CAVALRY SPV I LLC v. FOWLER

22CF14037

DEFENDANT'S MOTIONS TO DISMISS AND TO STRIKE

This is a limited jurisdiction collections case involving a debt owed to Citibank, and allegedly assigned to plaintiff. Before the Court are two motions filed by defendant: a motion to "dismiss" based upon a failure to state; and a motion to "strike" exhibits attached to the operative complaint. A review of the proofs of service and accompanying paperwork indicates that plaintiff has actual and constructive notice of these motions (even though the service was technically imperfect). There is no opposition filed, which suggests to this Court that either the amount in controversy does not warrant the effort, or that plaintiff concedes the points raised in the motions. Either way, an independent review is required.

Defendant's motion to "dismiss" is actually a motion for judgment on the pleadings. It is defective since the motion lacks a §439 meet and confer declaration. Nevertheless, a pleading is adequate if it contains a reasonably precise statement of the ultimate facts, in ordinary and concise language, and with sufficient detail to acquaint a defendant with the nature, source and extent of the claim. (CCP §§ 425.10(a), 459; in accord, *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Gray v. Dignity Health* (2021) 70 Cal.App.5th 225, 236; *Tung v. Chicago Title Co.* (2021) 63 Cal.App.5th 734, 758-759.) A motion for judgment on the pleadings on the grounds of failure to state (CCP §430.10(e)) will be denied if, upon a consideration of all the facts stated, it appears that the plaintiff is entitled to any relief at the hands of the court against the defendants, even though the facts may not be clearly stated or may be intermingled with a statement of other facts irrelevant to the cause of action shown. (*New Livable California v. Association of Bay Area Governments* (2020) 59 Cal.App.5th 709, 714; *Wittenberg v. Bornstein* (2020) 51 Cal.App.5th 556, 566; *Weimer v. Nationstar Mortgage, LLC* (2020) 47 Cal.App.5th 341, 352.)

The operative pleading here contains causes of action for open book and account stated. An open book is a detailed statement constituting the principal record of transactions between a debtor and creditor arising out of a contractual relationship between the two. (CCP §337a.) An account stated requires an agreement between the parties as debtor/creditor regarding an amount due and a promise of repayment. (See *Gleason v. Klamer* (1980) 103 Cal.App.3d 782, 786; *H. Russell Taylor's Fire Prevention Service, Inc. v. Coca Cola Bottling Corp.* (1979) 99 Cal.App.3d 711, 726.) Although the only records attached to the operative pleading are two monthly statements, and lacks the usual array of documents this Court sees in such cases (e.g., cardmember agreement, proof of actual use by the cardmember, and notice of default), the exhibits

with the averments are more than sufficient to acquaint defendant with the nature and basis of the claim.

Defendant separately contends that the claims asserted are barred by the applicable statute of limitations, as a matter of law. Seeking dispositive relief for failure to state at the pleading stage on an affirmative defense is a high bar: it must appear clearly and affirmatively that, upon the face of the complaint, the right of action is necessarily barred. This will not be the case unless the complaint alleges every fact which the defendant would be required to prove if he were to plead the bar of the applicable statute of limitation as an affirmative defense. (*Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32, 42; *May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, 1324.) Although defendant contends that the April 2019 payment was in fact not made, which is another way of saying that the cause of action accrued earlier, it is of no consequence since the statute of limitations for open book and account stated is four years (see CCP §337(b)), and this lawsuit was filed in December 2022. In other words, even if the cause of action accrued in January of 2019, it would be timely based on the commencement date.

Finally, defendant appears to suggest that plaintiff's averments of an assignment are insufficient to prove an assignment was made. Although this Court could take judicial notice of plaintiff's status as a well-known debt buyer, it is generally not a requirement at the pleading stage to "prove" a valid assignment unless the claim asserted is not assignable. (See, *e.g., Amalgamated Transit Union, Local 1756, AFL–CIO v. Superior Court* (2009) 46 Cal.4th 993, 1002; *Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 993; in accord, *Fink v. Shemtov* (2012) 210 Cal.App.4th 599, 610.) Defendant does not allege something amiss with the assignment, only that she does not accept the fact that a complete assignment has been made. This is a matter for discovery and potentially summary judgment, but not a basis for attacking the pleading in a vacuum.

