SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: April 16, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

FOR ORAL ARGUMENT: Before 4:00 PM today you must notify the:

(1) Court by calling (408) 808-6856 and

(2) Other side by phone or email that you plan to appear at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

FOR APPEARANCES: The Court strongly prefers in-person appearances. If you must appear virtually, please use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR COURT REPORTERS: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
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FOR YOUR NEXT HEARING DATE: Please reserve your next hearing date using Court Schedule—an online scheduling tool that can be found on the Santa Clara County court website here:
https://reservations.scscourt.org/

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1-3	22CV403049	Naren Chaganti vs Henry Gong et al	Wells Fargo Bank, N.A.'s and Bank of America's Demurrer is SUSTAINED WITH 30 DAYS LEAVE TO AMEND. The order to show cause for failure to serve the Gong Defendants is continued to August 15, 2024 at 10 a.m. in Department 6. Court to prepare formal order.
4	23CV423435	Mark Tracy vs Cohne Kinghorn PC et al	Walter J. Plumb III's motion to quash is GRANTED. Scroll to line 4 for complete ruling. Court to prepare formal order.
5	23CV425000	Jack Hansen vs Armando Sanchez et al	Case reassigned.
6-7	18CV321554	Palo Alto Property Owner LLC vs The Grocery Men I, LLC et al	Palo Alto Property Owner LLC's motions to compel further responses to requests for production and special interrogatories from Christopher Iversen and Addison Wright are GRANTED. A notice of motion with this hearing date was served on Iversen and Wright by electronic mail on March 5, 2024. Iversen failed to file an opposition. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) And, while Wright did file an opposition, that opposition does not argue the requested discovery is not relevant or otherwise assert relevant objections to producing the requested discovery. The Court has reviewed the separate statements and Wright's and Iversen's written discovery responses. Those responses are inadequate and, in some cases, not credible. Accordingly, Wright and Iversen are ordered to produce complete, verified, Code compliant written responses and to produce all documents in their possession, custody, and control sought by the discovery requests within 20 days of service of this formal order. Wright, Iversen, and their respective counsel are also ordered to pay Plaintiff's $6,415.00 in attorneys' fees and costs incurred in bringing this motion. Court to prepare formal order.
8	22CV409001	Michelle Ronolo vs FCA US, LLC et al	Notice of settlement filed; motion of calendar.
9	23CV427474	Bank Of America, N.A. vs Quang Nguyen	Bank of America, N.A.'s Motion for Order that Matters in Request for Admission of Truth of Facts be Admitted is GRANTED. A notice of motion with this hearing date was served on Defendant by U.S. mail on March 11, 2024. Defendant failed to file an opposition. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) There is also good cause to grant this motion. Plaintiff served requests for admission on Defendant by mail on January 22, 2024. To date, Defendant has served no responses. A party served with Requests for Admission must serve a response within 30 days. (Code of Civ. Pro. §2033.250.) When a party fails to respond—even in the face of a motion to have the matters in the Requests for Admission deemed admitted—as Defendant has done here, the Court must order the Requests for Admission deemed admitted. (Code of Civ. Pro. §2033.280(c); *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 775-776.) Such a "deemed admitted" order establishes that the nonresponding party has responded to the requests for admission by admitting the truth of the matters contained in the requests. (*Id.*) Accordingly, Plaintiff's motion is granted, and the matters set forth in Plaintiff's requests for admission are deemed admitted. Court to prepare formal order.

10	17CV314286	U.S. Bank National Association et al vs Fareed Sepehry-Fard	Fareed Sepehry-Fard's motion for an order to prepare and send mistrial transcripts for the period of March 15, 2023 to March 24, 2023 is DENIED. This motion was previously brought and denied. There was no trial. This order will be reflected in the minutes.
11	19CV352562	WAHR Financial Group LLC vs Tarena Merritt	Tarena Merritt's claim of exemption is GRANTED, IN PART. The Court orders $100 per pay period to be garnished from defendant's wages. Court will prepare formal order.
12	21CV385427	Urvashi Bhagat vs Hong Guo et al	Plaintiff's motion to transfer venue is DENIED. Plaintiff chose the correct venue when she filed this lawsuit. As Plaintiff alleges in her complaint, Plaintiff, both defendants, and the subject property are all located in Santa Clara County. There is no basis to transfer this case to San Francisco. Plaintiff's unhappiness with the Court's rulings is not a basis for transfer. Further, the undersigned Court will not be the trial judge. The Court agrees there was no basis for this motion to transfer and that fees are appropriate pursuant to Code of Civil Procedure 396b. The Court finds 8 hours at $150 per hour reasonable given the volume of Plaintiff's filings in support of this motion. Plaintiff is ordered to pay Defendant $1200 in fees and costs within 30 days of service of this formal order. Plaintiff is also again ordered to pay the $750 in fees and costs Judge Rudy previously ordered Plaintiff to pay Defendant. Court to prepare formal order.

