

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

Department 3

Honorable William J. Monahan, Presiding

Allison Croft, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2130

DATE: 4/23/2024 TIME: 9:00 A.M.

TO CONTEST THE RULING: Before 4:00 p.m. today (4/22/2024) you must notify the:

- (1) Court by calling (408) 808-6856 and
- (2) Other side by phone or email that you plan to appear and contest the ruling.
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court prefers in-person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to **Department 3**.

https://www.sccscourt.org/general_info/ra_teams/video_hearings_teams.shtml

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.sccscourt.org/>

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) **Please Note:** Any proposed orders must be submitted with the Judicial Council Form EFS-020 Proposed Order (Cover Sheet). Please include the date, time, dept., and line number.

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV415412	Nathaniel Reichert vs Andy Pham	Motion: Compel Plaintiff Nathaniel Reichert's responses to Def's s Form Interrogatories, Set One, Special Interrogatories, Set One, and Demand for Inspection, Set One, and for sanction by Def Andy Phuc Pham Ctrl Click (or scroll down) on Line 1 for tentative ruling. The court will prepare the order.

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LINE 2	20CV364697	RECYCLING SPECIALISTS, LLC et al vs AUSTIN KYLES et al	Motion: Leave to Amend Cross-complaint Ctrl Click (or scroll down) on Line 2 for tentative ruling. The court will prepare the order.
LINE 3	23CV415412	Nathaniel Reichert vs Andy Pham	Motion: Withdraw as attorney Shaun Joseph Bauman to Plaintiff Nathaniel Reichert Unopposed and GRANTED.
LINE 4	23CV420300	Northeast Securities Co., Ltd. vs Que Wenbin et al	Motion: Order to dismiss action on ground of forum non conveniens by Defendant Mike Que Ctrl Click (or scroll down) on Line 4 for tentative ruling. The court will prepare the order.
LINE 5	23CV427526	Swift Financial, LLC as Servicing Agent for WebBank vs Atlantis Glass, Inc., a California Corporation et al	Hearing: Amended Petition to Confirm Arbitration Award by Petitioner Swift Financial, LLC as Servicing Agent for WebBank against Respondents Atlantis Glass, Inc., a California Corporation and Sepandar Danesh, an individual Unopposed and GRANTED.
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LINE 7			
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			

Calendar Line 1

Case Name: *Nathaniel Reichert vs Andy Pham*

Case No.: 23CV415412

Good cause appearing, defendant Andy Pham (“Defendant”)’s motion for an order compelling plaintiff Nathaniel Reichert (“Plaintiff”) to provide verified substantive responses, without objections, to Defendant’s Form Interrogatories (“FI”), Set One, Special Interrogatories (“SI”), Set One, and Demand for Inspection (“RPD”) Set One is GRANTED. Plaintiff shall serve code-compliant verified responses, without objections, to Defendant’s FI, Set One, SI, Set One, and RPD, Set One, within 30 days of notice of entry of this order.

Plaintiff failed to respond to Defendant’s properly served discovery in this action. The propounding party may seek a motion to compel responses if no response is received, and no meet and confer is required. (Code Civ. Proc. (“CCP”) §§ 2030.290(b) (unanswered interrogatories); 3031.300(b) (unanswered demand for inspection); *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007)148 Cal.App.4th 390, 403-404.) A party that fails to serve a timely response to the discovery request waives any objection to the discovery, including one based on privilege or the protection of work product. (*Id.*)

Defendant’s request for monetary sanctions is granted against Plaintiff in the reasonable amount requested of \$1,060 pursuant to CCP sections 2030.290(c) (interrogatories); 2031.300(c) (demands for inspection); and 2023.010-030 (misuse of discovery process). Plaintiff shall pay this amount in full to Defendant within 30 days of notice of entry of this order.

Defendant’s request for monetary sanctions to also be awarded against Plaintiff’s counsel is DENIED. The court finds that other circumstances make the imposition of sanctions unjust against Plaintiff’s counsel.

Defendant shall serve notice of entry of this order on (1) Plaintiff’s current attorney of record (and since he is moving to withdraw) also on (2) the last known address listed for Plaintiff in the motion to withdraw as counsel for Plaintiff:

Nathaniel Reichert
910 Eton Way
Sunnyvale, CA 94087.

The court will prepare the order.

