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: February 20, 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:

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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: You no longer need to file a blank notice of motion to obtain a hearing date. **Phone lines are now open for you to call and reserve a date before you file your motion**.

Where to call:408-882-2430
When to call: Monday through Friday, 8:30 am to 12:30 pm

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	18CV321554	Palo Alto Property Owner LLC vs The Grocery Men I, LLC	Parties are ordered to appear for the examination.
2	18CV321554	Palo Alto Property Owner LLC vs The Grocery Men I, LLC	Parties are ordered to appear for the examination.
3	22CV397918	Devinder Shoker et al vs Venkatapathi Rayapati	Off calendar.
4	23CV418299	Rajeev Guliani vs Milind Dalal et al	Parties are ordered to appear for case management conference.
5	21CV391498	Hugo Amaya et al vs The Permanente Medical Group Inc. et al	Kaiser Defendants Demurrer to Plaintiffs Third Amended Complaint is SUSTAINED WITHOUT LEAVE TO AMEND. An amended notice of motion with this hearing date and time was served by electronic mail on October 24, 2023. No opposition was filed. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Plaintiff also fails to correct the numerous errors in her complaint, including failure to join Mr. Amaya's daughter as a plaintiff, which the Court previously found to be required. (July 25, 2023 Order Sustaining Demurrer with Leave to Amend.) It is Plaintiffs burden to demonstrate further amendment could cure the defects. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Plaintiff filed no opposition and fails to meet this burden. Sustaining the Kaiser Defendants demurrer without leave to amend is therefore appropriate. Court to prepare formal order. Kaiser Defendants to prepare form of judgment and dismissal.

6	22CV400295	MIN-SUN MOON et al vs HECTOR LEON et al	Plaintiffs Motions to Compel Lula Technologies, Inc. to Provide Responses to (1) Request for Production (Set One) and for $1,250 in Sanctions, (2) Special Interrogatories (Set One) and for $1,250 in Sanctions, and (3) Form Interrogatories (Set One) and for $1,250 in Sanctions are GRANTED, IN PART. Plaintiff served these discovery requests on August 2, 2023, making Defendants responses due September 6, 2023; Plaintiff agreed to a two-week extension for responses, extending that deadline to September 20, 2023. After receiving no responses by that date, Plaintiff sent a meet and confer letter dated September 22, 2023, inviting a discussion about an additional extension, if needed, and stating "If we fail to receive any responses from you, we will be forced to seek court intervention in the matter." The parties' correspondence appears to have crossed in the mail, as Defendant served discovery responses by mail on September 20, 2023, making those responses timely under the agreed-upon extension. Plaintiff argues those were not responses because they consisted entirely of objections and were unverified. However, Code Civil Procedure sections 2030.250 and 2031.050 states: "The party to whom the [discovery is] directed shall sign the response under oath *unless the response contains only objections*." (Emphasis added.) Here, it is undisputed that the responses served on September 20, 2023 consisted only of objections, and Defense counsel signed those responses. Thus, the Court finds objections are not waived. And, while Plaintiffs September 22, 2023 letter plainly cannot satisfy the type of robust meet and confer the Code requires before bringing a motion to compel since it was written and sent before Plaintiff even received Defendants responses, it is equally true that Defendant did not produce any substantive discovery responses until very close in time to when Defendants opposition to these motions were due, and it appears there are still no verifications for these responses. Thus, the Court finds it unlikely that Plaintiff would have received substantive responses without filing these motions. Defendant is therefore ordered to (1) provide verifications for its discovery responses within 10 days of service of this formal order and (2) pay Plaintiff $1500 in sanctions within 30 days of service of this formal order. The reduction in the sanction request reflects that these three motions are virtually identical, and no substantial reply or argument is necessary given Defendant has now produced substantive responses. Although the Court is awarding these sanctions because motion practice was necessary for Plaintiff to obtain timely substantive responses, future discovery disputes must be the subject of *meaningful* meet and confer *before* the motion is filed. This means reviewing the opponent's responses, picking up the phone, talking through specific issues, identifying areas of agreement, and only bringing those areas of disagreement that cannot be resolved after robust discussion to the Courts attention.
7	22CV400295	MIN-SUN MOON et al vs HECTOR LEON et al	Please see line 6, above.
8	22CV400295	MIN-SUN MOON et al vs HECTOR LEON et al	Please see line 6, above.
9	23CV410362	The Kanavel Group, LLC, a Wyoming limited liability company vs 1-20 DOES	Redwoods Motion to Strike is GRANTED with 10 days leave to amend. Please scroll down to lines 9-10 for full tentative ruling. Court to prepare formal order.
10	23CV410362	The Kanavel Group, LLC, a Wyoming limited liability company vs 1-20 DOES	Redwoods Demurrer to the Fourth and Fifth Causes of Action is SUSTAINED with 10 DAYS LEAVE TO AMEND but otherwise OVERRULED. Please scroll down to lines 9-10 for full tentative ruling. Court to prepare formal order.
11	23CV423435	Mark Tracy vs Cohne Kinghorn PC et al	Defendants' Motions to Quash are GRANTED. Please scroll down to lines 11-14 for full tentative ruling. Court to prepare formal order.