13	22CV408447	ALEJANDRA VERGARA vs GABRIELA VERGARA	Alejandra Vergara's motion for leave to file an Amended Complaint is DENIED. "[It] is a rare case in which 'a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case.' (*Guidery* v. *Green*, 95 Cal. 630, 633; *Marr* v. *Rhodes*, 131 Cal. 267, 270. If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion. (*Nelson* v. *Superior Court*, 97 Cal.App.2d 78; *Estate of Herbst*, 26 Cal.App.2d 249; *Norton* v. *Bassett*, 158 Cal. 425, 427.)" (*Morgan v. Superior Court of Los Angeles County* (1959) 172 Cal. App. 2d 527, 530-531 (error for trial court to fail to give leave to amend). The unique situation here is that amendment is requested in the face of a summary judgment motion. *Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal. App. 4th 1059, 1069 even in the face of a summary judgment motion, "the rule is that if it is reasonably possible that a defect in a complaint can be cured by an amendment, the trial court abuses its discretion by dismissing the action." In *Kirby*, the court of appeal reversed the trial court's grant of summary judgment where "appellants submitted sufficient documentation in the form of deposition statements and the supplementary declarations to indicate a distinct probability that the complaint could be amended [to state a claim and requested] leave to amend prior to entry of judgment, in their motion for reconsideration." (*Id.*) However, "amendments are usually allowed after summary judgments have been filed only to repair complaints that are legally insufficient—in other words, those that would be subject to a motion for judgment on the pleadings. (*Van v. Target Corp*. (2007) 155 Cal. App. 4th 1375, 1387, citing *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719, fn. 5; *Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614, 625, disapproved on another ground in *Colmenares v. Braemar Country Club, Inc*. (2003) 29 Cal.4th 1019, 1031, fn. 6.) After studying Plaintiff's original and proposed amended complaint, the Court finds the proposed amended to go well beyond the amendments permitted in *Kirby* and *Williams v. Braslow* (1986) 179 Cal. App. 3d 762. The proposed amendment here is more akin to that in *Van v. Target Corp.*, where that court found: "Appellants' proposed amendment would not cure a legally insufficient complaint, but rather, would state a different theory of recovery. Such an amendment is impermissible. (*Van v. Target Corp.*, 155 Cal. App. 4th at 1387, citing *Hobson v. Raychem Corp., supra*, at p. 626.) Accordingly, Plaintiff's motion to amend is DENIED. Court to prepare formal order.
14-15	23CV416081	John Hamilton vs Luis Ortiz et al	Plaintiff John Hamilton's motion for trial preference is GRANTED. A notice of motion with this hearing date was served on Defendant by electronic mail on March 12, 2024. No opposition was filed. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Further, under Code Civil Procedure section 36, "the court shall grant" a petition for trial preference made by a party "who is over 70 years of age"; "has a substantial interest in the action as a whole"; and where "[t]he health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation." Plaintiff is 76 years old and, according to medical records submitted with his motion, is suffering from severe health issues. Accordingly, Plaintiff's motion is granted, and the parties are ordered to appear to set a trial date. Court to prepare formal order.
16	22CV401810	JANE DOE vs QIN XIE	The Court will provide the parties with its tentative ruling at the start of argument on the motion during the hearing.

Calendar Lines 1-2
Case Name: *Naren Chaganti v. Henry Gong, et al.*
Case No.: 22CV403049

Before the Court is (1) defendant Wells Fargo Bank N.A.'s ("Wells Fargo") demurrer to plaintiff Naren Chaganti's Complaint; and (2) defendant Bank of America N.A.'s ("Bank of America") demurrer to the Complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises from Chaganti's legal representation of defendants Henry Gong, Jasmine Gong, and Gong Investments LLC (collectively, the "Gong Defendants") in "multiple protracted complex litigations" involving residential property located at 2276 Bentley Ridge Drive in San Jose (the "Property").[1] (Complaint, ¶¶ 1, 9.) In 2015, Jason Pacheco and Shanna Pacheco (collectively, the "Pachecos") sued the Gong Defendants over a dispute regarding the Property. (Complaint, ¶ 12-14.) David Hamerslough represented the Pachecos in the underlying matter. (Complaint, ¶ 14.) According to the Complaint, the Gong Defendants and Chaganti entered a fee agreement under which the Gong Defendants would pay when they were able to or as funds became available. (Complaint, ¶ 39.) The Gong Defendants repeated the promise many times as the litigation proceeded. (Complaint, ¶ 40-41.) On this basis, Chaganti alleges the agreements contained an attorney's lien on the Gong Defendants' properties. (Complaint, ¶ 42.) Hamerslough never contacted Chaganti with any settlement proposal in 2021 or 2022. (Complaint, ¶ 70.) Chaganti alleges, on information and belief, that Hamerslough contacted the Gong Defendants indirectly through the Pachecos or others to settle the underlying matter, without Chaganti's knowledge and involvement. (Complaint, ¶¶ 72-76.)

On March 21, 2022, Hamerslough filed a mandatory settlement conference statement, that did not mention a settlement had been reached and Chaganti conveyed the information to the Gong Defendants the same day. (Complaint, ¶¶ 82-83.) On March 22, 2022, Chaganti received an email from Kurt Hendrickson requesting signature on a substitution of counsel for the Gong Defendants, which they had executed on March 17, 2022. (Complaint, ¶ 85.) Hendrickson requested transfer of the case file, which was intended to mislead Chaganti into believing the case would go to trial on April

[1] As some individuals share surnames, the Court will refer to them by their first names for purposes of clarity. No disrespect is intended. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

4, 2022. (Complaint, ¶ 87.) On March 22, 2022, Chaganti signed and sent the substitution forms and notified Hendrickson that Henry had all the original papers and the entire file. (Complaint, ¶ 90.) On March 23, 2022, unknown to Chaganti, Hendrickson filed a notice of settlement of the entire case, and the trial was taken off calendar. (Complaint, ¶ 92.) On March 24, 2022, to preserve his right to payment, Chaganti sent a letter notifying Hamerslough of his interest in the proceeds of the Pacheco suit, which included a suggestion of an attorney's lien over the subject matter of the suit. (Complaint, ¶ 93.) On April 4, 2022, Chaganti learned Hendrickson had filed the notice of settlement in March. (Complaint, ¶ 95.) Chaganti alleges, on information and belief, that Bank of America and Wells Fargo received portions of the disputed settlement proceeds from the underlying case in derogation of Chaganti's lien rights. (Complaint, ¶ 20.)