Defendant's motion to "strike" is also missing the required meet and confer declaration. (CCP §435.5.) Nevertheless, pursuant to CCP §§ 435 and 436, a party may move for an order striking from a pleading "any irrelevant, false or improper matter" or "any part of any pleading not drawn in conformity" with laws, rules or orders. A matter is considered "irrelevant" if it is not essential to the statement of the claim or defense or if it is neither pertinent to nor supported by an otherwise sufficient claim or defense. (CCP §431.10(b) and (c).) A matter is considered "false" if it is, on its face, contrary to fact or truth (as opposed to a sham). (*Garcia v. Sterling* (1985) 176 Cal.App.3d 17, 21.) The motion is to be used sparingly, not as a line item veto. (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1683.) The motion to strike fails on the merits because defendant's contention that the exhibits are "inaccurate" is not a basis for striking them from the Complaint – they represent an essential part of plaintiff's claim and are properly incorporated by reference. (See *Clements v. T.R. Bechtel Co.* (1954) 43 Cal.2d 227, 242.)

Defense motions are DENIED.

The Clerk shall provide notice of this Ruling to the parties forthwith. Plaintiff is ordered to serve and file a proposed order consistent herewith and CRC 3.1312.

FOSTER v. IRBC2 PROPERTIES LLC et al

21CV45573

DEFENSE DEMURRER TO SAC

This is a wrongful foreclosure case. The operative pleading herein is the Second Amended Complaint filed 01/05/23, which contains the following seven (7) causes of action: wrongful foreclosure; cancellation of instruments; slander of title; intentional and negligent infliction of emotional distress; unfair business practices; accounting; and a new claim for unjust enrichment (having replaced the previous claim for declaratory relief). As this Court has previously noted, plaintiff's general theory of the lawsuit is that California TD Specialists did not have legal authority to conduct, on behalf of 2005 Residential Trust 3-2 by Wilmington Savings Fund Society FSB, a nonjudicial foreclosure sale of plaintiff's residence because (1) one of the entities in the chain (IRBC-2) was misidentified and (2) assignments within the chain were untimely. Because the issue of lawful standing to conduct a nonjudicial foreclosure sale falls within a narrow, and presently underdeveloped, area of law, the parties have focused entirely on the pleadings so far. Unfortunately, the pleadings have never been easy to follow, based largely on plaintiff's writing style and unfamiliarity with pleading rules. Consistent with the "pleadings only" limited approach, here is yet another demurrer – this to the entire Second Amended Complaint, and to each cause of action subsumed therein, by defendants FCI Lender Services, IRBC-2 Properties, Park Tree Investments, Real Time Resolutions, Wilmington Savings Fund, and Connie Riggsby.

Background Facts (as alleged and deduced from incorporated exhibits)

On or about 08/08/02, plaintiff acquired via grant deed, for a reported $25,000, a half-acre lot in the Copper Cove subdivision of Copperopolis, overlooking Lake Tulloch, designated APN 067-022-005, and commonly referred to as 4928 Pueblo Trail, Copperopolis, California (hereinafter "subject property"). Soon thereafter, plaintiff completed construction thereon of a 2,831 sq ft residence with four bedrooms and 3 bathrooms, using funds he borrowed from IndyMac Bank. The amount of the loan is unknown.

On or about 07/06/06, plaintiff secured a home equity line of credit from Countrywide Bank in the amount of $450,496.00 (designated as *Loan No 9160017686*). The note for this line of credit (hereinafter "HELOC") was secured by a deed of trust to the subject property (hereinafter "HELOC-DOT") with the power of sale in favor of MERS as Countrywide's nominated beneficiary. According to plaintiff, this HELOC did not qualify as either a negotiable (Comm. Code §3104) or a bearor (Comm. Code §3205) instrument.