12	23CV423435	Mark Tracy vs Cohne Kinghorn PC et al	Please see line 11, above.
13	23CV423435	Mark Tracy vs Cohne Kinghorn PC et al	Please see line 11, above.
14	23CV423435	Mark Tracy vs Cohne Kinghorn PC et al	Please see line 11, above.
15	23CV426722	JOHN FLETCHER et al vs GENERAL MOTORS LLC et al	General Motors Demurrer and Motion to Strike are off calendar. General Motors failed to serve proper notice of the motion and demurrer. The Code of Civil Procedure, Rules of Court, and Civil Local Rules require that the moving party serve a written notice of motion with the hearing date and time. (See Code Civ. Proc. §§1005(a), 1010.) A court lacks jurisdiction to hear a motion that has not been properly served, even if the non-moving party had some type of advanced notice. (See *Diaz v. Professional Community Mgmt.* (2017) 16 Cal.App.5th 1190, 1204-1205; *Five-O-Drill Co. v. Superior Court of Los Angeles County* (1930) 105 Cal. App. 232.) If General Motors wants its demurrer and motion to strike heard, it must reserve a hearing date and file and serve an amended notice of motion.
16	23CV426722	JOHN FLETCHER et al vs GENERAL MOTORS LLC et al	Please see line 15, above.
17	23CV427353	Jacquelline Cordero vs American Honda Motor Company, Inc..	Plaintiff filed a first amended complaint on February 5, 2024; motion to strike off calendar.
18	23CV427353	Jacquelline Cordero vs American Honda Motor Company, Inc..	Plaintiff filed a first amended complaint on February 5, 2024; demurrer off calendar.
19	23CV410362	The Kanavel Group, LLC, a Wyoming limited liability company vs 1-20 DOES	Plaintiff is ordered to appear and show cause why the Lis Pendens should not be expunged for failure to post an undertaking.
20	23CV410362	Rissa Arellano vs City of Gilroy, Timothy C. Carthen, Does 1 to 25	All parties to this action signed a stipulation continuing "the Motion for Summary Judgment (MSJ) date currently set for March 19, 2024. . . to April 16, 2024." The Court signed the parties' proposed order to that effect. However, this February 20, 2024 date remained on calendar for Gilroy's summary judgment motion, filed November 17, 2023; Timothy C. Carthens summary judgment motion was set for March 19, 2024. Given the way the parties drafted their stipulation, the fact that both Gilroy's and Mr. Carthen's counsel signed the stipulation, and that Plaintiff did not file an opposition to Gilroy's motion, the Court understands the parties intended to also continue Gilroy's summary judgment hearing to April 16, 2024 and will do so.

21	21CV382438	Huong Burrow et al vs Long	Defendants Motion for Attorneys' Fees for Prevailing on Motion to Expunge Lis Pendens (CCP §405.38) is GRANTED. While Defendants did seek fees as part of their motion to expunge, the Court did not make findings or otherwise rule on that request for fees in its December 18, 2023 order granting the motion to expunge. The Court's focus in the order and at argument was on whether it had jurisdiction to consider the motion in the first instance given the motion to set aside default is on appeal. Thus, the present motion is akin to a renewed motion, not a motion for reconsideration. Code of Civil Procedure section 405.38 provides: "The court *shall* direct that the party prevailing on any motion under this chapter be awarded the reasonable attorney's fees and costs of making or opposing the motion unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust." (Emphasis added.) "When a motion to expunge is made and granted [], the moving party is easily classified as the prevailing party, for the trial court will have determined adversely to the resisting party [] that the action is not one in which there was a right to record a lis pendens …." (*Trapasso v. Superior Court* (1977) 73 Cal. App. 3d 561, 570.) That was the case here. The Court understands Plaintiffs believe they were significantly harmed by Defendants' collective conduct, and they may very well prove that damage and obtain a money judgment against one or more of the Defendants. However, real property is unique, and a lis pendens is not available to secure such property for a potential future damages judgment. While the Court's jurisdiction may have been a somewhat novel issue after the Court set aside the default, the recording of the lis pendens in the first instance was not. The Court finds rates and hours reasonable for this market and motion and awards Defendants $23,854.00 in attorneys' fees and costs. Court to prepare formal order.

Calendar Lines 9-10
Case Name: *The Kanavel Group, LLC v. Milestone Financial, LLC, et al.*
Case No.: 23CV410362

Defendant Redwood Holdings, LLC ("Redwood") demurs to plaintiff The Kanavel Group, LLCs second amended complaint ("SAC") and moves to strike portions contained therein. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This is an action for wrongful foreclosure. In 2016, Milestone Financial LLC dba Alviso Fundings ("Milestone Financial") loaned Plaintiff $620,000 (the "Loan") subject to a promissory note ("Note") secured by real property located at 11820 Foothill Avenue in Gilroy (the "Property").[1] (SAC, ¶¶ 1, 10.) A Deed of Trust was recorded on December 16, 2016. (SAC, ¶ 11.) In 2018 and 2020, Milestone Financial imposed amended terms for the Loan and Plaintiff had no choice but to agree to the demands each time. (SAC, ¶ 13.)

The 2020 Amended Loan Agreement called for 23 monthly interest-only payments of $5, 647.06 due on the first day of each month beginning March 1, 2020 through January 31, 2022, with an unpaid principal balance of $662,360.06 due on January 31, 2022. (SAC, ¶ 14.) Plaintiff complied with the terms of the 2020 Amended Loan Agreement. (SAC, ¶ 17.) By December 2021, Plaintiff made all interest payments then due and was preparing to obtain financing to pay of the principal balance (the "Balloon Payment"), however, that month, Milestone Financial recorded a Notice of Default ("2021 NOD"). (SAC, ¶¶ 18-19.) Plaintiff contacted Milestone Financial and its loan servicer but did not receive a sensible explanation for the filing of the 2021 NOD. (SAC, ¶ 20.) As a result of the 2021 NOD, Plaintiff was unable to obtain refinancing and Milestone refused to accept Plaintiffs offer to pay the principal amount. (SAC, ¶¶ 21-22.)

March 23, 2022, Plaintiff filed an action against Milestone Financial, which initiated settlement discussions with Milestone Financial. (SAC, ¶ 23.) On April 14, 2022, the Notice of Trustee's Sale ("April 2022 NOTS") was recorded but did not take place as the parties were in settlement discussions. (SAC, ¶ 24.)

[1] Plaintiff is an LLC wholly-owned by Charles Kanavel ("Kanavel").