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Calendar Line 2

Case Name: *RECYCLING SPECIALISTS, LLC et al vs AUSTIN KYLES et al*

Case No.: 23CV415412

Motion to Amend

Good cause appearing, cross-complainants Austin J. Kyles; Jeannette E. Kyles; and Austin J. Kyles and Jeanette E. Kyles as Trustees of the Austin J. Kyles and Jeannette E. Kyles Revocable Trust, dated February 17, 1998, (“Cross-Complainants”) motion for an order granting leave to amend their Cross-Complaint to add fictitiously named parties and allegations supporting Cross-Complainants’ claims against them on the grounds that Cross-Complainants were truly ignorant of the fictitiously named cross-defendants’ identities when the Cross-Complaint was filed on July 10, 2020, pursuant to Code of Civil Procedure (“CCP”) sections 473(a), 474 and 576 and California Rules of Court (CRC) Rule 3.1324 is GRANTED. Cross-Complainants are granted 15 days leave to file their proposed First Amended Cross-Complaint.

The court may, in the furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading. (CCP § 576.) Judicial policy favors resolution of all disputed matters between the parties in the same lawsuit and thus the court’s discretion will usually be exercised liberally to permit an amendment of the pleading. (*Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1428.) courts are bound to apply a policy of great liberality in permitting amendments “at any stage in the proceedings, *up to and including trial*,” absent prejudice to the adverse party. (*Aikinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761 (internal quotations omitted and emphasis added.)

The proposed First Amended Cross-Complaint (“FACC”) replaces fictitiously named ROE cross-defendants with the now known named cross-defendants and adds previously unknown facts, establishing their liability for breach of contract claims in the Cross-Complaint filed on July 10, 2020.¹ The FACC states a case of direct successor liability based on the terms of Personal Guarantees, not a fraudulent transfer action. The FACC alleges pursuant to section 9 of the Personal Guaranties, that the to be ROE’d in cross-defendants are, as successors and transferee(s) of substantially all of Howard Misle (“Misle”)’s assets, obligated to make payment to the Kyles Trust where, as is alleged here, Recycling Specialists LLC (“RSP LLC”) defaulted on the underlying Promissory Notes. Their alleged liability is based on the terms of the Personal Guarantee, not a fraudulent conveyance action barred by Nevada law (as claimed in the opposition).

The court agrees with Cross-Complainants that no fraudulent conveyance action is brought under the Uniform Voidable Transaction Act (Cal. Civ. Code § 3439) eq seq.), nor Nevada’s equivalent, in the FACC.

¹ The ROE’d in cross-defendants in the FACC are:

Roe 1-Meghan Konecne, individually;

Roe 2-Meghan Konecne, as personal representative of the Estate of Howard Nathan Misle;

Roe 3- Meghan Konecne, as trustee of the Silver Spur Trust;

Roe-4 Meghan Konecne, as trustee of the Nevada marital Trust described within the Silver Spur Trust; and

Roe 5-Gayle Misle, as trustee of the Silver Spur Trust.

The court agrees with Cross-Complainants' reply that a personal jurisdiction challenge is impermissible premature. (See Reply, p. 7.) It is also impermissibly premature to determine whether the FACC should be dismissed for failure to serve the to be ROE'd in cross-defendants within 3 years of filing of the Cross-Complaint on July 10, 2020, under CCP 583.210. The case of *Lopa v. Sup. Ct. (Lopa)* (1975) 46 Cal.App.3d 382, 387 cited in the Opposition at page 10 is distinguishable because it was a motion to dismiss (under repealed CCP section 581a) for failure to serve within three years, *not* a denial of the motion to amend. The opposition has not shown that the action is barred by the statute of limitations. This is a disputed factual issue because Cross-Complainant is relying on the waiver of the statute of limitations in the terms of the Personal Guarantee in bringing this amendment. These are issues that may be addressed when (and if) they are properly raised in response to the service of the FACC.

The request for judicial notice ("RFJN") filed 3/15/2024 filed by plaintiffs/cross-defendants Recycling Specialists, Inc., Recycling Specialists, LLC and Meghan Konecne ("Konence") is GRANTED.

The opposition points to Cross-Complainants' knowledge of Konecne when she substituted in for the late Howard Misle on behalf of the estate on January 18, 2022 (RFJN Ex. D.) However, this was *after* the Cross-Complaint was filed on July 10, 2020.

Designating a cross-defendant by a fictitious name is proper only if Cross-Complainants were genuinely ignorant of the cross-defendant's true name or the facts rendering the cross-defendant liable when the cross-complaint was filed. (See *McClatchy v. Coblentz, Patch, Duffy & Bass, LLP* (2016) 247 Cal.App.4th 368, 371-372; *Taito v. Owens Corning* (1992) 7 Cal.App.4th 798, 802, modified (July 15, 1992).) "The test is whether, **at the time the [cross-]complaint was filed**, the [cross-complainants] "[were] ignorant of the facts giving [them] a cause of action against the person.'" [Citation] The focus is on the *facts* that the [cross-complainants] knew, not on whether the [cross-complainants] subjectively knew [they] had a cause of action based on those facts" and there is no duty to exercise reasonable diligence to obtain facts. (*Hahn v. New York Air Brake LLC* (2022) 77 Cal.App.5th 895, 899-900 [emphasis added].)

