CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 12
HEARING DATE: 01/12/18

GENERAL INSTRUCTIONS FOR CONTESTING TENTATIVE RULINGS IN DEPT. 12

NOTE PROCEDURE CAREFULLY

The tentative ruling will become the Court's ruling unless by 4:00 p.m. of the court day preceding the hearing, counsel or self-represented parties call the department rendering the decision to request argument and to specify the issues to be argued. Calling counsel or self-represented parties requesting argument must advise all other affected counsel and self-represented parties by no later than 4:00 p.m. of his or her decision to appear and of the issues to be argued. Failure to timely advise the Court and counsel or self-represented parties will preclude any party from arguing the matter. (*Local Rule* 3.43(2).)

Note: In order to minimize the risk of miscommunication, Dept. 12 prefers and encourages fax or email notification to the department of the request to argue and specification of issues to be argued – with a **STRONG PREFERENCE FOR EMAIL NOTIFICATION**. Dept. 12's Fax Number is: (925) 608-2693. Dept. 12's email address is: dept12@contracosta.courts.ca.gov. Warning: this email address is not be used for any communication with the department except as expressly and specifically authorized by the court. Any emails received in contravention of this order will be disregarded by the court and may subject the offending party to sanctions.

Submission of Orders After Hearing in Department 12 Cases

The prevailing party must prepare an order after hearing in accordance with CRC 3.1312. If the tentative ruling becomes the Court's ruling, a copy of the Court's tentative ruling **must be attached to the proposed order** when submitted to the Court for issuance of the order

1. TIME: 9:00 CASE#: MSC14-01166
CASE NAME: MAKTAB TARIGHAT VS. KAMRAN AZIZI
HEARING ON MOTION TO SET THE MATTER FOR TRIAL
FILED BY MAKTAB TARIGHAT OVEYSSI SHAHMAGHSOUDI
**** TENTATIVE RULING: ****

Counsel and pro per party to appear. The Court intends to discuss (1) what disputed issues exist between MTO and Lindstrom; (2) how those issues can best be decided (e.g., which ones require full trial or which might be decided on documents, declarations, or motion practice); (3) the timing of further proceedings and trial. Also relevant will be the content and status of the separate cross-complaint mentioned by Lindstrom, whether it has been served (and if not, why not), and how (if at all) it relates to the MTO/Lindstrom dispute.

2. TIME: 9:00 CASE#: MSC15-01459
CASE NAME: LASKARI VS. COWAN & THOMPSON CONSTRUCTION
HEARING ON MOTION TO COMPEL PRODUCTION OF DOCS
FILED BY COWAN & THOMPSON CONSTRUCTION, INC.
**** TENTATIVE RULING: ****

This motion is **denied without prejudice.**

The Court appreciates Mr. Steele's caution in wanting to ensure that he did not inadvertently disclose anything as to which plaintiff might have some privilege claim. Plaintiff, however, has asserted no such claim. Moreover, while privilege may sometimes arise in the absence of an actual attorney-client relationship (such as in an initial engagement interview in which the attorney declines the representation), Steele quite rightly informed plaintiff right from the start that Steele would not be acting as plaintiff's attorney. Any unreasonable belief to the contrary on plaintiff's part would not establish a basis for privilege.

The motion, however, appears to be either moot or premature or both. Steele advises that he has no hard-copy responsive documents. If defendant requests a more formal confirmation of that fact, Steele should provide it. As to electronic records, it appears that that is the subject of a good-faith but uncompleted search, but that Steele intends to comply if he is able to find anything. If defendant believes in the future that Steele has failed to comply, it may bring another motion.

The present motion was not subject to the Discovery Facilitator program because it was not a case of asserted defects in a partial response, but of complete non-production. Any future motion, however, might well be subject to that program.

Defendant asserts that Steele should be sanctioned for destroying documents sought in litigation. Defendant, however, presents neither any chronology nor any other factual support for such an accusation. Defendant is cautioned about throwing around accusations such as this without a proper basis.

3. TIME: 9:00 CASE#: MSC16-01480
CASE NAME: NI VS. SEENO ENTERPRISES
HEARING ON DEMURRER TO 3rd Amended COMPLAINT
FILED BY SEENO ENTERPRISES, LLC
**** TENTATIVE RULING: ****

The demurrer of Defendant Seeno Enterprises, LLC (Seeno) to the third cause of action in the Third Amended Complaint (TAC) is **sustained without leave to amend.**

I. Background

On April 24, 2016, Huajin Li entered a Superfoot Reflexology store in a Pittsburg shopping mall with his son Jason Li. Seeno owns the mall and it had hired Defendant Northpoint Security Services, Inc. (Northpoint) to provide security services there. A perpetrator thereafter entered the Superfoot store brandishing a weapon, and grabbed Jason while demanding the cashier

hand over the cash in the register. Huajin Li ran towards his son upon seeing that he was held hostage. The perpetrator shot Huajin Li, killing him.

Plaintiffs are Jason Li and Sharon Li, through their guardian ad litem Liping Ni, who also brings individual claims. Seeno demurs to the third cause of action for willful misconduct.

II. Demurrer to Third Cause of Action (Willful Misconduct)

The Court previously addressed the willful misconduct claim in the demurrers to Second Amended Complaint filed by both Seeno and Northpoint. The Court found that the allegations were insufficient to state that claim against either entity for similar reasons.