On June 27, 2022, another Notice of Default ("2022 NOD") was recorded, which stated Plaintiff was in default under the Loan in the amount of $810, 819.02. (SAC, ¶ 26.) On September 20, 2022, Plaintiff entered into a purchase and sale agreement with Foryou Revocable Living Trust and Orange Coast Title, as agent for the seller and buyer requested a payoff demand statement from Milestone Financial. (SAC, ¶ 28.) Milestone Financial knew of the pending sale, nevertheless, on October 20, 2022, another Notice of Trustee's sale ("2022 NOTS") was recorded. (SAC, ¶ 27.) On December 4, 2022, the Property was sold to Redwood. (SAC, ¶ 30.)

Plaintiff initiated this action on January 23, 2023, and on June 27, 2023, it filed its FAC, which asserting: (1) wrongful foreclosure; (2) violation of Business & Professions Code section 17200; (3) cancellation of instruments; (4) quiet title; (5) interference with contractual relations; (6) interference with prospective economic relations. On July 31, 2023, Redwood filed its demurrer and motion to strike. On November 9, 2023, the Court issued its order (the "Order"), which sustained the demurrer to each cause of action.

On November 29, 2023, Plaintiff filed its SAC, which asserts the same claims. On January 3, 2024, Redwood filed its motion to strike and on February 5, 2024, it filed its demurrer, both of which Plaintiff opposes.

II. Request for Judicial Notice

Redwood requests judicial notice of the following ten documents:

(1) Deed of Trust, recorded on December 16, 2016: Exhibit 1;

(2) Settlement Agreement, Indemnity, and Seconded Amendment to Promissory Note: Exhibit 2;

(3) 2021 NOD, recorded on December 15, 2021: Exhibit 3;

(4) 2021 NOTS, recorded on April 14, 2022: Exhibit 4;

(5) Note of Rescission, recorded on June 21, 2022: Exhibit 5;

(6) 2022 NOD, recorded on June 27, 2022: Exhibit 6;

(7) October 2022 NOTS, recorded on October 20, 2022: Exhibit 7;

(8) Trustees Deed Upon Sale, recorded on January 26, 2023: Exhibit 8;

(9) Notice of Pendency of Action, recorded on January 30, 2023: Exhibit 9; and

(10) Milestone Financials Notice of Motion, Motion to Compel Arbitration, and accompanying documents, filed on March 28, 2023: Exhibit 10.

The Court may take judicial notice of property records under Evidence Code section 452, subdivisions (c) and (h). (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264 (*Fontenot*), disapproved of on other grounds by *Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919 ["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 documents legally operative language, assuming there is no genuine dispute regarding the documents 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)].)

Judicial notice of court records is permitted under Evidence Code section 452, subdivision (d). However, with respect to court records, the law is settled that "the court will not consider the truth of the documents contents unless it is an order, statement of decision, or judgment." (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 375 (*Joslin*).)

Redwoods request for judicial notice is GRANTED.

III. Demurrer

A. 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).)

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.)

Redwood demurs to each cause of action on the ground they fail to allege sufficient facts to state a claim. (Code Civ. Proc., § 430.10, subd. (e).)

1. Bona Fide Purchaser

"As a general rule, the purchaser at a nonjudicial foreclosure sale receives title under a trustees deed free and clear of any right, title or interest of the trustor." (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 831 (*Moller*).) "A properly conducted nonjudicial foreclosure sale constitutes a final adjudication of the rights of the borrower and lender." (*Id*., citing *Smith v. Allen* (1968) 68 Cal.2d 93, 96.) "Once the trustees sale is completed, the trustor has no further rights of redemption." (*Id*., citing *Ballengee v. Sadlier* (1986) 179 Cal.App.3d 1, 5.) "If the trustees deed recites that all statutory notice requirements and procedures required by law for the conduct of the foreclosure have been satisfied, a rebuttable presumption arises that the sale has been conducted regularly and properly; this presumption is conclusive as to a bona fide purchaser." (*Id*.) The term bona fide purchaser means "one who pays value for property without notice of any adverse interest or of any irregularity in the sale proceedings." (*Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1250.) Thus, to qualify as a bona fide purchaser the buyer must: "(1) purchase the property in good faith *for value*, and (2) have no knowledge or notice of the asserted rights of another." (*Id.* at p. 1251, original italics.) Whether a buyer is a bona fide purchaser is ordinarily a question of fact. (*OC Interior Services, LLC v. Nationstar Mortgage, LLC* (2017) 7 Cal.App.5th 1318, 1331.)

Plaintiff seeks to set aside the wrongful foreclosure via cancellation of the 2022 NOD because it stated the incorrect amount owed. (SAC, ¶ 26.) Redwood purchased the property at the Trustees sale on December 5, 2022, and a Trustees Deed upon Sale was recorded on January 26, 2023. (SAC, ¶ 30.) Plaintiff alleges Redwood knew or should have known the foreclosure sale was invalid as it was held

without proper notice of the continuance of the foreclosure sale to Plaintiff and others. (SAC, ¶ 39.) Plaintiff also alleges Redwood knew from the Multiple Listing Services ("MLS") that the Property was under contract for sale for $1,100,000 and it knew the amount of the mortgage was substantially less than $1,100,000. (SAC, ¶ 41.) When Redwood bid on the Property, it did so with the knowledge that the amount due under the 2022 NOD and 2022 NOTS was incorrect and/or disputed. (*Ibid*.)

Redwood argues it purchased the Property as a bona fide purchaser because: (1) it perfected its interest by recording a Trustees Deed Upon Sale (RJN at Exh. 8); (2) it had no actual knowledge or constructive notice of any irregularity with the sale (*Ibid*.); and (3) there was no lis pendens or notice of any issues relative to the Property at the time of the sale.

Redwood asserts the same arguments the Court addressed in the Order, when it concluded these are factual matters which cannot be resolved on demurrer. (The Order, p. 6:19-20.) The Court further stated,

> Redwoods cited cases concerned appeals from judgment and considered evidence outside the pleadings to determine whether a buyer was a bona fide purchaser which the Court cannot do here. (*Bank of New York Mellon v. Citibank, N.A.* (2017) 8 Cal.App.5th 935, 950 [factual issues may not be resolved on demurrer]; *Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1058 [demurrer is not appropriate vehicle for resolving disputed facts]; see also *Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374 [courts function on demurrer is limited to testing the legal sufficiency of the complaint].)