At the time the Cross-Complaint was filed on July 10, 2020, Misle was still alive and had answered the Cross-Complaint. Misle never provided any Cross-Complainant with notice that he transferred substantially all of his assets to the Silver Spur Trust or to anyone triggering section 9 to the Personal Guarantees. As such, at the time of filing their Cross-Complaint on July 10, 2020, it appears from a preponderance of the evidence that Cross-Complainants were unaware of the facts conferring liability on the to-be ROE'd-in cross-defendants and are entitled to amend their Cross-Complaint. (See Reply, p. 10.)

The court will prepare the order.

Calendar Line 3

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Calendar line 4

Case Name: Northeast Securities, Co., Ltd. vs Que Wenbin, et al.

Case No.: 23CV420300

Forum Non Conveniens

Defendant Mike Que (“Mike”)’s motion to dismiss the action on the grounds of forum non conveniens against plaintiff Northeast Securities Co, Ltd., pursuant to Code of Civil Procedure (“CCP”) section 410.30 is DENIED.

CCP section 410.30, subd. (a) states:

When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just.

(CCP § 410.30, subd. (a) (Deering, Lexis Advance through the 2024 Regular Session Ch 1).)

“Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere.” (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751 (*Stangvik*).) “On a motion for forum non conveniens, the defendant, as the moving party, bears the burden of proof.” (*Stangvik, supra*, 54 Cal.3d at 751.)

The California Supreme Court in *Stangvik* provided an analysis of the factors to be considered in a *forum non conveniens* motion:

In determining whether to grant a motion based on forum non conveniens, a court must first determine whether the alternate forum is a "suitable" place for trial. If it is, the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California. The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation. [Citations.]

(*Stangvik, supra*, 54 Cal.3d at 751.)

Suitable Alternative Forum

In *Stangvik*, the Supreme Court concluded that the availability of a suitable alternative forum was not simply a factor to be considered in the balancing test, but a threshold inquiry that must be satisfied before the court could proceed to the balancing test. (*Stangvik*, *supra*, 54 Cal.3d at pp. 751–752 & fn. 3.) In order for an alternative forum to be suitable, there must be jurisdiction and no statute of limitations bar to hearing the case on the merits. [Citation.]

(*David v. Medtronic, Inc.* (2015) 237 Cal.App.4th 734, 742-743.)

Here, the moving party Mike did *not* file any supporting declarations. There is *no* evidence regarding whether there is “no statute of limitations bar to hearing the case on the merits” in People’s Republic of China [China or PRC] or Tiwan [Hong Kong or HK]. This distinguishes the present case from the case cited by Mike on pages 6-7 of his MPA filed 3/12/2024 of *Guimei v. Gen. Elec. Co.* (2009) 172 Cal.App.4th 689 where the court had declarations of both experts regarding Chinese law. (*Id.*, at p. 701.) It also distinguishes it from the case cited by Mike on page 7 of his MPA filed 3/12/2024 *Chong v Superior Court* (1977) 58 Cal.App.4th 1032, where the defendants “have consented to jurisdiction and to tolling any statute of limitations during the pendency of the proceedings in California.” (*Id.* at p. 1038.)

Mike relies on the language of the Complaint, and argues at page 7 of his MPA filed 3/12/2024:

Here Mike, based on the language of the Complaint in this case appears to be subject to the jurisdiction of the Hong Kong and Chinese courts, in that the property is located in Hong Kong, and the judgment was entered in China, with Mike being a Chinese citizen, Plaintiff has alleged not facts that would deny jurisdiction in those two countries, and has provided no information as to why Plaintiff is not seeking to enforce the judgment against Mike in those two jurisdictions.

However, Mike’s argument at page 7 of his MPA filed 3/12/2024 that he “has satisfied the suitable alternative prong” by arguing “[t]his makes China [or Hong Kong] a suitable forum, even if California law is more favorable to plaintiffs or recovery would be more difficult in China [or Hong Kong]” citing *Guimei*, *supra*, 172 Cal.App.4th at p. 694 (*citations omitted*) is *not* persuasive. Mike failed to meet his burden of proving that is “no statute of limitations bar to hearing the case on the merits” in China or Hong Kong. Accordingly, Mike failed to satisfy the threshold issue that China or Hong Kong was a suitable alternative forum.