On or about 06/27/12, there was recorded against the property an assignment of the HELOC-DOT **from** MERS **to** The Bank of New York Mellon fka The Bank of New York, as successor trustee to JPMorgan Chase Bank as trustee on behalf of the Certificateholders of the CWHEQ Inc., CWHEQ Revolving Home Equity Loan Trust, Series 2006-G (hereinafter "Mellon"). According to plaintiff, this assignment was "void" because it occurred after the close of that particular securitized pool. However, plaintiff also claims that Mellon holds all the legal and equitable interest in the HELOC. Both cannot be true.

On or about 08/30/16, plaintiff was informed via letter that Ditech Financial LLC's right to collect on plaintiff's loan was being transferred to Real Time Resolutions. At that time, it was reported that plaintiff had a principal balance owing of $491,446.00.

On or about 05/13/17, Real Time Solutions (which secured the servicing obligation on plaintiff's HELOC from DiTech Financial in2016) transferred said servicing obligations to FCI Lender Services, effective 06/01/17. Shortly thereafter, Connie Riggsby caused to be recorded an assignment of the HELOC from Mellon to 2005 Residential Trust 3-1 by Wilmington Savings Fund Society FSB (Instrument No. 2017-010309, hereinafter "Trust 3-1"), and immediately therewith an assignment from Trust 3-1 to 2005 Residential Trust 3-2 by Wilmington Savings Fund Society FSB (hereinafter Trust 3-2). According to plaintiff, there was no evidence of Connie's authority to act on Mellon's behalf (either as Orion VP or CTF VP), subjecting both the second and third assignments to collateral attack.

On or about 04/10/18, California TD Specialists caused to be recorded against the subject property a Notice of Default, reflecting a current arrears of $220,267.36.

On or about 07/11/18, plaintiff filed suit against California TD Specialists, FCI Lender Services, and Trust 3-2. See 18CV43398.

On or about 08/01/18, California TD Specialists caused to be recorded against the subject property a Notice of Trustee's Sale for an estimated accrued debt of $710,657.61.

On or about 07/01/19, plaintiff filed a Request for Dismissal without prejudice of 18CV43398.

On or about 09/05/19, California TD Specialists caused to be recorded against the subject property a Trustee's Deed Upon Sale, indicating that the foreclosing beneficiary (Trust 3-2) secured the property for itself with a full-credit bid of $716,395.00.

On or about 10/16/19, Trust 3-2 caused to be recorded against the subject property a quitclaim deed in favor of "IRBC-2" Properties, LLC.

On 09/02/21, plaintiff filed the pending (second) civil action, this time against California TD Specialists, FCI Lender Services, 2005 Residential Trust 3-2 Wilmington Savings Fund, ***plus*** IRBC2 Properties, Park Tree Investments, Real Time Resolutions, Connie Riggsby, and Orion Financial Group.

Demurrer to Second Amended Complaint

A demurrer presents an issue of law regarding the sufficiency of the allegations set forth in the complaint. The challenge is limited to the "four corners" of the pleading (which includes exhibits attached and incorporated therein), or from matters outside the pleading which are judicially noticeable. The complaint is read as a whole. Material facts properly pleaded are assumed true, but contentions, deductions or conclusions of fact/law are not. In general, a pleading is adequate if it contains a reasonably precise statement of the ultimate facts, in ordinary and concise language, and with sufficient detail to acquaint a defendant with the nature, source and extent of the claim. (CCP §§ 425.10(a), 459; in accord, *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Gray v. Dignity Health* (2021) 70 Cal.App.5th 225, 236 n.10.)

Defendants demur on the ground that the pleading fails to state sufficient facts. A demurrer on this basis (CCP §430.10(e)) will be denied if, upon consideration of all the facts stated, it appears that the plaintiff is entitled to any relief at the hands of the court against the defendants even though the facts may not be clearly stated or may be intermingled with a statement of other facts irrelevant to the cause of action shown. (*New Livable California v. Association of Bay Area Governments* (2020) 59 Cal.App.5th 709, 714; *Wittenberg v. Bornstein* (2020) 51 Cal.App.5th 556, 566; *Weimer v. Nationstar Mortgage, LLC* (2020) 47 Cal.App.5th 341, 352.)