First, the Court found *Doe v. United States Youth Soccer Assn.* (2017) 8 Cal.App.5th 1118, 1140-41, to be instructive. There, the Court of Appeal held that mere knowledge of a generalized risk of sexual abuse of children in an athletic program did not constitute "actual or constructive knowledge that injury to children like plaintiff was probable." (*Id.*) And in *Doe* – as here – the defendant actually took affirmative steps to prevent harm: the soccer organization required a voluntary disclosure form, and here Seeno provided security through Northpoint. Thus, the Court held that knowledge that the mall was in a high-crime area was an insufficient basis for a willful misconduct claim under *Doe.*

Second, the allegations that the on-duty guard "intentionally" failed to prevent the gunman from entering the mall and the Superfoot store were also insufficient. Plaintiffs did not allege that the individual was armed, that the guard saw this, and/or that the guard was otherwise aware that the perpetrator intended to commit a crime.

Willful misconduct has three elements distinct from an ordinary negligence claim. Plaintiff must show: 1) defendant's actual or constructive knowledge of the danger to be apprehended; 2) defendant's actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger; and 3) defendant's conscious failure to avoid the peril. (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 526.)

In the TAC, plaintiffs once again generally allege that Seeno knew that the mall was in a high-crime area, and knew that a risk of harm was probable as opposed to merely possible. They add allegations that, despite this knowledge, Seeno intentionally kept guards to a minimum to increase its own profits. (See TAC ¶¶ 16, 36.) Plaintiffs contend that the "peril to be apprehended" was a danger to *any* invitee. (Opposition at 2:23-3:3.) Seeno's "intentional disregard of this knowledge in favor of advancing its own bottom line … serves as the foundation for plaintiffs' willful misconduct claim." (Opposition at 3:16-18.)

These allegations are no more sufficient than before. Plaintiffs have beefed up the level of detail of some of their allegations (particularly those relating to Northpoint rather than Seeno), but they have not added anything of substance on the points that led to the sustaining of the demurrer to this cause of action in the Second Amended Complaint. Plaintiffs do not allege prior violent incidents of any kind – much less ones like the incident here – at the mall itself. Rather, "statistics *in the area* showed high murder and burglary rates." (TAC, ¶¶ 14, 34, emphasis added.) Even accepting as true that Seeno intentionally kept guards to a minimum to

increase its profit, Seeno's alleged *knowledge* still consists only of the mall being in a statistically high-crime area. This is possibility of some crime in the vicinity, not probability of an injury at the mall. The Court has already held that that is too attenuated an allegation to support willful misconduct.

The TAC also newly alleges that the perpetrator actually brandished a gun upon entering the mall, and the guard saw this yet failed to stop him. In opposition, plaintiffs confirm that these allegations are not support for their willful misconduct claim against Seeno. (TAC, p. 2, Introduction, lines 2-9 [Seeno's liability not based on "would-be knowledge and disregard of the presence of the shooter" but on recognized risk to invitees and failure to provide adequate security].)

The Court does not believe that plaintiffs can reasonably cure these defects. After multiple amendments, plaintiffs' willful misconduct theory still presupposes that Seeno's knowledge that the mall was in a statistically high-crime area is sufficient for a willful misconduct claim, and it is not. (*Berkley* at 526.) Therefore, Seeno's demurrer to the third cause of action is **sustained without leave to amend.**

4. TIME: 9:00 CASE#: MSC16-01970
CASE NAME: NGUYEN VS. CITY OF RICHMOND
HEARING ON MINOR'S COMPROMISE
**** TENTATIVE RULING: ****

The proposed minor's compromise is **approved.**

5. TIME: 9:00 CASE#: MSC16-02080
CASE NAME: MORALES VS. CC INTERFAITH
HEARING ON OSC RE CONTEMPT AND REQUEST FOR SANCTIONS
FILED BY CONTRA COSTA INTERFAITH HOUSING
**** TENTATIVE RULING: ****

The motion for an OSC re contempt is **denied**. Defendant presents no evidence of ability to pay, nor of willful nonpayment. In any event, contempt (with the prospect of adding more monetary sanctions) is not an appropriate remedy for nonpayment of discovery sanctions.

Defense counsel are advised that it may be prudent to tone down their litigation tactics a notch or two.

6. TIME: 9:00 CASE#: MSC17-00009
CASE NAME: SIMENTAL VS. TULIK
HEARING ON DEMURRER TO COMPLAINT
FILED BY DANA COTTEE
**** TENTATIVE RULING: ****

The demurrer and motion to strike are ordered off calendar.

Attorney Andrew Shalaby filed a motion to strike on behalf of defendants Waldemar Tulik and Dana Cottee and a demurrer on behalf of Dana Cottee. Attorney Alan Hunter filed answer on behalf of Waldemar Tulik. Attorney David Stock filed an answer on behalf of Dana Cottee. One of these answers was filed before the present demurrer. There does not appear to be associations of counsel or substitutions of counsel filed in this case that would explain why different attorneys are filing things on behalf of Waldemar Tulik and Dana Cottee. The Court surmises that Mr. Shalaby may be overlooking the involvement of insurance defense counsel. There is also no compliance with the requirement to meet and confer.