(Order, 6: 20-27.)

While Redwood mostly relies on the same cases in support of its arguments, it also cites to multiple superior court cases, which are not binding on this Court. (Cal. Rules of Ct., Rule 8.1115; see also *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, 761 ["a written trial court ruling has no precedential value"]; *In re Molz* (2005) 127 Cal.App.4th 836, 845 ["trial court decisions, of course, have no precedential authority"].) Therefore, the Court declines to depart from its prior ruling and the demurrer on the basis that Redwood is a bona fide purchaser is OVERRULED.

2. First Cause of Action: Wrongful Foreclosure

"The elements of a wrongful foreclosure cause of action are: (1) [T]he trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering." (*Sciarratta v. U.S. Bank Natl. Assn.* (2016) 247 Cal.App.4th 552, 562 (*Sciarratta*).) "[M]ere technical violations of the foreclosure process will not give rise to a tort claim; the foreclosure must have been entirely unauthorized on the facts of the case." (*Ibid*.) Plaintiff has the burden to "affirmatively to plead facts demonstrating the impropriety [of the sale]." (*Fontenot,* 198 Cal. App. 4th at 270.)

A debtor cannot set aside a foreclosure based on irregularity in the sale procedure without alleging tender of the amount of the secured debt. (*Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 512.) The rationale is that without allegations of tender, any irregularities in the sale were not the cause of damages to the borrower. (*Ibid.* (citations omitted).) "Recognized exceptions to the tender rule include when: (1) the underlying debt is void; (2) the foreclosure sale or trustees deed is void on its face; (3) a counterclaim offsets the amounts due; (4) specific circumstances make it inequitable to enforce the debt against the party challenging the sale; or (5) the foreclosure sale has not yet occurred." (*Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1062.)

Again relying on *Angell v. Superior Court* (1999) 73 Cal.App.4th 691, Plaintiff argues it is excused from the tender requirement because the 2022 NOD is void. However, as the Court previously explained, *Angell* is factually distinguishable. (Order, 8:8-11.) Moreover, Plaintiffs allegation that the 2022 NOD contained a gross misstatement of the amount owed is contradicted by the exhibits and judicially noticeable materials.

"While the allegations [of a complaint] must be accepted as true for purposes of demurrer, the facts appearing in exhibits attached to the complaint will also be accepted as true, and if contrary to the allegations in the pleading, will be given precedence." (*Brakke v. Economic Concepts, Inc.* (2013) 213

Cal.App.4th 761, 767 (*Bakke*); see also *SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83 (*SC Manufactured Homes*) ["[i]f the allegations in the complaint conflict with the exhibits, we rely on and accept as true the contents of the exhibits"].)

Paragraph 18 of the Settlement Agreement, Indemnity, and Second Amendment to Promissory Note Secured by Deed of Trust, is titled "Lender Remedies on Default" and provides:

> Advancement for reimbursement by Borrower, any and all costs of collection, including but not limited to, reasonable attorneys fees incurred on account of such collection activities, whether or not suit is filed herein, with all such sums becoming party of the indebtedness and secured by the Deed of Trust. Any advance paid by Lender, which may include, but not be limited to, past due property taxes, insurance premiums and other obligations required by Borrower shall be subject to an administrative fee provided for above in the paragraph entitled, Agreed Liquidated Damages.

(See SAC, Exh. C, ¶ 18; RJN, Exh. 2, ¶ 18.)[2]

The Agreed Liquidated Damages is contained in Paragraph 15 of the Settlement Agreement, Indemnity, and Second Amendment to Promissory Note Secured by Deed of Trust and it provides specific terms regarding late charges on monthly payments, the default interest rate, and lender advances. (*Id*. at ¶ 15.) Thus, at the time of the Settlement Agreement, Indemnity, and Second Amendment to Promissory Note Secured by Deed of Trust, the agreement of debt owed (payoff) was:

A. Previous Payoff as of January 31, 2020: $659,360.06

B. Lender Settlement Fee (financed): $2,350.00

C. Attorney/Doe Fee (financed): $650.00

D. Payoff as of January 31, 2020: $662, 360.06

(SAC, Exh. C, ¶ 8 [emphasis original].)

Plaintiff alleges the 2022 NOD falsely reported a balance due of $810,819.02, which was incorrect because it was based on a principal of $685,985.79. (SAC, ¶ 37.) However, the 2022 NOD states Plaintiff was in default due to "the unpaid principal balance of $655,139.53, which became due on

[2] The Settlement Agreement, Indemnity, and Second Amendment to Promissory Note Secured by Deed of Trust is attached to the FAC, thus it is properly considered on this demurrer. (See *SCEcorp. V. Superior Court* (1992) 3 Cal.App.4th 673, 677.)

January 31, 2022, plus accrued interest, late charges, advances, attorney fees, and foreclosure fees." (SAC, Exh. E; RJN, Exh. 6.)

Plaintiffs allegation that it is excused from the tender requirement because the 2022 NOD is void because of an incorrect amount owed is contradicted by the exhibits, thus, they will be given precedence. (See *Brakke, supra*, 213 Cal.App.4th at p. 767.) Therefore, Plaintiff fails to allege how the 2022 NOD is a gross misstatement in the amount owed.

Late-payment fees, like those measured against the unpaid balance of a loan "may violate [Civil Code] section 1671] and amount to unlawful penalties if their primary purpose is to compel prompt payment through the threat of imposition of chargers bearing little to no relationship to the amount of the actual loss incurred by the lender." (*Honchariw v. FJM Private Mortgage Fund, LLC* (2022) 83 Cal.App.5th 893, 901.) Plaintiff alleges the 2022 NOD and 2022 NOTS included a default interest rate of 19.2% prior to the loan maturity date and the underlying loan included a 10.2% interest rate in violation of California usury law. (SAC, ¶¶ 37-38.) However, it appears Plaintiff conflates the late payments and default interest rate, which were separately addressed in the Settlement Agreement, Indemnity, and Second Amendment to Promissory Note Secured by Deed of Trust. Therefore, Plaintiff cannot establish excuse from the tender requirement on this basis.