Plaintiff points out that Mike has not indicated he would submit to the jurisdiction either the PRC or HK courts.) The Complaint alleges that Mike is an individual citizen of the PRC and on information and belief that Mike shares and maintains a residence within California. (Complaint ¶ 11.) Plaintiff has also submitted evidence clearly demonstrating Mike’s lengthy history of availing himself of California laws, doing business within California, and that Mike has represented that he resides in California for many years. The moving papers do not clarify or otherwise indicate where Mike is a citizen or resides. Plaintiff points out that after being personally served with process in HK in August 2023, Mike represented to this court in prior motion practice that he was a resident of HK. (See Motion to Quash.) However, then Plaintiff personally served Mike to a residence in Texas where he was served again. (See Proof of Service filed April 8, 2024

Private Interest Factors

“The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses.” (*Stangvik, supra*, 54 Cal.3d at 751.)

Mike focusing on the real estate transactions in PRC or HK argues that “All of the effect, harm, and damages caused by Defendants’ alleged conduct occurred in Hong Kong and China and would require proof through third party witnesses in Hong Kong and China. It does not appear that any evidence exists in California. The evidence that exists in Hong Kong and China would have to be translated. Moreover, Hong Kong and Chinese court would be able to compel the attendance of witnesses located there and it will be less burdensome for those witnesses to attempt proceedings in Hong Kong or China. California courts do not have the jurisdiction over any nonparty witnesses located in China or Hong Kong ([CCP] § 1989.) Clearly, the cost of obtaining discovery and testimony in Hong Kong and China will be significantly reduced.” (Mike’s MPA filed 3/12/2024, p. 8.)

Here, the Complaint alleges that the transfer at issue, the Intra Transfer, was orchestrated, took place, and primarily involved parties located within California. Accordingly, Plaintiff argues that “[k]ey evidence relevant to the claims within the Complaint is primarily located within California. The harm suffered by Plaintiff was the result of acts and directions by residents of California and done and issued from within California.” (Plaintiff’s MPA filed 4/10/2024, p. 10.)

Here, the court agrees with Mike that *some* of the evidence relating to the title change of property in HK will be in HK. But it also agrees with Plaintiff that *some* of the evidence is going to be in California, especially regarding the other claims in the Complaint involving California properties which are alleged to be a part of the same international conspiracy.

Public Interest Factors

“The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation. [Citations.]” (*Stangvik, supra*, 54 Cal.3d at 751.)

Plaintiff is a Chinese corporation and seeks a judgment based on alleged fraudulent transfers of real property. While Mike is correct that paragraph 2 of the Complaint alleges the Defendants “violated PRC laws”, that was contained within a general allegation regarding Defendants participation “in a conspiracy to perpetrate international fraud wherein they violated PRC laws, made fraudulent transfers, wrongfully converted assets and obfuscated any assets that may have been used to satisfy the Judgment Debtors’ creditors”. (*Complaint*, ¶ 2.) It was also after alleging in paragraph 1 of the Complaint that: “This is an action pursuant to the Uniform Voidable Transactions Act, as codified in California Civil Code (“CCP”)² §§

² The reference to the CCP appears to be a typographical error. CCP usually refers to the Code of Civil Procedure, but the Complaint is referencing the Cal. Civil Code sections dealing with the UVTA.

3439 et seq., for avoidance of fraudulent transactions conducted within the State of California in order to enforce that certain foreign judgment that became final, conclusive, and enforceable on December 2, 2018, by its own terms and PRC law...” (*Complaint*, ¶ 1.)

This action is directly related to California because the underlying facts are derived from Judgment Debtors’ conduct that occurred in California, and the claims arise out of and are brought pursuant to California law giving California a great interest in this matter. The UVTA prescribes a choice of law to be applied for any claims brought under it, specifically the choice of law is “the law of the jurisdiction in which the debtor is located when the transfer is made...” (Cal. Civ. Code § 3439.10(b). “Pursuant to the UVTA, it is contrary to public policy for a debtor to convey or conceal his property for the purpose of defrauding his creditors.” (*Berger v. Varum* (2019) 35 Cal.App.5th 1013, 1025.)

Here, the Complaint alleges that the transfer at issue, the Intra Transfer, was orchestrated, took place, and primarily involved parties located *within* California. “Furthermore, several of the subject properties---albeit not those transferred to Mike---are located within California.” (Plaintiff’s MPA filed 4/10/2024, p. 8.)

Here, the court agrees with Plaintiff’s argument that:

The facts that underpin the claims within the complaint are directly related to California, namely that the judgment Debtors, from within California, have conspired, orchestrated, and conducted a scheme to defraud their legitimate creditors on a global scale. Most importantly however is the fact that the claims within the Complaint are brought pursuant to a California statute, the UVTA and in accordance with that statute’s choice of law provision, a California court is best suited to interpret and apply California law. See Cal. Civ. Code § 3439.10(b).

(Plaintiff’s MPA filed 4/10/2024, p. 9.)

Here, balancing all the public and private factors, the court finds that they weigh in favor of adjudicating the complaint in California.

For all the forgoing reasons, the motion is DENIED.

The court will prepare the order.

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