

1 Neal E. Costanzo SBN 122352
Michael G. Slater SBN 247302
2 Costanzo & Associates
A Professional Corporation
3 575 E. Locust Avenue, Suite 115
Fresno CA 93720
4 Telephone: (559) 261-0163
Facsimile: (559) 261-0706
5

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FRESNO COUNTY SUPERIOR COURT
By: J. Nelson, Deputy

6 Attorneys for Pinedale County Water District

7 NO FILING FEE REQUIRED GOVERNMENT CODE §6103

8 **SUPERIOR COURT OF CALIFORNIA**

9 **COUNTY OF FRESNO**

10 PINEDALE COUNTY WATER)
DISTRICT, a County Water District,)

11 Plaintiff,)

12 v.)

13 CITY OF FRESNO, a Municipal)
14 Corporation, and DOES 1 through 5)
15 inclusive,)

16 Defendants.)
17

CASE NO. 18CECG02957

**MEMORANDUM OF POINTS AND
AUTHORITIES IN REPLY TO
OPPOSITION TO MOTION TO
TRANSFER**

Date: December 5, 2018

Time: 3:30 p.m.

Dept.: 502

18 **I. INTRODUCTION**

19 This is the flip side of the motion that was heard in this court in Case No.
20 17CECG02055. In that case, the Defendant in this case, the City of Fresno (Fresno) filed
21 a Petition for Writ of Mandate which, of course, was filed in that case and was again filed
22 in a Request for Judicial Notice in Opposition to the Motion to Transfer that action that had
23 been made by Pinedale County Water District (Pinedale), Plaintiff in this case, and the
24 Respondent in Case No. 17CECG02055. In Case No. 17CECG02055, Pinedale filed a
25 Motion to Transfer under CCP §394 of the Code of Civil Procedure in response to the
26 petition filed by Fresno which is a Petition for Writ of Mandate to compel Pinedale to pay
27 a judgment. (See Request for Judicial Notice Ex. 1). The judgment sought to be enforced
28 is one entered by the Madera County Superior Court.

MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO OPPOSITION TO MOTION TO TRANSFER

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1 In the Motion to Transfer under CCP §394, in Case No. 17CECG02055 Pinedale
2 moved to transfer the action to the Kings County Superior Court in light of the fact that
3 Madera is not a neutral court. In that case, as shown by the court's records, Fresno
4 opposed the motion, as it does here, not on the ground that it is anything other than
5 mandatory upon this court to transfer the action to a neutral county, but to seek to have the
6 action transferred to Madera County. Pinedale objected because Madera County is not
7 a neutral county given the fact that it entered the judgment sought to be enforced. The
8 court subsequently ordered and the action was transferred to Kings County. The Notice
9 of Transfer and transfer by this court to Kings County was acknowledged by the Kings
10 County Superior Court on February 20, 2018. (See Costanzo Declaration at Ex. A).

11 In the proceedings on the prior motion to transfer, the parties both requested
12 assignment to a disinterested judge from a neutral county as the best option and, as noted,
13 Pinedale objected to the assignment to a Madera County Judge on the ground that a
14 Madera County Judge was not disinterested given the fact that the judgment sought to be
15 enforced was entered by Madera County. The court transferred the matter to Kings
16 County. (See Costanzo Declaration Ex. B).

17 A. THE CLAIMS IN THE COMPLAINT ARE JURY TRIABLE.

18 §394 requires a change of venue in actions where governmental entities are
19 adversaries and either one of them objects to the venue in the county where the defendant
20 governmental entity resides, unless a jury is not of right or a jury is waived, in which case,
21 the court may, in lieu of transfer, request assignment of a disinterested judge from a
22 neutral county. (*City of Alameda v. Superior Court* (1974) 42 Cal.App.3d 312, 316;
23 *Brennan v. Superior Court* (1994) 30 Cal.App.4th 454, 457-458). The transfer is
24 mandatory and the options provided by §394, assignment of a disinterested judge from a
25 neutral county or transfer to a neutral county, are the only options potentially available to
26 this court. (Id.). Fresno has demurrer to the complaint which is the subject of this transfer
27 motion and because the transfer motion has been filed, presumably, the court moved the
28 hearing date on that demurrer to coincide with the hearing date of this motion to transfer.