Before reaching the merits, this Court must note two procedural concerns. First, when plaintiff was granted leave to file an amended pleading, this Court ordered that the pleading "comply with all rules of pleading (including but not limited to CCP §§ 425.10(a), 457, 459, and CRC 2.112), and shall in no event exceed 15 pages (excluding exhibits), which shall comply with CRC 2.100-2.114." The reason for this instruction was plain – to get plaintiff focused on what matters at this stage of the proceeding. Although plaintiff failed to comply, the present iteration is better than the former ones, and as such the transgression will be overlooked this one last time. Second, plaintiff has inserted a new cause of action without obtaining express Court permission to do so. However, when the new cause of action responds directly to the concerns raised by the court, the pleader has implied authority to add the new, refined cause of action. (See *Community Water Coalition v. Santa Cruz County Local Agency Formation Com.* (2011) 200 Cal.App.4th 1317, 1323; *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023; *Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1015.) The new unjust enrichment claim does relate to the issues already in the case, and more importantly the claim fails in any event (see discussion *infra*).

Plaintiff's **first** cause of action is for wrongful foreclosure. There are several discreet theories espoused therein, but as a demurrer the challenge must knock out the entire cause of action, or nothing. (See *Fenimore v. Regents of the University of California* (2016) 245 Cal.App.4th 1339, 1351 [one of the theories untenable]; *Pointe San Diego Residential Community, LP v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, 274 [some theories barred].) For example, while this Court has

already found that most of the sub-theories fail as a matter of law (MERS as nominee, MERS power to assign, Riggsby's authority), there is one theory that might survive demurrer, and that is the issue of whether the assignment to a closed pool is void or voidable. (See *Yvanova v. New Century Mortgage Corp*. (2016) 62 Cal.4th 919, 936, 942-943 [borrower can sue when assignment to closed pool is void]; *Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 43-44 [assignment to closed pool is voidable]; *Yhudai v. IMPAC Funding Corp.* (2016) 1 Cal.App.5th 1252, 1260 [same]; *Saterback v. JPMorgan Chase Bank* (2016) 245 Cal.App.4th 808, 815 n.5 [same]; *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1083 [assignment to closed pool is void].) Although the overwhelming weight of authority disagrees with *Glaski's* holding that an assignment to a closed pool is void, *Glaski* was similarly rejected by its peers on the standing question (and later validated by the Supreme Court). Since there are facts not available to this Court at this stage (terms of the SPA, whether assignment was accepted into pool, any objection from beneficiary, etc), this question is best resolved at summary judgment. Demurrer OVERRULED.

Plaintiff's **second** cause of action is based on Civil Code §3412, which provides that "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 plead a cause of action for cancellation of instrument, plaintiff must show that he will be injured or prejudiced if the instrument is not cancelled. (See *Robertson v. Superior Court* (2001) 90 Cal.App.4th 1319, 1323.) An "instrument" is "a written paper signed by a person or persons transferring the title to, or giving a lien on real property, or giving a right to a debt or duty." (Government Code §27279.) Recordings not affecting title are not instruments. (See 5 Miller & Starr, Cal. Real Estate (3d ed. 2000) §11:6, pp. 19–35; *Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1388, 1399-1400; *Ward v. Superior Court* (1997) 55 Cal.App.4th 60, 64-65.) Plaintiff identifies a number of recordings, but the only true instrument subject to cancellation here is the trustee's deed upon sale – which plaintiff describes as void because Mellon never had an interest therein. This is a factual dispute that cannot be resolved at the pleading stage. Demurrer OVERRULED.