Chaganti filed Complaint August 8, 2022, asserting: (1) declaratory judgment; (2) breach of contract; (3) restitution; (4) breach of covenant of good faith and fair dealing; (5) fraud and deceit; (6) negligent misrepresentation; (7) civil conspiracy; (8) imposition of a constructive trust; (9) tortious interference; (10) breach of fiduciary duty; (11) aiding and abetting; (13) fraud and deceit; (14) negligent misrepresentation; (15) constructive fraud; (16) conspiracy to commit fraud; (17) tortious inducement to breach a contract; (18) inducement of breach of fiduciary duty; (19) infliction of emotional distress; (24) violation of Penal Code section 496.[2] On February 26, 2024 and March 11, 2024, Bank of America and Wells Fargo filed their demurrers, which Chaganti opposes.

II. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

[2] The Complaint does not include a twelfth cause of action and jumps from the nineteenth cause of action to the twenty fourth.

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

III. Wells Fargo's Demurrer

Wells Fargo demurs to the first cause of action for declaratory judgment on the ground it fails to allege sufficient facts to state a claim. (See Code Civ. Proc., § 430.10, subd. (e).)

A. Request for Judicial Notice[3]

Wells Fargo requests judicial notice of the Deed of Trust, recorded on March 30, 2004 (Exh. 1).

The Court may take judicial notice of property records under Evidence Code section 452, subdivision (c) and (h). (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264, disapproved of on other grounds by *Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919 [stating that "a court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity. From this, the court may deduce and rely upon *the legal effect* of the recorded document, when that effect is clear from its face" (emphasis added)].)

[3] On its own motion, the Court will take judicial notice of the Court's (Hon. Thang Barrett) Statement of Decision, filed on July 27, 2018. (Evid. Code, § 452, subd. (d); *Joslin v. H.A.S Ins. Brokerage* (1986) 184 Cal.App.3d 369, 375.)

Chaganti opposes the request because he contends it does not show the current status of the deed of trust. However, he does not allege that the property had been transferred or deeded to the Panchechos. Additionally, he fails to offer any items for judicial notice that would establish the Deed of Trust is not current. Thus, judicial notice is GRANTED.

B. Analysis

Wells Fargo argues Chaganti's lien is against the settlement proceeds rather than the Property, and its lien has superiority over his attorney's lien.

1. Attorney's Lien

"'A lien is a charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security for the performance of an act.' An attorney's lien 'upon the fund or judgment which he has recovered for his compensation as attorney in recovering the fund or judgment…is denominated a "charging lien."' A charging lien may be used to secure either an hourly fee or a contingency fee." (*Fletcher v. Davis* (2004) 33 Cal.4th 61, 66 [citations omitted] (*Fletcher*).) An attorney's charging lien is a "*security* interest" in the proceeds of the litigation. (*Isrin v. Superior Court* (1965) 63 Cal.2d 153, 158 (*Isrin*).) In California, a charging lien is "created only by contract…Unlike a service lien or a mechanic's lien, for example, an attorney's lien is not created by the mere fact that an attorney has performed services in a case." (*Fletcher, supra,* 33 Cal.4th at p. 66.)

"An attorney's contractual lien is created and takes effect when the fee agreement is executed. A contractual lien for attorney fees is a secret lien; no notice is required before it is effective against a judgment creditor who levies on the judgment…Where there are competing liens, the general rule is that, all things being equal, liens have priority according to the time of their creation. An attorney's lien on a judgment for services prevails over later encumbrances." (*Waltrip v. Kimberlin* (2008) 164 Cal.App.4th 517, 525 [citations omitted] (*Waltrip*); see also Civ. Code, § 2897 ["Other things being equal, different liens upon the same property have priority according to the time of their creation, except in cases of bottomry and respondentia"].) The creation of the lien is all that is necessary to protect an attorney's security interest – a separate "notice" of the lien is not required. (*Cetenko v. United California Bank* (1982) 30 Cal.3d 528, 533.)

However, "an attorney lien does not always have priority over the other liens; it does not have priority over prior liens on the same property… an attorney's contractual lien for fees cannot displace a creditor's *recorded* security interest in real property that is the subject of the litigation." (*Waltrip, supra,* 164 Cal.App.4th at pp. 626, citing *Pangborn Plumbing Corp. v. Carruthers & Skiffington* (2002) 97 Cal.App.4th 1039, 1051.)

Chaganti alleges the Gong Defendants proposed a fee agreement regarding his legal representation in the underlying matter, and the parties entered that agreement, which contained an attorney's lien on the Gong Defendants' properties. (Complaint, ¶¶ 39-42.) He further alleges Wells Fargo (and Bank of America) "are not entitled to any superior rights to the attorney lien because the trial court (Hon. Thang Barrett) found that the Gongs sold the property in 2012 under an agreement with the Pachecos. (Complaint, ¶ 151.) He subsequently alleges the Court (Hon. Thang Barrett) concluded the agreement was an "installment land sales contract." (Complaint, ¶ 154.)

