “Second Amendment to the Trust to the extent” it violated the “Signed Agreement.” (See Original Petition, ¶¶ 17, 18.) The FAP seeks the same exact remedy with the *same exact cause of action* to invalidate the Second Amendment. (See FAP, ¶¶ 18-27.)

For the foregoing reasons, the court finds that the sham pleading doctrine does not apply here.

g. Failure to State a Cause of Action

Respondent argues that Petitioner’s “cause of action could not be stated under another possible legal theory.” (MPA, p. 11:16.) According to Respondent, the Document fails to meet the requirements outlined under Probate Code section 6110 to be a codicil and also fails as an effective amendment to the Trust. (*Id.* at pp. 11:20-12:22.) Moreover, Respondent argues that even if “the Court were to find that the [Document] effectively amends the First Amendment to the Trust,” the Second Amendment “revokes and/or amends” the Document’s effect on the Trust. (*Id.* at p. 12:9-12.)

Petitioner responds that interpreting the Document “is a legal issue for the court.” (Opposition, p. 5:19.) Petitioner argues that “it is axiomatic that the interpretation of a legal document lies in the sound discretion of the Trial Court. Furthermore, California law has

interpreted the notion of a trust amendment very broadly. . . . [A] document purporting to be an ‘agreement’ can also be a ‘codicil’ or will, thereby constituting a trust amendment.” (*Id.* at 6:7-7:3.) Petitioner further argues that the Document is a valid amendment to the Trust – the Document “is an ‘instrument in writing,’ clearly signed by the settler, and delivered to herself as trustee.” (*Id.* at p. 7:15-17.) “Ultimately, the Trial Court here will determine whether the document is a codicil, a will, an amendment, or an ‘agreement.’” (*Id.* at p. 7:18-19.)

The court does not find Respondent’s argument as to the validity of the codicil persuasive. Respondent directs the court to Probate Code sections 50, 88, 6110, and 6221 in arguing that the Document is not a valid codicil because the witnesses did not sign the Document attesting to the Decedent’s alleged signature. (MPA, pp. 11:19-12:9.) First, the court cannot consider extrinsic evidence on a motion for judgment on the pleadings, Respondent has not requested judicial notice of the Document, and the Document itself is not attached to Original Petition or the FAP. Nor has either party requested that the court judicially notice it. Therefore, for the purposes of this motion, the Document is extrinsic evidence the court cannot consider. Even if it were not, Probate Code section 6110, along with other requirements, states that if a will does not have witnesses, “the will shall be treated as if it was executed in compliance with [the witness requirement] if the proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator’s will.” (See Prob. Code, § 6110, subd. (c)(2).) “In construing trust instruments, as in the construction and interpretation of all documents, the duty of the court is to first ascertain and then, if possible, give effect to the intent of the maker.” (*In re Estate of Gump* (1940) 16 Cal.2d 535, 548.) Petitioner alleges Decedent executed a document with the intent that it be read as a codicil, and while the FAP makes no allegations as to whether the codicil was witnessed, Probate Code section 6110 permits the proponent of a will the opportunity to establish, by clear and convincing evidence, whether a testator executed an alleged will in compliance with their testamentary intent. (FAP, ¶¶ 9-11.) This is not an evidentiary proceeding, as a court decides a JOP motion on the pleadings. The court finds Petitioner has pled sufficient facts here.

As to Respondent’s argument that the Document is not an amendment to the Trust, the court agrees with Petitioner that *Gardenhire v. Superior Court* (2005) 127 Cal.App.4th 882 (*Gardenhire*) is informative. In *Gardenhire*, the Court of Appeal agreed with the trial court that because Decedent “did not limit or qualify the term ‘written notice,’ she authorized revocation via any writing that unambiguously manifested her intent to revoke, including a will. We find significant support for such broad latitude in the fact that she named herself the trustee. The trust allowed [Decedent] to revoke simply by giving herself written notice of her intent to do so. Since she could not be mistaken about her own intent no matter how she chose to manifest it in writing, the broad, unqualified language of the trust reasonably implies that she did not intend to restrict the form of written notice or the nature of the documents used to provide it. Rather, any writing that unambiguously manifested her intent would do.” (*Gardenhire, supra*, 127 Cal.App.4th at p. 888.) Similarly, in *Doolittle v. Exchange Bank* (2015) 241 Cal.App.4th 529 (*Doolittle*), the Court of Appeal found that a trust provided that the trustor shall have the right to “modify, alter and amend any of the provisions, terms or conditions” of the trust “by an instrument signed by her and delivered to the trustee.” (*Doolittle, supra*, 241 Cal.App.4th at p. 547.) The court held that “[u]nder this provision, any instrument that manifests an intent to amend the trust will be enforceable as an amendment to the trust.” (*Ibid.*, citing *Cook v. Cook* (2009) 177 Cal.App.4th 1436, 1442.)