Plaintiff's **third** cause of action is for slander of title. Slander occurs when a person publishes a false statement that disparages title to property and causes pecuniary loss. To state a claim for slander of title, a plaintiff must allege (1) a publication, (2) which is without privilege or justification, (3) which is false when made, and (4) which causes direct and immediate pecuniary loss. In general, instruments recorded in connection with a nonjudicial foreclosure proceeding are privileged communications under Civil Code §2924(d) and Civil Code §47, except in those rare instances when the publication either was (1) motivated by hatred or ill will towards the plaintiff, or (2) that the defendant lacked reasonable grounds for belief in the truth of the publication and acted in reckless disregard of the plaintiff's rights. (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1336-1338; *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 335-

336.) Since the only issue here is whether the assignment to a closed pool is valid, and since this occurred in 2012 – well before the alleged conspirators were involved in the action – there are no facts pled to show that MERS or Mellon acted with hatred, ill will, or recklessness. This is especially true since *Glaski* was decided after MERS made its assignment to Mellon. Even if the assignment is void, no fault can be attributed to MERS or Mellon at the time. Demurrer SUSTAINED WITHOUT LEAVE TO AMEND.

Plaintiff's **fourth** cause of action for intentional and negligent infliction of emotional distress fails to state sufficient facts. First, there is no independent tort of negligent infliction of emotional distress; rather, the tort is negligence, a cause of action in which a duty to the plaintiff is an essential element. It should be pled specifying the duty owed to plaintiff as one imposed by law, assumed by conduct or based on a special relationship. (*Ragland v. U.S. Bank Nat. Assn.* (2012) 209 Cal.App.4th 182, 205; *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 532; *Wooden v. Raveling* (1998) 61 Cal.App.4th 1035, 1043.) The facts pled regarding the 2012 assignment do not support any duty owed to plaintiff. Second, the essential elements of a cause of action for Intentional infliction of Emotional Distress include: (1) extreme and outrageous conduct by the defendant; (2) with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (3) resulting in severe or extreme emotional distress; and (4) actually caused by the defendant's outrageous conduct. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051; *Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty USA* (2005) 129 Cal.App.4th 1228, 1259.) For a properly plead "extreme and outrageous conduct," the alleged conduct must (1) be pled with reasonable particularity and (2) be so extreme as to exceed all bounds of that usually tolerated in a civilized community and which would – to the average member of the community – arouse resentment against the actor. (*Hughes, supra*, 46 Cal.4th at 1051; *McMahon v. Craig* (2009) 176 Cal.App.4th 1502.) The Economic Loss Rule severely limits any opportunity to recover emotional distress damages in a financial arms-length scenario. (See *Butler-Rupp v. Lourdeaux* (2005) 134 Cal.App.4th 1220.) Although there is an exception for recovery for emotional distress caused by property loss where there is a preexisting relationship or the harm results from an independent intentional tort (see *Ragland v. U.S. Bank Nat. Assn.* (2012) 209 Cal.App.4th 182, and *Lubner v. City of Los Angeles* (1996) 45 Cal.App.4th 525), there are no such facts alleged. Demurrer SUSTAINED WITHOUT LEAVE TO AMEND.

Plaintiff's **fifth** cause of action if for unfair business practices. This claim is effectively duplicative of the first cause of action for wrongful foreclosure, as both rise and fall on the same wrongdoing and carry the same nature of relief. Demurrer OVERRULED.

Plaintiff's **sixth** cause of action for accounting is adequate. Although this is an independent cause of action, the nature of this claim is akin to discovery. In other words, the purpose of this cause of action is to secure from a party in sole possession of books the detail about what is owed on the debt. (See *Fleet v. Bank of America* (2014) 229 Cal.App.4th 1403, 1413; *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 910; *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179.)

Although plaintiff does not admit to owing anyone anything on his HELOC, he claims that DiTech "charged off" (forgave) the debt. As the servicer, DiTech had no such legal authority, but this becomes more a question of fact to resolve in discovery. Demurrer OVERRULED.