1 The court has no jurisdiction to rule on the demurrer. The filing of a transfer motion under
2 CCP §394 operates as a superceduious or stay of the proceedings in this court. The
3 transfer motion must be disposed of before any other steps can be taken by the court
4 including a ruling on the demurrer because any such ruling given the pendency of the
5 transfer motion would be a nullity. (*South Center LLC v. LJ Center Partners LP* (2011) 193
6 Cal.App.4th 634; *Pickwick Stages Systems v. Superior Court* (1934) 138 Cal.App. 448,
7 449; *City of Oakland v. Darbee* (1951) 102 Cal.App.2d 493, 503-504). (Applying the rule
8 that a motion for transfer under §394 like one under §395 for change of venue suspends
9 the court's jurisdiction to take substantive action until passing on the motion for transfer).

10 Fresno's opposition goes into great detail as to whether a jury trial is or is not a
11 matter of right, in order to advance the request for assignment to a disinterested judge,
12 which, of course, controls the availability of that option since if jury trial is a matter of right,
13 the action is required to be assigned to a neutral county as opposed to a disinterested
14 judge from a neutral county. (*Brennan, supra*). Pinedale submits that the determination
15 of whether there is a right to a jury trial now, given the pendency of the current declaratory
16 relief claim and rescission claim, is debatable, and depends on the relief that is available
17 to Pinedale in the event rescission is granted. The rescission action might arguably be one
18 that would not require a jury, if it were not for the fact that Plaintiff expressly seeks to
19 recover the consideration paid for the contract sought to be rescinded which therefore
20 makes it an action at law which is specifically jury triable. (*Davis v. Security First National*
21 *Bank* (1934) 1 Cal.2d 541, 542; *Philpott v. Superior Court* (1934) 1 Cal.2d 512, 526;
22 *Paularena v. Superior Court* (1965) 231 Cal.App.2d 906, 914). Thus while a rescission
23 action is sometimes characterized as equitable, it is recognized as a legal action in which
24 the right to jury trial exists when monetary relief or the return of consideration paid under
25 the rescinded contract is sought in addition to an order rescinding the contract. (*Id.*;
26 *Runyan v. Pacific Air Industries Inc* (1970) 2 Cal.3d 304, 314-318). The same is true of
27 numerous proceedings that are labeled claims for declaratory relief. Unlike other equitable
28 actions, declaratory relief is for some purposes treated as if it were a coercive proceeding,

1 and the courts are not permitted to be used as a means to circumvent the right to a jury
2 trial. (*State Farm Mutual Auto Insurance Company v. Superior Court* (1956) 47 Cal.2d 428,
3 431; *Patterson v. Insurance Company of North America* (1970) 6 Cal.App.3d 310, 315;
4 *Escamilla v. California Insurance Guarantee Company* (1983) 150 Cal.App.3d 53; *Entin*
5 *v. Superior Court* (2012) 208 Cal.App.4th 770, 781).

6 The option of assigning the matter to a disinterested judge is not available to this
7 court. The action is jury triable, notwithstanding the selective authorities cited in the
8 opposition to the motion by Fresno.

9 Fresno attempts to keep this action out of the Kings County Superior Court at all
10 costs. First, Fresno claims the complaint in this case is simply a reiteration of a cross-
11 complaint to which Fresno demurred in the Kings County Superior Court leading to an
12 order of the court dismissing that cross-complaint and the filing of this complaint. In fact,
13 Fresno's demurrer to the cross-complaint in the Superior Court was granted with prejudice,
14 but Fresno never did obtain an order dismissing that cross-complaint. In fact, the order
15 granting that demurrer was made in specific contemplation of Pinedale filing the action as
16 a new action in the Fresno County Superior Court, moving to transfer that action to the
17 Kings County Court and ultimately transferring that action to the Kings County Court and
18 having it consolidated with the action that is filed there now.

19 These facts are set out fully in the Ex Parte Application for Order Shortening Time
20 and the Memorandum of Points and Authorities in Support thereof in addition to the
21 Declaration of Neal E. Costanzo filed in the Kings County Superior Court Case No. 18C-
22 0051 where the petition to compel the payment of the Madera County Judgment is still
23 pending. Contrary to what Fresno claims in its motion, although the Kings County Court
24 did indeed deny a motion to transfer this case and to consolidate it with the case now
25 pending there, it did so in anticipation of this court entering an order transferring the case
26 to Kings County. For whatever reason, the court in Kings County was not comfortable with
27 ordering the transfer of this case unilaterally but did entertain the ex parte application for
28 order shortening time which sought to vacate the date previously set for the trial of the