An attorney's lien is a "security interest" in the *proceeds of the litigation*. (*Isrin, supra,* 63 Cal.2d at p. 158.) However, Chaganti alleges the parties agreed the payment of his fees would be "by the sale of the properties involved in the litigation, or by selling other properties owned by them." (Complaint, ¶ 40.) Wells Fargo contends Chaganti did not comply with California Rules of Professional Conduct, Rule 1.8.1, which requires a client's informed written consent when a business transaction with a client involves a security or other pecuniary interest adverse to the client. Chaganti did not attach the agreement with the Gong Defendants to his Complaint, and that agreement is not before the Court. Therefore, whether Chaganti complied with Rule 1.8.1 requires examination of extrinsic evidence and goes beyond the scope of demurrer. For the purposes of this motion, the Court accepts Chaganti's allegations regarding his attorney's lien as true. (*Olson v. Toy* (1996) 46 Cal.App.4th 818, 823 [for purposes of demurrer, we accept these allegations as true] (*Olson*); see also *Committee on Children's Television, supra,* 35 Cal.3d at pp. 213-214 ["A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court."].) Therefore, based on the allegations in the Complaint, it appears Chaganti had an attorney's lien against the Property.

Nevertheless, Wells Fargo's Deed of Trust was recorded on March 30, 2004. It seems Chaganti's contention that there may be a more recent deed of trust arises from the underlying matter, which is still pending before the Court. Chaganti relies on the Court's (Hon. Thang Barrett) Statement of Decision in which it concluded the agreement between the Gong Defendants and the Pachecos was an installment sales contract. (Statement of Decision, p. 22.) However, the Court also concluded the Pachecos defaulted on the agreement and they had "the right to redeem the Property by paying the entire balance of the purchase price and any other amounts due under the contract…" (*Ibid*.) But, Chaganti does not allege the Pachecos exercised the right or that there was a transfer of the Property. Therefore, it is unclear to the Court whether there is a more recent deed of trust arising from the underlying dispute.

Chaganti alleges Wells Fargo waived its right to its superior lien by failing to exercise the due-on-sale clause, which would accelerate the maturity of the loan. However, even the authority Chaganti cites in the Complaint recognizes the clause is at the "option of the lender". (See Complaint, ¶ 152.) Chaganti alleges Wells Fargo (and Bank of America) *should have* accelerated their respective notes, but he does not allege they were *required to*. Chaganti does not provide any authority, and the Court is not aware of any, which states Wells Fargo's failure to exercise the due-on-sale clause subordinates or waives Wells Fargo's superior lien.

Wells Fargo's Deed of Trust was recorded in 2004. Chaganti alleges he entered a written agreement and subsequent oral and written promises around February 2015, which is the earliest date his lien could have been established. (Complaint, ¶¶ 52.) Therefore, Wells Fargo's lien has priority over Chaganti's lien. (*Waltrip, supra,* 164 Cal.App.4th at pp. 626.)

2. First Cause of Action: Declaratory Judgment

Code of Civil Procedure Section 1060, which governs declaratory relief, states:

> Any person interested under a written instrument, excluding a will or a trust, or under a contract, or who desires a declaration of his or her rights or duties with respect to another … may, in cases of actual controversy relating to legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties

> in the premise, including a declaration of any questions or construction or validity arising under the instrument or contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at this time.

(Code Civ. Proc. § 1060.)

The fundamental basis of declaratory relief is the existence of an actual and present controversy over a proper subject. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.) "A general demurrer to a cause of action for declaratory relief must be overruled as long as an actual controversy is alleged; the pleader need not establish it is entitled to a favorable judgment." (*Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 606.) A general demurrer is usually not an appropriate method for testing the merits of a declaratory relief action, because the plaintiff is entitled to a declaration of rights even if it is adverse to the plaintiff's interest. (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 752.)

Chaganti alleges there is an actual controversy regarding whether his attorney's lien has priority over Wells Fargo's lien on the Property. (Complaint, ¶ 149.) However, Wells Fargo's lien was recorded years before Chaganti's lien was established. As the Court stated above, Chaganti fails to provide any authority that Wells Fargo's failure to exercise the optional due-on-sale clause or due diligence subordinates its lien. Thus, there is no actual controversy as to whether Chaganti's attorney's lien supersedes Wells Fargo's lien.

Chaganti contends Wells Fargo is a necessary and indispensable party to this matter because if it is not joined in this suit, there is a possibility of additional litigation over the priority of its lien as to his attorney's lien. (Opp., p. 4:2-4.)

Code of Civil Procedure section 389 states:

> (a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the

> subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been joined, the court shall order that he be made a party.

(Code Civ. Proc. § 389, subd. (a).)

As the Court stated above, based on the Complaint and judicially noticed documents, there is no actual controversy as to whether Chaganti's attorney's lien supersedes any prior lien on the Property. Therefore, Wells Fargo's ability to protect its interest would not be impaired by the disposition of this matter. Thus, Wells Fargo is not currently an indispensable party.

Chaganti contends if the original terms of the loan were modified, Wells Fargo's lien superiority would be impacted. (Opp., p. 7:3-24.) The Complaint is devoid of allegations of a loan modification. However, as this is the first challenge to the pleading, the Court will give Chaganti leave to amend.

Based on the foregoing, the demurrer to the first cause of action is SUSTAINED with 30 days leave to amend.