Plaintiff's new **seventh** cause of action for unjust enrichment fails. Unjust enrichment is not a stand-alone cause of action, or even a remedy per se – it is a general principle underlying other claims/remedies. (*Everett v. Mountains Recreation and Conservancy Authority* (2015) 239 Cal.App.4th 541, 553; *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 231.) Demurrer SUSTAINED WITHOUT LEAVE TO AMEND.

Defendants to answer the Second Amended Complaint within 10 days. The Clerk shall provide notice of this Ruling to the parties forthwith. Defendants to prepare formal Orders pursuant to Rule of Court 3.1312 in conformity with these rulings.

In re MATTER OF SILVEIRA

21PR8357 (Consolidated with 22PR8424, 22PR8425, 22PR8452)

MOTION TO QUASH BUSINESS RECORD SUBPOENAS AND MOTION TO SUBSTITUTE PERSONAL REPRESENTATIVE

In this consolidated probate case, the descendants of Carolyn and David (Sr.) Silveira find themselves fighting over three parcels of land and roughly $500,000 in allegedly missing assets. Before the Court this day is a motion to quash subpoenas for personal and financial records, which are similar to the subpoenas previously issued (and quashed) in 21PR8424 (see Minute Order dtd 10/28/22). That order occurred prior to consolidation, and was based largely on the fact that 21PR8424 only involved an alleged oral promise to Manuel, not the alleged financial irregularities at issue in the other related actions. Also before the Court this day is a motion to substitute a new personal representative.

Motion to Quash Business Record Subpoenas

An allegation has been made that, before her passing, Carolyn "stole" from her husband David Sr. Since Carolyn's estate plan differed from David Sr's, there remains a question about whether Carolyn did improperly take assets, and if so, whether those assets should be redirected to those holding beneficial interests in David Sr's estate.

On 11/10/22, Audrey Petricevich – in her capacity as David Sr's personal representative – caused to be issued the following business record subpoenas:

- To Wells Fargo Bank, N.A., all records pertaining to Carolyn "and/or" David Jr.
- To Wells Fargo Advisors Financial Network, all records pertaining to Carolyn "and/or" David Jr.
- To Pacific Cascade Federal Credit Union, all records pertaining to Carolyn "and/or" David Jr.
- To Transamerica Corporation, all financial records pertaining to Carolyn "and/or" David Jr.
- To Bank of Stockton, all records pertaining to Carolyn
- To Bank of Stockton, all records pertaining to Carolyn "and/or" Francille
- To Charles Schwab & Co, all records pertaining to Carolyn "and/or" Francille
- To Comenity Capital Bank, all records – including records for World Financial Network National Bank and affiliates – pertaining to Carolyn "and/or" Francille

David Jr. and Francille have moved to quash the above-referenced subpoenas on the singular ground that they invade their personal right to privacy. Subsequent thereto, the

custodian of records for Wells Fargo and Transamerica Corp reportedly identified defects with the subpoenas, requiring those to be re-issued. Thus, for present purposes, the only subpoenas presently at issue, and subject to quashing, are the ones for Pacific Cascade, Bank of Stockton, Charles Schwab and Comenity. However, the same legal and factual predicate applies to all eight of the subpoenas so this will serve in effect as an advisory opinion regarding the re-issued subpoenas not presently before the Court.

Audrey's request to strike the motion in its entirety for failing to include a complete caption (CRC 3.350(d)) or sufficient evidence (CRC 3.1113(b)) is DENIED without prejudice. The technical omission of a caption is immaterial for present purposes, and the absence of meaningful briefing/support is best addressed alongside the merits of the motion. In fact, since reaching the merits is of paramount importance here, this Court is also willing overlooking the moving parties' failure to include a meet and confer declaration (see CCP §2025.410(c)) or separate statement (CRC 3.1345(a)(5)).