At the case management conference in this case, the Court intends to determine who represents Waldemar Tulik and Dana Cottee in this case and what the attorney or attorneys intended to file in response to the complaint. After this discussion, the Court may place the demurrer and motion to strike back on calendar for a future hearing date. However, any such hearing will be set far enough in the future to allow the parties time to comply with Code of Civil Procedure §§ 430.41 and 435.5.

The **case management conference in this case in continued to March 14, 2018** at 8:30 a.m. in Department 12 so that the case management conference in this case can occur at the same time as the case management conference in case no. MSC15-01049.

7. TIME: 9:00 CASE#: MSC17-00009
CASE NAME: SIMENTAL VS. TULIK
HEARING ON MOTION TO STRIKE COMPLAINT
FILED BY DANA COTTEE
**** TENTATIVE RULING: ****

See line 6.

CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 12
HEARING DATE: 01/12/18

8. TIME: 9:00 CASE#: MSC17-00632
CASE NAME: CHURCH VS. TURNAGE
HEARING ON MOTION TO STRIKE PORTIONS OF 1st Amended COMPLAINT
FILED BY KENNETH R. TURNAGE II GENERAL CONTRACTOR
**** TENTATIVE RULING: ****

The motion was resolved by stipulation and subsequent Court order dated December 4, 2017. It is therefore **off calendar**. If any party believes something remains to be decided, that party shall give notice in the usual way and appear on January 12, 2018.

9. TIME: 9:00 CASE#: MSC17-00862
CASE NAME: KOSI VS. LITTMAN
HEARING ON DEMURRER TO 1st Amended COMPLAINT
FILED BY WINDELER DEVELOPMENT GROUP, INC., et al.
**** TENTATIVE RULING: ****

This matter is continued to January 26, 2018 at 9:00 a.m.

10. TIME: 9:00 CASE#: MSC17-00862
CASE NAME: KOSI VS. LITTMAN
HEARING ON DEMURRER TO 1st Amended COMPLAINT
FILED BY MICHAEL LITTMAN
**** TENTATIVE RULING: ****

This matter is continued to January 26, 2018 at 9:00 a.m.

11. TIME: 9:00 CASE#: MSC17-00862
CASE NAME: KOSI VS. LITTMAN
HEARING ON DEMURRER TO 1st Amended COMPLAINT
FILED BY MICHAEL LITTMAN
**** TENTATIVE RULING: ****

This matter is continued to January 26, 2018 at 9:00 a.m.

12. TIME: 9:00 CASE#: MSC17-00862
CASE NAME: KOSI VS. LITTMAN
HEARING ON DEMURRER TO 1st Amended COMPLAINT
FILED BY TERRY LUKAS LITTMAN, WILLIAM JOSEPH BURGOYNE
**** TENTATIVE RULING: ****

This matter is continued to January 26, 2018 at 9:00 a.m.

13. TIME: 9:00 CASE#: MSC17-00862
CASE NAME: KOSI VS. LITTMAN
HEARING ON MOTION TO STRIKE IMPROPER MATTER FROM 1st Amended COMPLAINT
FILED BY WINDELER DEVELOPMENT GROUP, INC., et al.
**** TENTATIVE RULING: ****

This matter is continued to January 26, 2018 at 9:00 a.m.

14. TIME: 9:00 CASE#: MSC17-00862
CASE NAME: KOSI VS. LITTMAN
HEARING ON MOTION TO STRIKE PORTIONS OF 1st Amended COMPLAINT
FILED BY MICHAEL LITTMAN, MICHAEL LITTMAN
**** TENTATIVE RULING: ****

This matter is continued to January 26, 2018 at 9:00 a.m.

15. TIME: 9:00 CASE#: MSC17-01152
CASE NAME: CENTER VS. RICHMOND PATIENT'S GROUP
HEARING ON MOTION TO APPROVE PROPOSITION 65 SETTLEMENT & FOR ENTRY OF JUDGMENT / FILED BY CENTER FOR ADVANCED PUBLIC AWARENESS, INC.
**** TENTATIVE RULING: ****

Counsel should appear (CourtCall acceptable) to discuss whether a full associate’s hourly rate should be attributed to Mr. Berlin, given that he has not been admitted to the Bar despite having passed the bar exam more than a year ago (with no other explanation provided). In all other respects, the proposed settlement and Stipulated Consent Decree are **approved**.

16. TIME: 9:00 CASE#: MSC17-01152
CASE NAME: CENTER VS. RICHMOND PATIENT'S GROUP
CASE MANAGEMENT CONFERENCE
**** TENTATIVE RULING: ****

The CMC is vacated in light of the approval of the settlement (line 15).

17. TIME: 9:00 CASE#: MSC17-01640
CASE NAME: LARRY HARMEN VS. DEUTSCHE BANK
HEARING ON MOTION FOR DEMURRER TO PLAINTIFF'S COMPLAINT
FILED BY DEUTSCHE BANK NATIONAL TRUST COMPANY, et al.
**** TENTATIVE RULING: ****

Before the Court is a Demurrer filed by Carrington Mortgage Services, LLC and Deutsche Bank National Trust Company, as Indenture Trustee for New Century Mortgage Home Equity Loan Trust 2004-3. The Demurrer relates to the Complaint filed by Larry Harmen. Mr. Harmen is in pro per. The Complaint asserts causes of action for (1) general negligence; (2) trespass; (3) conversion; (4) loss of use; (5) fraud; and (6) civil conspiracy.