Nevertheless, Plaintiff further alleges excuse from the tender requirement because its fifth and sixth causes of action for interference with contractual relations and prospective economic relations anticipate damages in excess of the amount actually due under the note. (SAC, ¶ 41.) Redwood offers no argument as to this basis for excuse. For pleading purposes, Plaintiff alleges a basis for excuse from the tender requirement. Thus, the demurrer to the first cause of action is OVERRULED.

3. Second Cause of Action: Violation of Business and Professions Code section 17200, et seq.

"Business and Professions Code section 17200 et seq. prohibits unfair competition, including unlawful, unfair, and fraudulent business acts. The UCL covers a wide range of conduct. It embraces anything that can properly be called a business practice and that at the same time is forbidden by law." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143 (*Korea Supply*).) "Section 17200 borrows violations from other laws by making them independently actionable as unfair

competitive practices. In addition, under section 17200, a practice may be deemed unfair even if not specifically proscribed by some other law." (*Id.*)

Plaintiffs UCL claim is based on conduct pertaining to the loan and the foreclosure process. Plaintiff alleges Redwood encouraged Milestone to proceed with the foreclosure so that it could obtain the Property at $100,000 less than fair market value. (SAC, ¶ 47.) Redwood contends Plaintiff must meet a heightened pleading standard, however, Court aware no authority which states a UCL claim must be alleged with such specificity. Thus, the demurrer to the second cause of action is OVERRULED.

4. Third Cause of Action: Cancellation of Instruments

"Under Civil Code section 3412, [a] written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled. To prevail on a claim to cancel an instrument, a plaintiff must prove (1) the instrument is void or voidable due to, for example, fraud, and (2) there is a reasonable apprehension of serious injury including pecuniary loss or the prejudicial alteration of ones position." (*U.S. Bank National Assn. v. Naifeh* (2016) 1 Cal.App.5th 767, 778.)

Plaintiff alleges the 2021 NOD, April 2022 NOTS, 2022 NOD, October 2022 NOTS, and the Trustees Deed Upon Sale appear to be valid on their face but are all void. (SAC, ¶¶ 52-55.) It further alleges that if the instruments are left outstanding, it would cause serious injuries to Plaintiff. (SAC, ¶ 57.) On June 21, 2022, there was a rescission of the 2021 NOD. (RJN, Exh. 5.) Plaintiff alleges while the April 2022 NOTS was recorded and scheduled, it did not go through because the parties were engaged in settlement discussions. (SAC, ¶ 24.) As the Court stated above, Plaintiff fails to allege sufficient facts to establish that the 2022 NOD is void. As a result, Plaintiffs allegations that the 2022 NOTS and the Trustees Deed Upon Sale are void because they are based on the 2022 NOD is contradicted by the exhibits and judicially noticeable materials. (*Brakke, supra*, 213 Cal.App.4th at p. 767; see also *SC Manufactured Homes, supra*, 162 Cal.App.4th at p. 83.) Thus, the demurrer to the third cause of action is SUSTAINED with 10 days leave to amend.

5. Fourth Cause of Action: Quiet Title

"To maintain an action to quiet title a plaintiffs complaint must be verified and must include (1) a description of the property including both its legal description and its street address or common designation; (2) the title of plaintiff as to which determination is sought and the basis of the title; (3) the adverse claims to the title of the plaintiff against which a determination is sought; (4) the date as of which a determination is sought and, if other than the date the complaint is filed, a statement why the determination is sought as of that date; and (5) a prayer for determination of plaintiffs title against the adverse claims." (Code Civ. Proc., § 761.020.) The purpose of a quiet title action is to settle all conflicting claims to the property and to declare each interest or estate to which the parties are entitled. (See *Newman v. Cornelius* (1970) 3 Cal.App.3d 279, 284.) "Quieting title is the relief granted once a court determines that title belongs in plaintiff… [T]he plaintiff must show he has a substantive right to relief before he can be granted any relief at all." (*Leeper v. Beltrami* (1959) 53 Cal.2d 195, 216 (*Leeper*).)

The Court is still not persuaded by Redwoods argument that Plaintiffs claim cannot survive as a matter of law. Redwood relies entirely on district court cases, which are not binding on this Court, and contain only conclusory holdings. (See *Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1432, fn. 6; see, e.g., *Distor v. U.S. Bank N.A.* (N.D. Cal. 2009) 2009 U.S. Dist. LEXIS 98361 at p. *17.) In post-foreclosure actions in California, a quiet title claim is frequently brought together with a claim for wrongful foreclosure. (See e.g., *Sciarratta, supra,* 247 Cal.App.4th at p. 558; *Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919, 925; *Mendoza v. JPMorgan Chase Bank, N.A.* (2014) 228 Cal.App.4th 1020.) This makes sense, as there is no discernible reason why such issues cannot be resolved at the same time.

Here, based on the exhibits and judicially noticeable materials, Plaintiffs fails to establish the 2022 NOD and subsequently the 2022 NOTS and the Trustees Deed Upon Sale are void and thus, it fails to allege facts to establish it has a substantive right to relief. (*Leeper,* 53 Cal.2d at p. 216.) Thus, the demurrer to the fourth cause of action is SUSTAINED with 10 days leave to amend.

6. Fifth Cause of Action: Interference with Contractual Relations

"To state a claim for intentional interference with contractual relations, a plaintiff must plead (1) a valid contract between plaintiff and a third party; (2) defendants knowledge of this contract; (3) defendants intentional acts designed to induce a breach or disruptions of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*The Kind & Compassionate v. City of Long Beach* (2016) 2 Cal.App.5th 116, 129 (internal citations and quotations omitted).)

Redwoods uncertainty argument was not in its demurrer notice, and its argument that a heightened pleading standard must be met for this claim is not supported by authorities. Therefore, the demurrer cannot be sustained on this basis. However, Redwoods main argument appears to be failure to state sufficient facts.