The basic purpose of discovery is to take the "game" element out of trial preparation by enabling parties to obtain the evidence necessary to evaluate and resolve their dispute beforehand. (*Emerson Electric Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1107; *Reales Investment, LLC v. Johnson* (2020) 55 Cal.App.5th 463, 473-474.) Audrey is concerned about accounts which came to light in the related dissolution action. Although Audrey has a presumptive right to inquire about any matter which – based on reason, logic and common sense – might (1) be admissible, (2) lead to admissible evidence, or (3) reasonably assist that party in evaluating the case, preparing for trial and/or facilitating resolution (see *Williams v. Superior Court* (2017) 3 Cal.5th 531, 557), there is a counterbalance to this broad right to discovery in the Constitutional right to privacy. (See Calif. Const. Art. 1, §1; and *County of Los Angeles v. Los Angeles County Employee Relations Commission* (2013) 56 Cal.4th 905, 927; *Board of Registered Nursing v. Superior Court* (2021) 59 Cal.App.5th 1011, 1039.) Although David Jr. and Francille have the ultimate burden of establishing that in fact their privacy rights have been implicated (see *Fairmont Ins. Co. v. Superior Court* (2000) 22 Cal.4th 245, 255), privacy is presumed when banking records are sought. Thus, the burden shifts to Audrey to show a particularized need for the records, to wit: the information is directly relevant to a party's cause of action, essential to a fair determination of the action, AND not available through alternative, less-intrusive means. (*Britt v. Superior Court* (1978) 20 Cal.3d 844, 859.) Analysis should include "the purpose of the information sought, the effect that disclosure will have on the parties and on the trial, the nature of the objections urged by the party resisting disclosure, and ability of the court to make an alternative order which may grant partial disclosure, disclosure in another form, or disclosure only in the event that the party seeking the information undertakes certain specified burdens which appear just under the circumstances." (*Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 658; *Fortunato v. Superior Court* (2003) 114 Cal.App.4th 475, 480.)

Taking into consideration all of these factors, including Audrey's representation that the accounts sought all belong to Carolyn (not David or Francille), the moving parties have failed to demonstrate a genuine privacy concern. More importantly, Audrey has demonstrated a substantial and bona fide need for the information. Although counsel proposes a protective order as a work-around – there is an easier work-around, and that is to strike from the subpoena references to David Jr. and Francille. Since the contention is that these accounts belonged to Carolyn, and are evidence of her wrongdoing, the inclusion of "and/or David or Francille" is unnecessary – at least on this first round. The subpoenas, as amended herein, are proper. Motion to quash GRANTED as to the striking of "and/or David or Francille" references, but otherwise DENIED.

The Clerk shall provide notice of this Ruling to the parties forthwith. Audrey to prepare formal Orders pursuant to Rule of Court 3.1312 in conformity with these rulings.

Motion to Substitute Party

The pending action (21PR8357) was commenced by the acting trustee (David Sr) and joined by his three children in their individual capacities as trust beneficiaries. Since the commencement thereof, David Sr has passed away, and one of those beneficiary – Audrey – has stepped into David Sr' shoes as a personal representative. However, as a technical matter, since David's passing nobody has substituted in as acting successor trustee, which is necessary for the continued prosecution of this trust petition.

Pursuant to CCP §377.31, "on motion after the death of a person who commenced an action or proceeding, the court shall allow a pending action or proceeding that does not abate to be continued by the decedent's personal representative." All that is required is that the person seeking to substitute in "execute and file an affidavit or a declaration" stating all the details necessary to acquaint the court with the need for substitution. Although the declaration filed does not comport with the requirements set forth in CCP §377.32, this Court takes judicial notice of David Sr's death and Audrey's appointment as personal representative. Since there is no opposition, and no plea in abatement, the failure to comply with CCP §377.32 has been waived. (See *Maleti v. Wickers* (2022) 82 Cal.App.5th 181, 228; *Aghaian v. Minassian* (2021) 64 Cal.App.5th 603, 614.)

Motion to substitute in in representative capacity as acting successor trustee is GRANTED.

The Clerk shall provide notice of this Ruling to the parties forthwith. Audrey to prepare formal Orders pursuant to Rule of Court 3.1312 in conformity with these rulings.