Defendants demur pursuant to Code of Civ. Proc. § 430.10(e) on the grounds that Mr. Harmen lacks standing and has failed to state facts sufficient to state his causes of action.

For the following reasons, the Demurrer is **sustained**, without leave to amend.

<u>Request for Judicial Notice</u>

Defendants request judicial notice of several Contra Costa County Recorder Documents. This request is unopposed. The request is **granted**. Evid. Code §§ 452, 453.

<u>Analysis</u>

The claims of the Complaint are all directed towards the eviction process and procedure subsequent to a nonjudicial foreclosure. Non-party Heather Woodhull was the original borrower on a loan secured by a deed of trust against 2313 Greenridge Dr., Richmond, CA 94803. RJN at Ex. 1. After default (RJN Ex. 2), a notice of trustee sale was recorded against the property. RJN Ex. 5. The property was sold to Deutsche Bank on April 25, 2008 at the foreclosure sale. RJN Ex. 6. Defendant John Brosnan was the sole tenant at the property. Complaint ¶ 16. An unlawful detainer action was filed against the borrower and any occupants of the property. Complaint at ¶ 18.

The allegations of the Complaint center on two theories. First, it is alleged that the proof of service of summons in the 2008 unlawful detainer action was forged, so that Woodhull and Brosnan were not properly served and a default judgment was improperly entered against them. Second, it is alleged that Brosnan's vehicles and personal property were removed from the residence when the eviction was carried out, and those vehicles and property were in some

fashion lost or damaged (though, except for an allegation that some of the property was left on the curb, there is little detail as to how anything in particular was lost or damaged).

What is missing from the Complaint is any cognizable connection between the wrongs the Complaint alleges as to Woodhull or Brosnan, and this Plaintiff. Indeed, the Complaint very nearly does not mention Plaintiff personally at all. The Complaint repeatedly acknowledges that all of the vehicles and personal property involved in the case belonged to Brosnan, not Plaintiff. The Complaint alleges no connection between any of that property and Plaintiff, nor does it allege any connection between Plaintiff and the loss of or damage to that property. At most, it contains only entirely conclusory allegations of resultant harm to Plaintiff, which on their faces are non sequiturs. The best of these allegations is ¶ 95: "Defendants wrongfully exerted dominion over the property of Property, Brosnan's vehicles and Brosnan's personal property, thereby injuring Plaintiff." Injuring Plaintiff how? How was Plaintiff harmed by exercise of dominion over someone else's property? The Complaint does not say.

In his untimely-filed opposition, Plaintiff asserts that he had some form of security interest in some unidentified portion of the damaged property. Nothing of the kind is alleged in the Complaint, however. (There is also no allegation that defendants had any reason to be aware of any such security interest.) The UCC section cited by Plaintiff has to do with sales of identified goods, not with security interests. And even if such a security interest might allow Plaintiff to assert some claim for loss of the value of his security interest, Plaintiff offers no explanation for how it could possibly allow him to litigate over the legality of the eviction as such.

Defendants also point out that these events are alleged to have occurred in 2008, and they argue that the claims are therefore barred by limitations. The opposition entirely ignores this part of defendants' attack.

The Demurrer is **sustained**, without leave to amend. "Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.

If Plaintiff seeks to contest the tentative in order to seek leave to amend, he must come to the hearing prepared to explain, cogently and in some detail, how he would propose to amend and how he would have standing to assert claims for whatever wrongs he contends occurred, and how such claims could be timely.

In light of this disposition, the motion to consolidate this case with the unlawful detainer case is moot, and is taken off calendar in both cases.

Finally, the Court notes the extensive and combative involvement in this case of Brosnan – nominally a defendant, but clearly aligned with Plaintiff. Brosnan has been designated as a vexatious litigant. Defendants suggest that Brosnan is really conducting this case to assert his own claims, using Plaintiff Harmen as a proxy or stalking horse by which to evade Brosnan's vexatious litigant status. That is a plausible inference from the papers before the Court, but the Court has no such evidence or issue before it at present. Because the case is ending, there is no occasion for further inquiry on this subject. The issue is flagged as a cause for concern, however, if this matter were to continue in any form.

CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 12
HEARING DATE: 01/12/18

18. TIME: 9:00 CASE#: MSC17-01862
CASE NAME: BURNETT VS. ELLIOTT
HEARING ON MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT
FILED BY SHARON ELLIOTT, KIMBERLY GOMEZ
**** TENTATIVE RULING: ****

Defendants' motion to quash is **denied**.

Defendants' motion to quash is based on the fact that both defendants are residents of Oregon and that they have no contacts with California. "When a defendant challenges personal jurisdiction, the plaintiff has the burden to prove, by a preponderance of the evidence, the factual basis for the exercise of jurisdiction. [Citation.]" (*Shisler v. Sanfer Sports Cars, Inc.* (2006) 146 Cal.App.4th 1254, 1259; see also *Ziller Electronics Lab Gmbh v. Superior Court* (1988) 206 Cal.App.3d 1222, 1232-33.)

A court may exercise two types of personal jurisdiction over a defendant: general jurisdiction and specific jurisdiction. Each is considered below.

General Jurisdiction

"General jurisdiction exists when a defendant is domiciled in the forum state or his activities there are substantial, continuous, and systematic." (*Shisler, supra,* 146 Cal.App.4th at 1258-59.)

