

TENTATIVE RULINGS

FOR: January 12, 2018

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

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

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

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

In the Matter of the Charles K. Marshall Revocable Trust **17PR000070**

PETITION FOR ORDER APPROVING SETTLEMENT AGREEMENT AND DETERMINING WAIVER OF RIGHT TO CONTEST TERMS OF TRUST

TENTATIVE RULING: The Petition is GRANTED.

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Conservatorship of Josef P. Hausted **17PR000242**

PETITION FOR APPOINTMENT OF PROBATE CONSERVATOR OF THE PERSON ó LIMITED CONSERVATORSHIP

APPEARANCE REQUIRED. The proposed conservatee need not appear.

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

BVK Gaming, Inc. v. Timothy J. Long

17CV001155

DEMURRER TO THE COMPLAINT

TENTATIVE RULING:

Defendant Timothy J. Long's request for judicial notice of the complaint (exhibit A) in this case, the cross-complaint (exhibit B) in *Long v. BVK Gaming, Inc.*, Case No. 26-56249, and the September 17, 2012 Order striking that cross-complaint (exhibit C) is GRANTED. (Evid. Code, § 452, subd. (d).)

Plaintiff BVK Gaming Inc.'s (BVK) request for judicial notice of the complaint (exhibit A) in this action, the cross-complaint (exhibit B) in Case No-26-56249,¹ the dismissal of the cross-complaint (exhibit C), and the notice of entry of judgment on verdict (exhibit D) is GRANTED IN PART AND DENIED IN PART. The request is granted as to the complaint and the notice of entry of judgment. (*Id.*) The request is granted to the cross-complaint, but the request is denied as to the unfiled version of the cross-complaint BVK attached to exhibit B. The document contains no filed date. BVK did not request judicial notice of this document. (See Cal. Rules of Court, rule 3.1113(l).) The request is denied as to the dismissal. The document actually attached is the September 17, 2012 Order striking the cross-complaint, not a dismissal of cross-complaint. (*Id.*)

Long's supplemental request for judicial notice of the Complaint [stricken per court order] and an Order After Hearing on Motion to Strike from *BVK Gaming, Inc., et al. v. Timothy J. Long, et al.*, Case No. 26-62431, is DENIED. The introduction of new evidence via reply is improper. Long should have requested judicial notice of these materials when he filed his demurrer. Moreover, the complaint attached to the request is a pleading from Case No. 26-62431. Long has not requested the Court take judicial notice of the pleading in that case. The stricken cross-complaint, which actually is the subject of the request, is from Case No. 26-56249, and it is not attached as an exhibit. (See Cal. Rules of Court, rule 3.1113(l).)

Long's demurrer to the complaint on the ground of lack of jurisdiction is OVERRULED. Long contends the Court lacks jurisdiction because the applicable statutes of limitations bar BVK's claims. According to Long, the complaint is based on a breach of the agreement in October of 2012 as alleged in paragraph 20. (Dem. at p. 4:12-13.) This is a misrepresentation of the allegation. As BVK proffers, the complaint is based on a breach of the agreement that occurred since October 2012, which includes acts in 2014 and 2016. (Compl., ¶ 20.) The specific dates of the purported breaches can be clarified during the discovery process.

Long's demurrer to the complaint on the ground of failure to state sufficient facts is OVERRULED. Long argues res judicata bars this action because of a trial in Case No. 26-

¹ BVK represents a filing date of July 29, 2011. The first page clearly contains a stamp filed date of August 1, 2011.

56249, and the fact BVK filed a cross-complaint based on the same claims in the case at bar, which the Court struck as a discovery sanction. The Court summarily rejects Long's argument. The California Supreme Court has endorsed the use of the terms "claim preclusion" and/or "issue preclusion," instead of the term "res judicata." (See *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 823.) It is important to distinguish these two types of preclusion because they have different requirements. (*Id.* at p. 824.) Long makes no such distinction. Although only before the Court on a demurrer, Long, as the party asserting the defense, bears the burden of at least setting forth the requirements of these doctrines and that they have been met. (See *Basurto v. Imperial Irrigation Dist.* (2012) 211 Cal.App.4th 866, 881.) Even if the Court assumed either doctrine applied, the demurrer necessarily fails because Long fails to set forth any legal authority presenting the requirements of the doctrines. It is impossible for the Court to apply the allegations in the complaint and the facts that are the proper subject of judicial notice to legal requirements not presented.

The Court did not consider the extraneous information contained in the opposition at page 3:8 as it is not in the complaint or the proper subject of judicial notice.

Long did not comply with Code of Civil Procedure section 430.41 by filing a meet-and-confer declaration. Long's attorneys submitted a declaration with the reply stating they met-and-conferred with opposing counsel a week prior to the opposition due date. This action does not comply with the statute's requirement to meet-and-confer prior to the filing of a demurrer. (Code Civ. Proc., § 430.41, subd. (a).) Long's attorneys are admonished for these failures.

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

Conservatorship of Philip Warren

17PR000217

PETITION FOR APPOINTMENT OF PROBATE CONSERVATOR OF THE ESTATE

APPEARANCE REQUIRED

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Conservatorship of Harry Fried

17PR000233

PETITION FOR APPOINTMENT OF PROBATE CONSERVATOR OF THE PERSON &
LIMITED CONSERVATORSHIP

APPEARANCE REQUIRED

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

Daisy Hernandez v. Daniel Pautenis

16CV001053

MOTION FOR ORDER THAT THE GENUINENESS OF DOCUMENTS AND THE TRUTH OF MATTERS SPECIFIED IN REQUESTS FOR ADMISSIONS BE DEEMED ADMITTED AND FOR SANCTIONS

TENTATIVE RULING: The unopposed Motion is GRANTED. Pursuant to Code of Civil Procedure section 2033.280, subdivision (c), sanctions in the amount of \$1,090 are imposed against Defendant Daniel Pautenis, individually and in his capacity as Personal Representative of the Estate of Audrey Bowers, in favor of Plaintiff Daisy Hernandez.

Jessica Lopez, et al. v. Daniel Pautenis

16CV001054 (consolidated with lead case 16CV001053)

MOTION FOR ORDER THAT THE GENUINENESS OF DOCUMENTS AND THE TRUTH OF MATTERS SPECIFIED IN REQUESTS FOR ADMISSIONS BE DEEMED ADMITTED AND FOR SANCTIONS

TENTATIVE RULING: The unopposed Motion is GRANTED. Pursuant to Code of Civil Procedure section 2033.280, subdivision (c), sanctions in the following amounts are imposed: 1) \$395 against Defendant Daniel Pautenis, individually, in favor of Plaintiffs Jessica Lopez and Antonio Lopez, and 2) \$395 against Defendant Daniel Pautenis, in his capacity as Personal Representative of the Estate of Audrey Bowers, in favor of Plaintiffs Jessica Lopez and Antonio Lopez.