3. Twenty-Fourth Cause of Action: Violation of Penal Code section 496

The notice of demurrer did not state that Wells Fargo challenged this claim, however, in the memorandum of points and authorities, Wells Fargo stated it did not need to address this claim based on an exchange with Chaganti in which Chaganti confirmed the claim is only alleged against the non-bank defendants. (Demurrer, p. 8:21-25; Campbell Decl., ¶ 3.) But in his opposition, Chaganti offers substantive argument as to why demurrer should be overruled. Given the circumstances, the Court declines to consider substantive arguments as to this claim. As the Court has granted Chaganti leave to amend his first cause of action, it expects Wells Fargo to be removed from this claim as Chaganti represented. Thus, the demurrer to the twenty-fourth cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

IV. Bank of America's Demurrer

Bank of America demurs to the first cause of action for declaratory judgment and the "twenty-fourth" cause of action for violation of Penal Code section 496 in the ground they fail to allege sufficient facts to state a claim. (See Code Civ. Proc., § 430.10, subd. (e).)

A. Request for Judicial Notice

Bank of America requests judicial notice of:

(1) Exhibit 1: The Short Form Deed of Trust recorded on March 23, 2007;

(2) Exhibit 2: The Fictitious Deed of Trust recorded on July 15, 1999;

(3) Exhibit 3: The Rejection of Award and Request for Trial After Attorney-Client Fee Arbitration filed in Case No. 23CV411375.

As with Wells Fargo's request, Chaganti argues judicial notice should be limited because these materials do not show the current status of the deed of trust. However, Chaganti does not allege the property was transferred or deeded to the Panchechos. Additionally, he fails to offer any items for judicial notice that would establish that the Deed of Trust is not current. Thus, judicial notice as to items 1 and 2 is GRANTED.

Exhibit 3 pertains to a fee dispute for Chaganti's representation of the Gong Defendants regarding a matter in Florida, thus the request is DENIED. (See *Gbur v. Cohen* (1979) 93 Cal.App. 296, 301 [stating that judicial notice is limited to relevant matters].)

B. Analysis

1. First Cause of Action: Declaratory Judgment

Plaintiff alleges there is an actual controversy regarding whether his attorney's lien has priority over Bank of America's lien on the Property. (Complaint, ¶ 149.)

Bank of America's Deed of Trust was recorded in 2007. (Bank of America's RJN, Exh. 1.) The earliest Chaganti's lien could have been established was February 2015. (Complaint, ¶ 52.) Bank of America's lien was recorded first and thus, has superiority over Chaganti's attorney's lien. (See *Waltrip, supra,* 164 Cal.App.4th at pp. 626.) Chaganti alleges the superiority of Bank of America's lien was waived due to its failure to exercise the due-on-sale clause; however, the clause is optional and Chaganti fails to provide any authority that the failure to exercise the clause or its purported failure to exercise due diligence displaces Bank of America's superior lien. Therefore, based on the

Complaint and judicially noticed documents, there is no actual controversy as to whether Chaganti's attorney's lien has superiority over Bank of America's lien.

Chaganti contends Bank of America is an indispensable party because it claims some rights to the Property, and it should be able to represent its interest in this matter. Given the Court's reasoning above, Bank of America's interest will not be impacted by adjudication of this matter. (See Code Civ. Proc., § 389, subd. (a).) As a result, Bank of America is not currently an indispensable party.

Bank of America's demurrer to the first cause of action is SUSTAINED with 30 days leave to amend.

2. Twenty-Fourth Cause of Action: Violation of Penal Code section 496

Penal Code section 496 states,

> (a) Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170.

(Pen. Code, § 496, subd. (a).)

The elements of this claim are: "(1) that the particular property was stolen, (2) that the accused received, concealed, or withheld it from the owner thereof, and (3) that the accused knew that the property was stolen. (*Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 213.) In general, statutory causes of action must be pleaded with particularity. (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790 (*Covenant Care*).)

Chaganti alleges his fees are his vested property right and they were subject to theft by the Gong Defendants. (Complaint, ¶ 248.) He further alleges each of the defendants obtained, received, concealed, or withheld property and/or aided in concealing, such property with full knowledge that it was obtained by theft at the time they obtained, received, or aiding in concealing the property. (See Complaint, ¶ 249.) Chaganti's allegations against Bank of America are conclusory, and thus

insufficient to plead a statutory claim. (See *Covenant Care, supra,* 32 Cal.4th at p. 790.) Moreover, Chaganti's request for judgment as to this claim, names every defendant except for Bank of America and Wells Fargo. (See Complaint, ¶ 250.) Bank of America's demurrer to this claim is SUSTAINED with 30 days leave to amend.

Calendar line 4
Case Name: *Mark Christopher Tracy v. Cohne Kinghorn, et.al*.
Case No.: 23CV423435

Before the Court is specially appearing Defendant, Walter Plumb's motion to quash service of summons. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

Plaintiff claims he is a "federal whistleblower in what [is] alleged to be the longest and most lucrative water grab [] in the State of Utah." (Complaint ¶ 1.) According to the complaint, Defendants "perpetuated a fraudulent scheme to retire senior water rights vis-à-vis duplicitous water claims….for the construction and massive expansion of a luxurious private urban development" in Salt Lake City, Utah. (Complaint ¶ 2.)