There is no dispute that Defendants are residents of Oregon, not California. (Comp. ¶3; Elliott decl. ¶2; Gomez decl. ¶2.) In addition, the admissible evidence presented by Plaintiff does not show that either defendant had substantial, continuous, and systematic contacts with California. Therefore, the Court does not find general jurisdiction exists over the defendants.

Plaintiff does contend that defendant Elliott (though not defendant Gomez) operates a business in California, namely a retail operation selling Christmas trees. In her reply, Elliott acknowledges that that was true until early 2016, when she sold the business – which casts some doubt on the veracity of the conclusory statement in her prior declaration that she has "had no contacts with the State of California". If it were necessary to establish whether or not Elliott still operates such a business, it might require an evidentiary hearing. As it is, the Court is not sure that a business, based out-of-state and operating in California for only one month a year, would suffice to establish general jurisdiction. And of course it is not contended that the claims in this case arise out of the Christmas tree business. Because there are sufficient facts to establish specific jurisdiction, the Court finds it unnecessary to rely on this asserted basis for general jurisdiction as to Elliott.

Specific Jurisdiction

Even if not subject to the Court's general jurisdiction, a defendant may still be subject to specific jurisdiction within California. "A court may exercise specific jurisdiction over a nonresident defendant only if (1) the defendant has purposefully availed himself or herself of forum benefits; (2) the controversy is related to or arises out of the defendant's contacts with the forum and

(3) the assertion of personal jurisdiction would comport with fair play and substantial justice." (*Shisler,* 146 Cal.App.4th at 1259 (quotes and citations omitted).)

Plaintiff included a declaration with her complaint. (Defendants complain that it is unsigned, but the original in the Court's file is signed.) Although it is unusual to provide a declaration with a complaint rather than verifying the complaint, the declaration appears to be signed by plaintiff under penalty of perjury and the Court will consider its contents in relation to this motion. Plaintiff declares that her father had a storage unit in Oakley, California. (Burnett decl. ¶ 6.) Defendants had represented to Plaintiff on multiple occasions that they would give her keys to the storage unit, but they never did so. (Burnett decl. ¶ 11.) Plaintiff also declares that after he father's death, it took her several months to obtain access to the storage unit and when she did, most of the assets in the unit had been removed. (Burnett decl. ¶ 11.) Plaintiff later obtained the file from the storage unit and she states that the file shows that defendants executed a new lease with the storage facility. (Burnett decl. ¶ 13.) Burnett also states that her cousin said that he helped defendant Kimberley Gomez remove assets from the storage unit. (Burnett decl. ¶ 12.)

In their motion, each defendant declares that "I have had no contacts with the State of California and I deny the claims of plaintiff Crystal Burnett alleged in her complaint." (Elliott decl. ¶ 4; Gomez decl. ¶ 4.) Other than stating that they have no contacts with California, the defendants provide no specific facts or additional details about their lack of contacts with California. Further, as the Court discusses above and below, these entirely conclusory statements are contradicted by Elliott's more specific admissions in her later declaration.

Plaintiff's declaration shows that specific jurisdiction over the defendants is proper based on their actions related to the storage unit. Plaintiff's evidence shows that defendants entered into a lease in California and then took items (which Plaintiff claims are rightfully hers) from the storage unit located in California. These facts show that defendants purposefully availed themselves of the benefits of California, that at least some of Plaintiff's complaint arises from defendants' contacts with California, and that exercising personal jurisdiction over the defendants comports with fair play and substantial justice.

Defendants argue that "Plaintiff's Complaint shows the only contact with the State is defendants' alleged dealings pertaining to the Oakley storage unit. This is insufficient to establish personal or general jurisdiction." (Defendants' Memorandum pages 9-10.) Defendants provide no legal authority for this position. Nor do they dispute Plaintiff's version of the facts related to the storage unit. The Court finds Defendants' argument unpersuasive. Maintaining a storage unit may not be sufficient in itself to support general jurisdiction. But given that a substantial part of Plaintiff's claims arises specifically from defendants' alleged conduct concerning the storage unit – and particularly, their alleged removal of assets from it, which removal must necessarily have occurred in California – this is more than enough to support specific jurisdiction.

It appears to be true, as defendants point out, that plaintiff has no first-hand knowledge that defendants removed assets from the Oakley storage unit. That, however, is certainly a strong and reasonable inference from the facts plaintiff does know first-hand, starting with the fact of defendants having secured the addition of themselves as co-tenants on the unit. Indeed, Elliott's reply acknowledges that defendants previously rented the unit in question, though she

states that they have not done so "since mid-2016" – an assertion unsupported by any declaration or documentation, and lacking in any explanation of what Elliott means by either her vague chronology or her assertion of having ceased to rent the unit. Both parts of that assertion, however, may well be consistent with Plaintiff's allegation that defendants removed the decedent's valuable assets from the unit sometime shortly before or after his death – an allegation that defendants have not disputed in any detail.

It may be correct, as defendants argue, that some of the other facts alleged in the complaint are not connected to California. That is not at issue on the present motion, however, which has to do only with whether defendants may properly be sued at all in California. Further, it is a fair characterization of plaintiff's complaint that it relies on what plaintiff contends to be a unified course of conduct in taking the property of the decedent or his estate, even if that conduct may have occurred in more than one state. If jurisdiction is otherwise established in this action, there is no obvious reason why plaintiff would be required to refile the same lawsuit in each state where part of the alleged facts occurred.