"Liability may … be imposed on one who aids and abets the commission of an intentional tort if the person … knows the others conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act …. (*Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 846 [33 Cal. Rptr. 2d 438].)" (*Chen v. PayPal, Inc*. (2021) 61 Cal.App.5th 559, 583 (internal quotations omitted).) However, knowledge alone, even specific knowledge, is not enough to state a claim for aiding and abetting. California law necessarily requires that for aiding and abetting liability to attach, a defendant have made a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act. As the Court of Appeal put it in *Gerard v. Ross* (1988) 204 Cal.App.3d 968, 983 put it: an alleged aider and abettor must have "acted with the intent of facilitating the commission of that tort." (*George v. eBay, Inc*. (2021) 71 Cal.App.5th 620, 641–642.)

Plaintiff alleges on September 26, 2022, it entered a contract with Foryou Revocable Living Trust for the purchase and sale of the Property. (SAC, ¶ 66.) Milestone Financial refused to provide an accurate payoff demand statement, which prevented Plaintiffs performance, as Defendants intended. (SAC, ¶¶ 68-69.) Redwood had actual knowledge from an MLS listing that the Property was under contract for sale for $1,100,000. (SAC, ¶ 70.) It further knew from inquiries of Milestone Financial that Plaintiff disputed the amounts owed under the 2022 NOD and 2022 NOTS. (*Ibid*.) Redwood substantially encouraged Milestone Financial to proceed with a foreclosure sale, so that it could

purchase it for $100,000 less, which interfered with Plaintiffs purchase and sale agreement and resulted in damage to Plaintiff. (SAC, ¶ 71.)

Although Redwood contends Plaintiff must provide more specific facts, it fails to cite any authority in support of a heightened pleading standard for an interference with contractual relations claim. Redwoods remaining arguments pertain to facts not before the Court and at this stage, the question of plaintiffs ability to prove its allegations is not at issue. (*Committee on Children's Television, supra,* 35 Cal.3d at pp. 213-214.) At this stage, Plaintiff alleges sufficient facts to state this claim and the demurrer to the fifth cause of action is OVERRULED.

7. Sixth Cause of Action: Interference with Prospective Economic Relations

To state a cause of action for intentional interference with prospective economic relations, a plaintiff must show "(1) the existence, between the plaintiff and some third party, of an economic relationship that contains the probability of future economic benefit to the plaintiff, (2) the defendants knowledge of the relationship, (3) intentionally wrongful acts designed to disrupt the relationship, (4) actual disruption of the relationship, and (5) economic harm proximately caused by the defendants action." (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc*. (2017) 2 Cal.5th 505, 512.) "Intentionally interfering with prospective economic advantage requires pleading that the defendant committed an independently wrongful act... [a]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (*Ixchel Pharma, LLC v. Biogen, Inc*. (2020) 9 Cal.5th 1130, 1142; see also *Della Penna v. Toyota Motor Sales, U.S.A., Inc*. (1995) 11 Cal.4th 376, 392-393 [stating that "a plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of pleading and proving that the defendants interference was wrongful by some measure beyond the fact of the interference itself"].)

Plaintiff alleges it was in an economic relationship with Foryou Revocable Living Trust, which would have sold the Property and benefitted Plaintiff. (SAC, ¶ 75.) Milestone Financial and Redwood knew about the economic relationship. (SAC, ¶ 76.) Milestone Financials refusal to provide an accurate payoff demand statement prevented Plaintiff from selling the Property. (SAC, ¶ 77.) Redwood had actual knowledge from an MLS listing that the Property was under contract for sale for $1,100,000.

(SAC, ¶ 79.) It further knew from inquiries of Milestone Financial that Plaintiff disputed the amounts owed under the 2022 NOD and 2022 NOTS. (*Ibid*.) Redwood substantially encouraged Milestone Financial to proceed with a foreclosure sale, so that it could purchase it for $100,000 less, which interfered with Plaintiffs purchase and sale agreement and resulted in damage to Plaintiff. (SAC, ¶ 80.)

The Court is not persuaded by Redwoods assertion that a heightened pleading standard is necessary. As stated above, Plaintiff sufficiently alleges Redwoods liability on an aiding and abetting theory. Thus, the demurrer to the sixth cause of action is OVERRULED.

IV. Motion to Strike

A. Legal Standard

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437, subd. (a); see also *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913.) In ruling on a motion to strike, the court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63 (*Turman*), citing *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) "Thus, for example, defendant cannot base a motion to strike the complaint on affidavits or declarations containing extrinsic evidence showing that the allegations are false or sham." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2020) 7.169.)

A motion to strike portions of a complaint or petition may be brought on the ground that the allegations at issue are "irrelevant" or "improper." (Code Civ. Proc., § 436, subd. (a).) Irrelevant matter includes (1) an allegation that is not essential to the statement of a claim or defense, (2) an allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense, and (3) a demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint. (See Code Civ. Proc., § 431.10, subds. (b), (c).) Generally speaking, motions to strike are disfavored and cannot be used as a vehicle to accomplish a "line item veto" of allegations in a pleading. (*PH II*,

Inc. v. Superior Court (1995) 33 Cal.App.4th 1680, 1683 (*PH II, Inc.*).) However, where irrelevant allegations are "scandalous, abusive, disrespectful and contemptuous," they should be stricken from the pleading. (*In re Estate of Randall* (1924) 194 Cal. 725, 731.)

"While under Code of Civil Procedure section 436, a court at any time may, in its discretion, strike portions of a complaint that are irrelevant, improper, or not drawn in conformity with the law, matter that is essential to a cause of action should not be struck and it is error to do so. Where a whole cause of action is the proper subject of a pleading challenge, the court should sustain a demurrer to the cause of action rather than grant a motion to strike." (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1281, internal citations omitted.)