1 Kings County action which was December 13, 2018. In response to that motion the trial
2 has been moved to May 28 and 29, 2019. Plaintiff's application points out that the purpose
3 of vacating the hearing is so that this case can be transferred to Kings County by order of
4 this court and later consolidated with the case now pending in the Kings County Superior
5 Court. These facts are all recited in the moving papers and supporting declarations that
6 are Exhibits C and D to the Costanzo Declaration filed herewith. These cases raise
7 common legal and factual questions and, in fact, this action is potentially dispositive of
8 Fresno's action in the Kings Court and to avoid a multiplicity of actions and a danger of
9 inconsistent judgments, it is necessary to transfer this case to Kings County so that the
10 action pending there can either be consolidated with it or this action can be tried first. A
11 rescission will terminate the contract and restore the parties to their former position by
12 requiring each to return whatever he or she has received as consideration under the
13 contract and the effect of the rescission is to reinstate the parties to the status quo that
14 existed before the contract was made. (*Wong v. Stoller* (2015) 237 Cal.App.4th 1375,
15 1387).

16 B. THE ACTION MUST BE TRANSFERRED TO KINGS COUNTY, THE
17 NEAREST NEUTRAL COURT AND THE ONLY COURT WHICH IS EQUIPPED TO ACT
18 TO AVOID AN UNNECESSARY DUPLICATION OR MULTIPLICATION OF THE
19 PROCEEDINGS BETWEEN THESE PARTIES ON THE SAME SUBJECT MATTER AND
20 THEREBY AVOID A MULTIPLICITY OF ACTIONS, ADDED EXPENSE,
21 INCONVENIENCE, CONFUSION AND THE POSSIBILITY OF INCONSISTENT
22 JUDGMENTS.

23 For the reasons stated above, the rescission claim is one as to which a jury trial is
24 available. So is the declaratory relief claim. The court's only option here is to transfer this
25 case to a neutral county. It would make absolutely no sense in light of the fact that the
26 rescission case is absolutely dispositive of the Petition for Mandate filed by Fresno to do
27 anything other than try the rescission case first because the outcome of the rescission case
28 will determine the outcome of the mandate petition, or whether it even proceeds to trial.
As shown by the Ex Parte Application for Order Shortening Time and accompanying
Memorandum of Points and Authorities and Declaration of Neal E. Costanzo attached as

1 Exhibit C and D to the accompanying Declaration of Neal E. Costanzo any other course
2 of action simply results in a multiplicity of proceedings, creates confusion, added expense
3 and a possibility of inconsistent judgments, something Fresno apparently wants very much,
4 but something that is absolutely contrary to the overriding policy of the law. (See Costanzo
5 Declaration at Ex. C p. 5-7).

6 **III. CONCLUSION**

7 For the foregoing reasons, this action must be transferred to Kings County.

8 //

9 Dated: November 27, 2018

COSTANZO & ASSOCIATES

10
11 By: 

Neal E. Costanzo, Attorneys for
Petitioner/Defendant

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1 PROOF OF SERVICE

2 The undersigned declares:

3 I, Julia Sellers, the undersigned, declare that:

4 I am employed in the County of Fresno, State of California. I am over the age of
5 eighteen years, and am not a party to the within action. My business address is 575 E.
6 Locust Avenue, Suite 115, Fresno California 93720.

7 I am familiar with the regular mail collection and processing practice of said
8 business, and in the ordinary course of business the mail is deposited with the United
9 States Postal Service that same day.

10 On November 27, 2018, I served the foregoing document described as:

11 **MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO OPPOSITION TO**
12 **MOTION TO TRANSFER**

13 on all parties to this action by causing a true copy thereof to be:

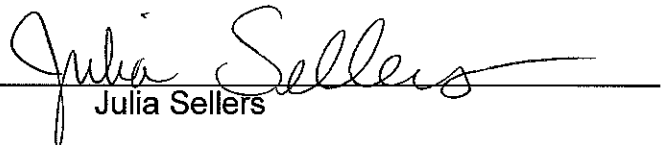
- 14 (☐) Telecopied Via Facsimile
15 (☒) Placed in a sealed envelope with postage thereon fully prepaid in the
16 designated area for outgoing mail
17 (☒) Electronic Mail
18 (☐) Sent Via Overnight Delivery (see below)

19 as addressed below:

20 James B. Betts
21 Joseph D. Rubin
22 Betts & Rubin
23 907 Santa Fe Avenue, Suite 201
24 Fresno, CA 93721
25 Email: br@bettsrubinlaw.com

26 I declare under penalty of perjury under the laws of the State of California that the
27 foregoing is true and correct.

28 Date: November 27, 2018


Julia Sellers