The Court finds that there is sufficient evidence for the Court to exercise specific jurisdiction over the defendants based on the defendants' actions related to the storage unit in Oakley.

Defendants also argue that Plaintiff does not have standing and that the complaint is subject to a demurrer and motion to strike. These arguments are not relevant to the current motion. However, the Court reminds the parties of the meet and confer requirements in Code of Civil Procedure §§430.41 and 435.5.

19. TIME: 9:00 CASE#: MSL17-00998
CASE NAME: KORB VS. ROMERO
HEARING ON MOTION FOR SANCTIONS UNDER CCP 128.5 & BPC 6125, 6126 &6127
FILED BY EDWARD J. ROMERO
**** TENTATIVE RULING: ****

This motion was taken off calendar by the moving party.

20. TIME: 10:00 CASE#: MSC14-01166
CASE NAME: MAKTAB TARIGHAT VS. KAMRAN AZIZI
HEARING ON OSC RE: WHY ANSWER SHOULD NOT BE STRICKEN & WHY CROSS-COMPLAINT SHOULD NOT BE DISMISSED
**** TENTATIVE RULING: ****

Counsel and pro per party to appear. See line 1.

21. TIME: 10:00 CASE#: MSL17-01099
CASE NAME: MIDLAND FUNDING VS. MANNING
COURT TRIAL - SHORT CAUSE/ 001 DAY(S)
**** TENTATIVE RULING: ****

The matter has been settled.

22. TIME: 09:01 CASE#: MSC17-01430
CASE NAME: RAM VS. WELLS FARGO
HEARING ON DEMURRER TO 1ST AMENDED COMPLAINT OF RAM FILED BY BRECKENRIDGE PROPERTY FUND 2016
**** TENTATIVE RULING: ****

This is an unlawful foreclosure action. Before the Court is a demurrer filed by Breckenridge Property Fund 2016, LLC. The Demurrer relates to the First Amended Complaint filed by Plaintiff Ireen L. Ram. The FAC asserts causes of action for (1) violations of Civ. Code § 2923.6; (2) wrongful foreclosure; (3) negligent misrepresentation; (4) fraudulent misrepresentation; (5) negligence; (6) violations of Bus. & Prof. Code § 17200 et seq.; and (7) quiet title (Code Civ. Proc. § 760.020). Only the quiet title claim is pleaded against Breckenridge.

Breckenridge demurs pursuant to Code Civ. Proc. § 430.010(e) on the ground that it is a bona fide purchaser for value of the subject property at a nonjudicial foreclosure sale, and as a consequence the sale is invulnerable to Plaintiff's challenge. Breckenridge demurs on the additional grounds that Plaintiff has failed to tender the indebtedness.

For the following reasons, the Demurrer is **sustained**, with one final opportunity to amend.

Request for Judicial Notice

The Court notes that Breckenridge filed two requests for judicial notice; one on November 20, 2017 and one on November 21, 2017. The two Requests are identical, requesting judicial notice of the Deed of Trust recorded March 21, 2006 and the Trustee's Deed Upon Sale recorded on September 1, 2017. These Requests are unopposed. The Requests are **granted**. Evid. Code §§ 452, 453.

Standard

"The function of a demurrer is to test the sufficiency of the complaint as a matter of law." *Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1420. A complaint "is sufficient if it alleges ultimate rather than evidentiary facts" (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550 ("*Doe*")), but the plaintiff must set forth the essential facts of his or her case "with reasonable precision and with particularity sufficient to acquaint [the] defendant with the nature, source and extent" of the plaintiff's claim. *Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1099. Legal conclusions are insufficient. *Id.* at 1098–1099; *Doe* at 551, fn. 5. The Court "assume[s] the truth of the allegations in the

complaint, but do[es] not assume the truth of contentions, deductions, or conclusions of law." *California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247.

Analysis

Quiet Title (Code Civ. Proc. § 760.020)

"A properly conducted nonjudicial foreclosure sale constitutes a final adjudication of the rights of the borrower and lender." *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 831. "As a general rule, a trustee's sale is complete upon acceptance of the final bid." *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 440-441. "If the trustee's 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." *Moeller*, supra, 25 Cal.App.4th at 831 (citations omitted); see also Civ. Code § 2924. "This presumption may only be rebutted by substantial evidence of prejudicial procedural irregularity." *Melendrez*, 127 Cal.App.4th at 1258. "[T]he two elements of being a BFP are that the buyer (1) purchase the property in good faith for value, and (2) have no knowledge or notice of the asserted rights of another." *Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1251.

Here, Breckenridge has provided certified copies of the Trustee's Deed Upon Sale. RJN Ex. B. Certified copies of recorded documents are self-authenticating. Evid. Code §§ 1530, 1600; see also *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264-65 (disapproved on another point by *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919). The TDUS reflects a foreclosure sale of the Property on July 19, 2017 and that Ireen Ram was the borrower under the foreclosed upon Deed of Trust. RJN Ex. B. Breckenridge has demonstrated that it purchased the Property at a foreclosure sale and thereafter "duly perfected" its title. Plaintiff argues in opposition that Breckenridge is not a BFP but this argument is not supported by either allegations in the FAC or judicially noticeable documents. Furthermore, Plaintiff's complaint is bereft of any allegations of prejudicial procedural irregularity. As discussed further in Line 23, below, Plaintiff has not alleged a material violation of the HBOR statute.