B. Analysis

Redwood moves to strike the following portions from the SAC relating to punitive damages:

(1) Paragraph 73: "Defendants…entitled to reasonable punitive damages…";

(2) Paragraph 82: "Defendants… entitled to reasonable punitive damages…"; and

(3) Prayer, Page 14, ¶ 9.

A motion to strike a claim for punitive damages is properly granted when the complaint fails to set forth the elements stated in the general punitive damage statute. (Civ. Code, § 3294; *Turman v. Turning Point of Cent. Cal., Inc.* (2010) 191 Cal.App.4th 53, 63-64.) These statutory elements include allegations that the defendant has been guilty of oppression, fraud, or malice. (Civ. Code, § 3294, subd. (a).) "Malice" is defined as conduct which is "intended by the defendant or cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights and safety of others." (Civ. Code., § 3294, subd. (c)(1).) "Oppression" means "despicable conduct that subjects a person to cruel and unjust hardship in a conscious disregard of that persons rights." (Civ. Code, § 3294, subd. (c)(2).) "Fraud" means "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civ. Code, § 3294, subd. (c)(3).)

A demand for punitive damages for the commission of any tort requires more than mere allegations of the "wrongfully and intentionally," "oppression, fraud, and malice" sort of language found in Civil Code section 3294. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6-7.)

"When the Defendant is a corporation…the oppression, fraud, or malice must be perpetrated, authorized, or knowingly ratified by an officer, director, or managing agent of the corporation." (*Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 164; Civ. Code, § 3294, subd. (b).) The purpose of this requirement is to "limit corporate punitive damage liability to those employees who exercise substantial independent authority and judgment over decisions that ultimately determine corporate policy." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 573.)

Here, Redwood is a corporation and Plaintiff fails to identify any officer, director, or managing agent of Redwood who perpetrated or knowingly ratified the alleged conduct. As a result, Plaintiff fails to allege punitive damages against Redwood. (See Civ. Code, § 3294, subd. (b).) Thus, the motion to strike is GRANTED with 10 days leave to amend.

Calendar lines 11-14
Case Name: *Mark Christopher Tracy v. Cohne Kinghorn, et.al*.
Case No.: 23CV423435

Before the Court are (1) Specially Appearing Defendants Cohne Kinghorne PC, Simplifi Company, Jeremy Cook, Eric Hawkes, Jennifer Hawkes, Michael Hughes, David Bradford, David Bennion, Gary Bowen (collectively "Kinghorne Defendants") Motion to Quash, (2) Specially Appearing Defendant Kem Gardner's Motion to Quash, and (3) Specially Appearing Defendant Paul Browns Motion to Quash. 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. Analysis

Defendants contend the Court lacks personal jurisdiction over them because (1) they are Utah residents with no substantial, continuous, and systematic contacts in California, (2) they have not purposefully directed any actions at California residents, (3) they have not purposefully conducted any activities in California, and (4) this dispute is not related, nor does it arise from Defendants alleged contacts with California.

Alternatively, Defendants request dismissal of this action on the grounds of inconvenient forum pursuant to Code of Civil Procedure section 418.10(a)(2). Defendants argue (1) none conducted business in California or had any contact with California, (2) Plaintiffs claims arise from alleged wrongful conduct occurring exclusively in Utah, and (3) nothing in the complaint indicates that California residents would benefit from this litigation.

Plaintiff alleges Defendants engaged in the following wrongful conduct:

- June 1, 2013, correspondence in which ECID Trustees announced a "fire-hydrant rental fee." (Complaint ¶ 65.)
- June 2014 correspondence in which ECIDs manager, Mr. Hawks, stated "… residents have not been clear about facts surrounding the Emigration Improvement District" and "the District has taken measures to hold down development in the Canyon by thoughtfully allocating water connections." (Complaint ¶ 66.)
- Defendant Kinghorn through Mr. Cook reported to Salt Lake Tribune reporter that "the majority of the accusations [filed by Mr. Tracy] are completely false and inaccurate, and the statements that are correct are used to support absurd conspiracy-theory conclusions." In the same article,

Mr. Hawkes stated that "the Utah special service holds the canyons most senior water right." (Complaint ¶¶ 69, 70.)

- October 6, 2015, letter to Canyon residents, Mr. Hughes as chairman for ECID chairman, Mr. Bradford as ECIDs trustee stated that "[Mr. Hughes] was fully exonerated and went on to become an expert witness for the National Association of Dealers as well as the SEC in Washington DC." (Complaint ¶ 71.)

- Mr. Hawk published a statement on the ECID website reporting that the lead levels in drinking water "is likely the result of plumbing within the homes tested and not water provided by the Emigration Improvement District." (Complaint ¶ 72.)

- November 18, 2018, ECID stated "it needs to set the record straight relative the relationship between its recent water right change application [and the development plans submitted to Salt Lake County]. There is none! Zero! Nada! The District has had zero communication with Mr. Walsh." (Complaint ¶ 73.)

- November 14, 2-18 email correspondence from "agarybowen@msn.com" to several members of the press stating that Mr. Tracy "is of the devil, who is the father of contentions" and "Lord Jesus Christ recorded in the Book of Mormon" required such things should be done away with." (Complaint ¶ 74.)

- Email correspondence and phone call in which Mr. Bowen accused Mr. Tracy of committing fraud and that the matter "should be referred to Office of the Utah Attorney General for criminal investigation." (Complaint ¶ 75.)

- December 15, 2018, email correspondence sent from paul.h.brown@verizon.net to Emigration Oaks resident stating that the FCA litigation and protest of change applications … has the potential of shutting down our only water supply… If you are among those supporting or encouraging these actions, please stop." (Complaint ¶ 76.)

- September 22, 2022, Mr. Hawkes, as manager of ECID posted a notice of water rate increase on ecid.org and stated that "the District has been required to defend against a series of meritless lawsuits filed by a former resident of Emigration Canyon named Mark Tracy. All of the various actions have been decided in favor of the District." (Complaint ¶ 77.)