Here, the Document includes language allegedly amending the Trust (see FAP, ¶ 9), and, as noted by Petitioner, the Trust “does not state an exclusive method by which the trust may be amended or revoked.” (Opposition, p. 7:18-20, citing MPA, Ex. B⁶ [the Trust states that the “Grantor reserves the power to amend or revoke this trust at any time during her lifetime, without notifying any beneficiary, and to withdraw property from it at any time or times during her lifetime. The powers to revoke, amend, and withdraw may be exercised only by the Grantor personally or by her conservator with court approval or pursuant to authority and for purposes expressly provided in a durable power of attorney executed by her.”].) For the purposes of a JOP, where the court accepts as true all material factual allegations, the court finds these allegations sufficient. (See *Gardenhire, supra*, 127 Cal.App.4th at p. 888 [“We find significant support for such broad latitude in the fact that she named herself the trustee. The trust allowed [Decedent] to revoke simply by giving herself written notice of her intent to do so.”].)

The court also does not find Respondent’s public policy and revocation arguments persuasive. Respondent argues that “the policy of the law is to make the disposition under a will in accordance with the desires of the testator,” and here “it would go against public policy for a term in a trust, will, or amendment, to withhold Soyla’s right to dispose of her property as she wishes. Further, it would go against her property rights to stop her from transferring her own property as she sees fit. [Citations.]” (MPA, p. 13:6-14.) Respondent further argues that the “Second Amendment revokes the Purported Document.” (*Id.* at p. 13:20.) As has been discussed, on a JOP motion, the “court accepts as true all material factual allegations, giving them a liberal construction, but does not consider conclusions of fact or law, opinions, speculation, or allegations contrary to law or judicially noticed facts. [Citations.]” (*Shea, supra*, 110 Cal.App.4th at p. 1254.) According to the allegations in the FAP, Respondent fraudulently induced Decedent into amending the Trust and Will. (FAP, ¶¶ 11, 12.) The FAP further alleges that the Document states the Will and Trust shall not be changed and provides for other distributions to Petitioner. (*Id.* at ¶ 9.) Taking these allegations as true on a JOP motion, as the court must, the court cannot find that the Second Amendment, purportedly an instrument created as a result of fraud, overrides Decedent’s intentions that are allegedly reflected in the Document.

h. Fees

Respondent argues that because the FAP attempts to circumvent the applicable statute of limitations, a potential material defect, the court should reject the FAP and “award fees for preparing and filing this motion and award damages to Respondent.” (MPA, p. 15:9-13.) Petitioner argues in response that “Respondent has had approximately 3 years to bring a motion to strike. If the Amended Petition were procedurally defective, as Respondent claims, he had a remedy. Namely, he could have served a 21 safe harbor notice under Code of Civil Procedure Section 128.7. Instead, Mr. Donald Farrell answered the Amended Petition on the merits and proceeded accordingly.” (Opposition, p. 8:14-15.)

⁶ Petitioner appears to mistakenly cite Exhibit A in the Opposition. The court also notes that Respondent refers to the Trust as Exhibit A in the MPA (see MPA, p. 3:3-4), but it appears Exhibit B is the Trust.

Respondent requests that the court award damages and fees for preparing and filing the present motion because Petitioner's amended pleading attempts to circumvent the statute of limitations as a sham pleading and the court has the "power to charge attorney fees and costs against [a] beneficiary's share of the trust [i]f that beneficiary, in bad faith, brings an unfounded proceeding against the trust" and "[w]hen an unfounded suit is brought . . . attorneys' fees may be made a charge against the interest in the estate of the party causing the litigation." (MPA, p. 15:5-9, quoting *Pizzaro v. Reynoso* (2017) 10 Cal.App.5th 172, 183, *Conley v. Waite* (1933) 134 Cal.App. 505, 506.) As previously discussed, the court finds that the sham pleading doctrine does not apply here, and, accordingly, the court does not find that Petitioner brought "an unfounded proceeding against the trust" on that basis. The court otherwise declines to award Respondent attorneys' fees for filing a JOP motion that targets an amended pleading Petitioner filed almost three years ago (that Respondent has seemingly already filed an objection to).

C. Conclusion

The court DENIES Respondent's motion for judgment on the pleadings. The court also DENIES Respondent's request for fees.

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