Additionally, Plaintiff has not alleged tender or that she is exempt from the tender requirement. There are four exceptions to the tender requirement in the nonjudicial foreclosure context: First, if the borrower's action attacks the validity of the underlying debt, a tender is not required because it would constitute an affirmation of the debt. Second, a tender will not be required when the person who seeks to set aside the trustee's sale has a counterclaim or set-off against the beneficiary. Third, a tender may not be required where it would be inequitable to impose such a condition on the party challenging the sale. Fourth, no tender will be required when the trustor is not required to rely on equity to attack the deed because the trustee's deed is void on its face. See *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112-13. There are no allegations in the FAC that would support any of these exceptions.

Plaintiff has failed to allege facts to state a claim for quiet title. The Demurrer is **sustained**, with one final opportunity to amend.

23. TIME: 09:01 CASE#: MSC17-01430
CASE NAME: RAM VS. WELLS FARGO
HEARING ON DEMURRER TO 1ST AMENDED COMPLAINT OF RAM FILED BY WELLS FARGO BANK, N.A., US BANK, N.A.
**** TENTATIVE RULING: ****

This is an unlawful foreclosure action. Before the Court is a demurrer filed by Defendant Wells Fargo Bank, N.A. for itself and dba America's Servicing Company; and Defendant U.S. Bank National Association, as Trustee for Structured Asset Investment Loan Trust Mortgage Pass-Through Certificates, Series 2006-3. The Demurrer relates to the First Amended Complaint filed by Plaintiff Ireen L. Ram. The FAC asserts causes of action for (1) violations of Civ. Code § 2923.6; (2) wrongful foreclosure; (3) negligent misrepresentation; (4) fraudulent misrepresentation; (5) negligence; (6) violations of Bus. & Prof. Code § 17200 *et seq.*; and (7) quiet title (Code Civ. Proc. § 760.020). All but the cause of action for Quiet Title are pleaded against Wells Fargo and US Bank.

Defendants demur pursuant to sections 430.10(e) on several grounds. For the following reasons, the demurrer is **sustained**, with a single opportunity to amend. The Court did not reach these Defendants' demurrer to Plaintiff's claim for quiet title because it is not asserted against them.

Request for Judicial Notice

Defendants request judicial notice of several county recorder documents as well as pleadings and orders from *Ram v. Wells Fargo Bank, N.A.*, et al. (Case No. MSC16-00115). This Request is unopposed. The Request is **granted**. Evid. Code §§ 452, 453.

Standard

"The function of a demurrer is to test the sufficiency of the complaint as a matter of law." *Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1420. A complaint "is sufficient if it alleges ultimate rather than evidentiary facts" (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550 ("*Doe*")), but the plaintiff must set forth the essential facts of his or her case "with reasonable precision and with particularity sufficient to acquaint [the] defendant with the nature, source and extent" of the plaintiff's claim. *Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1099. Legal conclusions are insufficient. *Id.* at 1098–1099; *Doe* at 551, fn. 5. The Court "assume[s] the truth of the allegations in the complaint, but do[es] not assume the truth of contentions, deductions, or conclusions of law." *California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247.

Analysis

Violations of Civ. Code § 2923.6

Civil Code § 2923.6 prohibits "dual tracking," wherein a "borrower's mortgage servicer, a mortgage service, mortgagee, trustee, beneficiary, or authorized agent" records a notice of default or notice of sale, notwithstanding a pending application for a first lien loan modification. Civ. Code § 2923.6. The ban on "dual tracking" becomes effective once the borrower submits a "complete application for a first lien loan modification." Civ. Code § 2923.6(c).

Here, Plaintiff alleges that she submitted a complete first lien loan modification application on July 11, 2017. FAC at ¶ 1. She alleges that Wells Fargo confirmed receipt of her completed

application on July 13, 2017. *Id.* She further alleges that notwithstanding the pending review of her loan modification application, Wells Fargo sold the property non-judicially to a third-party buyer on July 19, 2017. *Id.* at ¶ 3.

However, HBOR provides relief only for a "material" violation of the dual tracking statute. See Civ. Code § 2924.12(a)(1) ("a borrower may bring an action for injunctive relief to enjoin a material violation of Section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17."). Plaintiff has failed to allege that any technical violations of the dual tracking provisions were "material," in the sense that but for those violations, Wells Fargo would have agreed to a loan modification agreement that Plaintiff could have afforded. In the absence of such allegations, Plaintiff has failed to allege that she was damaged by any alleged technical violations of 2923.6.

Plaintiff has failed to state facts sufficient to constitute a cause of action for violation of Civil Code § 2923.6. The demurrer to this cause of action is **sustained**, with one opportunity to amend.

The Court notes that effective January 1, 2018 section 2923.6 no longer contains a prohibition on dual tracking. The prohibition on dual tracking was codified in former section 2923.6 that was repealed on January 1, 2018. Because the parties did not raise this point, the Court does not consider it at this time. However, Plaintiff may wish to consider whether to amend this cause of action in light of prevailing authority which holds that "[w]hen a pending action seeks recovery based on a statutorily based obligation, and that statutory provision is repealed by legislation not containing an express saving clause, the California courts have consistently concluded the pending actions should be abated." *Rankin v. Longs Drug Stores California, Inc.* (2009) 169 Cal.App.4th 1246, 1256.