- January 19, 2023, in a public hearing conducted via Zoom platform, Mr. Cook stated that Mr. Tracy was "hiding assets" and thus had committed perjury before the Utah State third District Court. (Complaint ¶ 78.)

A. Personal Jurisdiction

1. General Jurisdiction

To assert general jurisdiction over the Defendants for these alleged false and defamatory statements, Plaintiff has the burden of showing each Defendants continuance and systematic contact with the State of California "as to render it essentially at home in the forum State". (*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 asserts procedural challenges to Mr. Browns and Mr. Bowens motions, but he does not address the substantive issues those motions raise. Mr. Brown and Mr. Bowen resubmitted their declarations in accordance with the laws of California without any change to their contents. The general rule of motion practice, which applies here, is that new evidence is not permitted with reply papers. … "[T]he inclusion of additional evidentiary matter with the reply should only be allowed in the exceptional case … and if permitted, the other party should be given the opportunity to respond." (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1538.) Whether to accept new evidence with the reply papers is vested in the trial courts sound discretion. (*Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1308; *Carbajal v. CWPSC, Inc.*, (2016) 245 Cal. App. 4th 227, 241, *Hahn v. Diaz-Barba* (2011) 194 Cal.App.4th 1177, 1193 ["While additional evidentiary matter submitted with the reply ordinarily should not be allowed, the court has discretion to consider it when it poses no prejudice to the opposing party"].) The Court will consider the resubmitted declarations since the content of each declaration was not changed and no new evidence was presented.

The Court also has authority to extend the time for filing and hearing of a motion to quash. "[S]cheduling a hearing date beyond 30 days should not invalidate a motion to quash." (*Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286, 1296; Code of Civ. Proc. §§ 418.10(a) and (b).) Plaintiff was not prejudiced by the extended hearing date since the Courts record shows he was served with amended notices informing him of the scheduled hearing date and had sufficient time to file his oppositions.

As for substance, Plaintiff acknowledges Defendants reside in Utah, are domiciled in Utah, and/or are Utah professional corporations with offices in Utah. Aside from Mr. Gardner, who has a timeshare interest in a California property, none of the other moving Defendants own or have any real property interests in California. Aside from Mr. Bowen, who has sold approximately 500 copies of his

self-published book on Amazon, none of the remaining moving Defendants has conducted any business in California.

Mr. Gardner attests he acquired a percentage interest in a timeshare located in Carlsbad, California, and he stays at the property a handful of times each year for vacation lasting few days to a week. (Declaration of Kem Gardner ¶ 4.) Mr. Bowen attests he has sold approximately 500 copies of his book, through Amazon, in the last four years and it is possible that Amazon shipped some of the books to California residents. (Declaration of Gary Bowen ¶ 5, 6.)

This is insufficient to demonstrate the type of substantial, continuous conduct necessary to demonstrate general jurisdiction. Accordingly, Plaintiff fails to meet his burden of proving general jurisdiction over the moving-Defendants.

2. Specific Jurisdiction

To assert specific jurisdiction over the Defendants, Plaintiff has the burden of showing each Defendant purposefully (1) directed its/his/her activities at California residents, (2) derives a benefit from its/his/her 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 defendants 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 defendants 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 defendants 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 upon "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 shows purposeful availment, he must then demonstrate his claims for defamation, false light, and emotional distress are related to or arise out of Defendants contacts with the State of

California. This test does not require a "causal relationship between the defendants 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.)

Here, Plaintiffs specific allegations against (1) Mr. Brown is that he sent a false and defamatory email to the residents of Emigration Oaks; (2) Mr. Bowen is that he made calls and sent defamatory emails to a local press and the Deputy Utah State Engineer, Boyd Clayton; (3) Mr. Hawkes are that he, as ECIDs manager, posted false statements on ECIDs website and made false statements to a local reporter; (4) Mr. Cook is that he made defamatory statements to a local press reporter and in a public hearing that was conducted on the Zoom platform; and (5) Mr. Hughes and Mr. Bradford is that they made false statements in a letter that was sent to the local Canyon residents. (Complaint ¶¶ 65-78.) Plaintiff further alleges all Defendants were/are agents, collaborators, and co-conspirators with each other Defendants. (Complaint ¶ 21.) Although Plaintiff claims false statements were posted on ECIDs website, ECID is not a party.

There is no evidence these alleged actions were deliberately directed at California residents or establishing agency or a conspiratorial relationship among Defendants. There is no evidence showing Defendants (1) intentionally routed ECIDs website through San Jose, (2) deliberately posted false statements knowing it would be read by California residents, (3) the postings were read by property owners residing in California, and (4) as the result, California property owners paid monies to the moving Defendants. Consequently, the Court finds that Mr. Brown, Mr. Bowen, and Kinghorn Defendants did not purposefully avail themselves of the privilege of conducting activities in California.

Mr. Gardner's timeshare interest in a California property satisfies the "purposeful availment" requirement and establishes contact with the State 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.) However, to assert specific jurisdiction over Mr. Gardner, there must be a substantial nexus or connection between his fractional property ownership and Plaintiffs 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 of any nexus, much less a substantial nexus, between Plaintiff's claims and Mr. Gardner's California timeshare ownership.

Plaintiff fails to satisfy his initial burden of establishing the necessary jurisdictional facts to justify the trial courts exercise of specific jurisdiction, thus the burden does not shift to Defendants to demonstrate that assertion of jurisdiction would be unreasonable. (*Pavlovich*, 29 Cal.4th at 269; *Malone v. Equitas Reinsurance Ltd*., (2000) 84 Cal.App.4th 1430, 1437 n.3.)

Defendants' motions to quash are GRANTED.

B. 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.)

There must be some basis in fact to justify jurisdictional discovery. (*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"].) 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*.) Other than two deposition notices, Plaintiff offers no factual basis to justify continuing these motions for discovery. The evidence already before the Court is such that the Court concludes such discovery would be futile.

Accordingly, Plaintiff's request for additional jurisdictional discovery is DENIED.

C. Inconvenient Forum

Defendants alternate argument under the doctrine of forum non-conveniens is moot.