On September 26, 2014, Plaintiff filed suit under the Federal Claims Act in the Federal Court for the District of Utah relating to a public drinking water system in Salt Lake County operated by the Emigration Canyon Improvement District ("ECID"), a public entity. Plaintiffs suit was ultimately dismissed after several appeals. (Complaint ¶¶ 7, 61-64.)

In this action, Plaintiff asserts claims for libel, libel per se, false light, and intentional infliction of emotional distress based on emails sent by some of the Defendants and statements posted on the ECIDs website, www.ecid.org. (Complaint ¶¶ 79-111.) Plaintiff acknowledges the individual Defendants are Utah residents and the corporate Defendants are organized in Utah, their headquarters are located in Utah, and they operate in accordance with the laws of Utah. (Complaint ¶¶ 7-20) Plaintiff also acknowledges the alleged false and defamatory statements were made in association with ECID and in Utah. (Complaint ¶¶ 65-78.) Plaintiff nevertheless alleges this Court has jurisdiction because (1) the ecid.org website, though directed at Utah residents, is "routed through San Jose, California; and (2) "Defendants published false and defamatory statement[s] for the purpose of obtaining continued payment of monies from property owners residing in California." (Complaint ¶¶ 4, 21.)

II. Legal Standard

A defendant may specially appear and move to quash service of summons for lack of personal jurisdiction under Code of Civil Procedure section 418.10, subdivision (a)(1). When a defendant

moves to quash service of process on jurisdictional grounds, the plaintiff has the initial burden of demonstrating facts justifying the exercise of jurisdiction. (*Jayone Foods, Inc. v. Aekyung Industrial Co. Ltd*. (2019) 31 Cal.App.5th 543, 553.) "[T]he burden of proof is upon the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence." (*Evangelize China Fellowship, Inc. v. Evangelize Ching Fellowship Hong Kong* (1983) 146 Cal.App.3d 440, 444.)

Plaintiff cannot rely on vague and conclusory assertions of ultimate facts. (*Strasner v. Touchstone Wireless Repair & Logistics, LP* (2016) 5 Cal.App.5th 215, 222.) Plaintiff must provide affidavits and other authenticated documents to demonstrate competent evidence of specific evidentiary facts that would permit a court to form an independent conclusion on the issue of jurisdiction. (*In re Automobile Antitrust Cases I & II* (2005) 135 Cal.App.4th 100, 113.) Evidence of the jurisdictional facts or their absence may be in the form of declarations. "Where there is a conflict in the declarations, resolution of conflict by the trial court will not be disturbed on appeal if the determination is supported by substantial evidence. However, where the evidence of jurisdictional facts is not conflicting, the question of whether a defendant is subject to personal jurisdiction is one of law. (*Elkman v. National States Ins. Co.* (2009) 173 Cal.App.4th 1305, 1312-1313; see also *Greenwell v. Auto-Owners Ins. Company* (2015) 233 Cal.App.4th 783, 789, citing *Elkman*.)

Under the minimum contacts test, personal jurisdiction may be either general or specific. (*Snowney v. Harrahs Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1062.) Where general jurisdiction exists due to a non-resident defendants "continuous and systematic" activities in a state, the defendant can be sued on causes of action not related to its activities within the state. (*Cornelison v. Chaney* (1976) 16 Cal.3d 143, 147.) Absent the showing adequate to confer general jurisdiction, a defendant may still be subject to specific jurisdiction, meaning "jurisdiction in an action arising out of or related to the defendants contacts with the forum state." (*Healthmarkets, Inc. v. Super. Ct.* (2009) 171 Cal.App.4th 1160, 1167.)

If a non-resident defendants contacts with California are not sufficient for general jurisdiction, it may still be subject to California's specific personal jurisdiction if a three-prong test is met: (1) defendant must have purposefully availed itself of the states benefits, (2) the controversy must be related to or arise out of the defendants contacts with the state, and (3) California's exercise of

jurisdiction over the defendant comports with fair play and substantial justice. (*Pavlovich v. Super. Court* (2002) 29 Cal.4th 262, 269.) Plaintiff bears the burden of establishing the first two requirements. If the plaintiff does so, the burden shifts to the defendant to show that California's exercise of jurisdiction would be unreasonable. (*Greenwell,* 233 Cal.App.4th at 792.)

III. Judicial Notice

In support of his opposition to Mr. Plumb's motion to quash, Plaintiff requests the Court to take judicial notice of the Complaint and Acceptance of Service filed on March 11 and May 18, 1983, respectively, in the Third Judicial District Court of Salt Lake County, State of Utah, Case No. C83-1843.

The Court PARTIALLY GRANTS Plaintiff's request. Judicial notice can be taken of the existence of any document in a court file. However, the truth of the matters asserted in those documents, including the factual findings of the judge who was sitting as the trier of fact, is not entitled to notice. (*Steed v. Department of Consumer Affairs* (2012) 204 Cal.App.4th 112, 120-121; *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1562-1570.)

IV. Preliminary Matters

A. Timeliness

Plaintiff asserts Mr. Plumb's motion was filed nine calendar days after expiration of the response deadline. As a result, jurisdictional objections were either waived or the Court cannot grant the motion for lack of jurisdiction.

A motion to quash must be made at defendant's initial appearance in the action, on or before the last day to plead "or within any further time that the court may for good cause allow." (Code of Civil Procedure § 418.10(a); *Marriage of Obrecht* (2016) 245 Cal.App.4th 1, 16-17 (where motion to quash was filed after Defendant's time to plead expired, but Plaintiff filed no objection that the motion was untimely and court addressed motion on its merits, motion to quash was deemed timely).)