Wrongful Foreclosure

The elements of a cause of action for wrongful foreclosure are "'(1) the 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.' [Citation.]" *Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 408, quoting *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 104.

The sole basis for Plaintiff's wrongful foreclosure claim is her allegations regarding dual tracking in violation of § 2923.6. However, Plaintiff has failed to state facts sufficient to constitute a cause of action for violation of § 2923.6. As a consequence, a wrongful foreclosure claim premised solely on this alleged violation fails.

Plaintiff has failed to state facts sufficient to constitute a cause of action for wrongful foreclosure. The demurrer to this cause of action is **sustained**, with one opportunity to amend.

Negligent Misrepresentation

The elements of a cause of action for fraud are: "(1) a misrepresentation, which includes a concealment or nondisclosure; (2) knowledge of the falsity of the misrepresentation, *i.e.*, scienter; (3) intent to induce reliance on the misrepresentation; (4) justifiable reliance; and (5) resulting damages. *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173. The same elements comprise a cause of action for negligent misrepresentation, except there is no

requirement of intent to induce reliance." *Cadlo v. Owens-Illinois, Inc*. (2004) 125 Cal.App.4th 513, 519. "Each element in a cause of action for fraud or negligent misrepresentation must be factually and specifically alleged." *Id.*

Here, Plaintiff alleges the following factual representation: "that the trustee's sale date for the Property had been postponed from July 19, 2017, to August 2, 2017." FAC at ¶ 48. Plaintiff has alleged that at the time of this representation, Wells Fargo and US Bank did not reasonably believe it to be true "because they sold Plaintiff's property on July 19, 2017." *Id.* at ¶ 49. Plaintiff further alleges that "Defendants intended to deceive Plaintiff into believing that the trustee's sale date was postponed per the new application to ensure that she would not do anything to stop the trustee's sale." *Id.* at ¶ 57. Finally, Plaintiff alleges that in reliance on this representation she "did not seek alternative options to stop the trustee's sale." *Id.* at ¶ 58, see also ¶ 50 ("other options to save her Property" may have included a "pre-foreclosure temporary restraining order"). The Property was subsequently sold at a trustee's sale. *Id.* at ¶ 51.

Critically, however, Plaintiff's allegations lack specificity with respect to who made the actual representation and when. Further, while Plaintiff alleges conclusorily that she "justifiably relied on Defendants and did not seek alternative options to stop the trustee's sale" (*id.* at ¶ 58), she gives no hint of what those "alternative options" might have been, or whether they would have succeeded in preventing the trustee's sale, or whether any initial success (such as a TRO) would have succeeded for more than a brief time. Given her failure to plead a viable cause of action for HBOR violation or unlawful foreclosure, any such assertions of reliance are problematic.

Plaintiff has failed to state facts sufficient to constitute a cause of action for negligent misrepresentation. The demurrer to this cause of action is **sustained**, with one opportunity to amend.

Fraudulent Misrepresentation

As with negligent misrepresentation, "[e]ach element in a cause of action for fraud … must be factually and specifically alleged." *Cadlo*, *supra*, 125 Cal.App.4th at 519. In a fraud claim against a corporation, a plaintiff must allege the names of the persons who made the misrepresentations, their authority to speak for the corporation, to whom they spoke, what they said or wrote, and when it was said or written. *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645. The FAC lacks this detail.

The defects in this cause of action are the same as those in the preceding one – failure to allege when and by whom the representation was made, and failure to allege detrimental reliance adequately. The demurrer to this cause of action is **sustained**, with one opportunity to amend.

Negligence

To state a cause of action for negligence, a plaintiff must allege: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached that duty, and (3) the breach proximately caused the plaintiff's damages or injuries. *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal. App. 4th 49, 62. "The existence of a duty of care owed by a defendant to a plaintiff is a prerequisite to establish a claim for negligence." *Nymark v. Heart Fed. Savings & Loan Ass'n* (1991) 231 Cal. App. 3d 1089, 1096.

A lender may owe a borrower duties of care under Civil Code § 1714. See *Daniels v. Select Portfolio Servicing, Inc*. (2016) 246 Cal. App. 4th 1150, 1158, 1180-1182; *Alvarez v. BAC Home*

Loans Servicing, L.P. (2014) 228 Cal. App. 4th 941, 944-949; *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal. App. 4th 872. Under the foregoing case law, Wells Fargo and US Bank can both be said to owe a duty of care to Plaintiff.

The Court notes that the paragraphs supporting this cause of action in the FAC are largely devoted to legal argument and citation to case law rather than factual allegations. The gravamen of Plaintiff's negligence claim appears to be their allegations regarding dual tracking (FAC ¶¶ 1-3) and negligent misrepresentation (FAC ¶¶ 48-52). However, the FAC fails to allege how that alleged negligent conduct caused Plaintiff's default. In the absence of such a nexus, Plaintiff has failed to state facts sufficient to constitute a cause of action for negligence.

The demurrer to this cause of action is **sustained**, with one opportunity to amend.

Violations of Bus. & Prof. Code § 17200 *et seq.*

Plaintiff's claim for violation of the Unfair Competition Law ("UCL"), Bus. & Prof. Code section 17200, et seq., is derivative of her HBOR claim. Because the UCL claim is duplicative of the HBOR claim, and because the HBOR can provide the same (and additional) remedies for violation of the statute, the Demurrer is **sustained**, with one opportunity to amend.