While Plaintiff's proof of service declares the summons and complaint were mailed on January 5, 2024, from La Jolla, San Diego, USPS tracking history shows the packet arrived at its regional facility on January 6, 2024.[4] Therefore, but for a showing of good cause, the deadline for filing a

[4] On its own motion, the Court takes judicial notice of Plaintiff's (second) proof of service filed January 19, 2024

motion to quash would have been February 14, 2024 or February 15, 2024. Mr. Plumb's initial motion to quash was filed on February 15, 2024, but was rejected for failure to reserve a hearing date. According to Mr. Plumb's reply to Plaintiff's opposition, his attorney was informed of the rejection on February 23, 2024, and immediately refiled the motion on the same day.

The Court finds there is good cause to hear Mr. Plumb's motion on the merits.

B. Local Rule 8

Plaintiff appears to ask the Court to deny Mr. Plumb's motion to quash for failing to meet and confer regarding hearing dates in violation of Civil Local Rule 8A.

Civil Local Rule 8(B)(2)—not 8A—does require the parties to meet and confer before reserving a motion hearing date. However, Plaintiff provides no authority for denying a motion where Civil Local Rule 8(B)(2) has been violated. Points asserted without supporting authority are waived. (*People v. Dougherty* (1982) 138 Cal. App. 3d 278, 282; *Badie v. Bank of America* (1998) 67 Cal. App. 4th 779, 784-785 ["When [a party] fails to raise a point or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived]; *Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, 619, fn. 2 ["[A] point which is merely suggested by a party's counsel, with no supporting argument or authority, is deemed to be without foundation and requires no discussion"].

The court will therefore address the merits of Mr. Plumb's motion to quash.

V. Analysis

Mr. Plumb contends the Court lacks personal jurisdiction over him because (1) he is a resident of Utah with no substantial, continuous, and systematic contacts in California, (2) he has not purposefully directed any actions at California residents, (3) he has not purposefully conducted any activities in California, and (4) this dispute is not related, nor does it arise from his alleged contacts with California.

In opposition, Plaintiff reiterates his allegations and asserts that Mr. Plumb has purposefully availed himself to California laws through (1) his ownership of eight time-shares in California, (2) investment and management of Coastal Land Investments LLC, (3) investments by Plumb Land Investments LLC, (4) current involvement in a planned unit development in Hanford, California

through Titan Holdings; and (5) Parmics Inc.'s marketing and selling nutritional supplements to California residents.

In alternative, Mr. Plumb requests dismissal of this action, pursuant to Code. Civ. Proc. § 418.10(a)(2), on the grounds of inconvenient forum. Mr. Plumb argues (1) all Defendants are Utah residents, (2) the real property at issue is in Utah, (3) Plaintiff's claims arise from alleged wrongful conduct occurring exclusively in Utah, and (4) likely evidence and witnesses who would be called upon to provide discovery are in Utah. In opposition, Plaintiff contends forum non conveniens doctrine may not be invoked to deprive a resident Plaintiff access to California courts.

The complaint's pertinent allegations against Mr. Plumb are:

- "Defendant Walter J. Plumb III is an individual and resident of Utah former law partner of the President pro tempora of the United States Senate and Chairman of the Senate Judiciary Committee Orin Hatch, former member of the Emigration Advisory Committee, constructed the Boyer Wells and Emigration Oaks Reservoir of the Emigration Oaks Water System and employed ECID Chairman Hughes as an unlicensed contractor to construct the Emigration Oaks Waste Water System ("Land-Developer Plumb")." (Complaint ¶ 15.)
- Plumb, Land-Developers Gardner, and Utah attorney Bennion, collectively "Emigration Oaks Defendants", had acquired 1200 acres of property in the mountains immediately east of the city in early 1980s; location of luxury residential building investment "Emigration Oaks PUD". (Complaint ¶¶ 23, 24)
- Following acquisition of the Mt. Olivet Cemetery water right 57-8865, Emigration Oaks Defendants constructed Boyer Well No. 31 and the 355,000-gallon Boyer Tank on the north side of the canyon between May 15, 1984, and June 15, 1986. (Complaint ¶ 29)
- Emigration Oaks Defendants controlled a duplicitous water share sufficient for only 125 residential units. (Complaint ¶ 30)
- Sometime in January 1993, Boyer Well No. 1 "pumped dry" and the Boyer Tank exhausted the productive capacity of the water system. (Complaint ¶ 32)
- On February 20, 1994, Emigration Oaks Defendants constructed a second commercial well, Boyer Well No. 2, contrary to the Utah State Engineer Study. (Complaint ¶ 35)

- Sometime in 1998, Emigration Oaks Defendants, through Defendant Kinghorn, transferred legal title and liability of the water system as a "gift" to ECID, whereby ECID Trustees assumed obligation to provide water service to an additional 130 lots. (Complaint ¶ 40)
- To date, ECID through Simplifi continues operation of Boyer Well Nos. 1 and 2 as culinary water sources of the Emigration Oaks Water System (Complaint ¶ 44)
- All Defendants were/are agents, collaborators, and co-conspirators with each other Defendants. (Complaint ¶ 21)

A. Personal Jurisdiction

1. General Jurisdiction

Plaintiff has the burden of showing Mr. Plumb's continuance and systematic contact with the State of California "as to render [him] essentially at home in the forum State" to establish general jurisdiction. (*Saimler AG v. Bauman* (2014) 571 U.S. 117, 127.) In assessing a defendant's contacts with the forum state for purposes of general jurisdiction, the court looks at the contacts as they existed from the time the alleged conduct occurred to the time of service of summons. (*Strasner v. Touchstone Wireless Repair & Logistics, LP* (2016) 5 Cal.App.5th 215, 222-223.)

Plaintiff acknowledges Mr. Plumb is a resident of Utah. Mr. Plumb attests he has never been a resident of California, does not maintain bank accounts in California, and will not file a California income tax return for tax year 2023. Mr. Plumb also attests he owns interest in some time-shares in San Diego, which he uses to stay typically four days a year while vacationing in California. This is insufficient evidence for Plaintiff to meet his burden to prove that Mr. Plumb's sporadic stays in California were substantial and continuous such that general jurisdiction is properly exercised.

2. Specific Jurisdiction

To assert specific jurisdiction over Mr. Plumb, Plaintiff has the burden of showing Mr. Plumb purposefully (1) directed his activities at California residents, (2) derives a benefit from his activities in California, or (3) invoke privileges and protections of California's laws by purposefully engaging in significant activities within the State or by creating continuing obligations between himself and the residents of California. "As the name and definition of purposeful availment make plain, an out-of-state defendant's conduct toward the forum State or its residents is relevant to the jurisdictional

analysis only if that conduct is purposeful, deliberate, and intentional. [Citations.] An out-of-state defendant's contact with a forum state that is 'random' 'fortuitous' or 'attenuated' is not enough. [Citations.] This is why the mere fact that the out-of-state defendant's conduct has some 'effect' on a California resident is not enough, by itself, to constitute purposeful availment [citations]; to count, that effect must be *intended* [citations]." (*Jacqueline B. v. Rawls Law Group, P.C.* (2021) 68 Cal.App.5th 243, 254.) In tort cases, "purposeful availment" is based on "intentional actions expressly aimed at the forum state causing harm, the brunt of which is suffered -and which the defendant knows is likely to be suffered -in the forum state." (*Jewish Defense Organization, Inc. v. Sup. Ct. of Los Angeles County (Rambam)* (1999) 72 Cal.App.4th 1045, 1054.)

Once Plaintiff has shown purposeful availment, he must then show that his claims for defamation, false light, and emotional distress are related to or arise out of Mr. Plumb's contacts with the State of California. This test does not require a "causal relationship between the defendant's in-state activity and the litigation." (*Ford Motor Co. v. Montana Eighth Judicial District Court* (2021) 141 S.Ct. 1017, 1026.) The "arise out" of standard "asks about causation," but "relate to" does not. (*Ibid*.) "When determining whether specific jurisdiction exists, courts consider the relationship among the defendant, the forum, and the ligation." (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269.)

Mr. Plumb's timeshare interests in California properties satisfy the "purposeful availment" requirement. Owning an interest in real property in California through a mortgage, deed of trust, or other security interest constitute "purposeful availment" of the benefits and protections of the laws of California. (*Buchanan v. Soto* (2015) 241 Cal.App.4th 1353, 1363; *Easter v. American West Financial* (9th Cir. 2004) 381 F.3d 948, 961; *Sher v. Johnson* (9th Cir. 1990) 911 F.2d 1357, 1363.) Nevertheless, to assert specific jurisdiction over Mr. Plumb, there must be a substantial nexus or connection between this property ownership and Plaintiff's claims. (*Snowney,* 35 Cal.4th at 1068.) The more significant the forum contacts are, the less related to the cause of action they need to be. (*Ibid*.)

Here, there is no evidence establishing any nexus between Plaintiff's claims and Mr. Plumb's time-share ownership interests. Plaintiff also does not allege or submit any evidence that his claims arise out of or are related to Mr. Plumb's investments in Coastal Land Investments LLC, Plumb Land

Investments LLC, Titan Holdings, and/or sale of nutritional supplements to California residents through Parmics Inc.

Mr. Plumb's motion to quash is therefore GRANTED.

B. Inconvenient Forum

Mr. Plumb's alternate argument under the doctrine of forum non-conveniens is moot.

C. Jurisdictional Discovery

"A plaintiff is generally entitled to conduct discovery with regard to a jurisdictional issue before a court rules on a motion to quash. Granting of a discovery request lies in the discretion of the trial court." (*Goehring v. Superior Court* (1998) 62 Cal.App.4th 894, 911, internal quotes and citations omitted.) A court may deny such a request when it "could reasonably conclude further discovery would not likely lead to production of evidence establishing jurisdiction." (*Beckman v. Thompson (1992)* 4 Cal.App.4th 481, 487.)

Plaintiff requests leave to conduct jurisdictional discovery before the Court decides these motions. However, there must be some basis in fact for jurisdictional discovery—some reason to determine discovery is likely to produce evidence of California contacts sufficient for personal jurisdiction. (*In re Automobile Antitrust Cases* (2005) 136 Cal.App.4th 100, 127 ["In order to prevail on a motion for a continuance for jurisdictional discovery, the plaintiff should demonstrate that discovery is likely to lead to the production of evidence of facts establishing jurisdiction"].) Plaintiff provides none here, and when a plaintiff is not able to make an offer of proof of the existence of "additional relevant jurisdictional evidence," a court does not abuse its discretion in denying jurisdictional discovery. (*Ibid*.)

Plaintiff's request for additional jurisdictional discovery is accordingly DENIED.