

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

Department 16

(Dept 16 is now hearing cases that were formerly in Dept 2)

Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 05-09-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. 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 and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court will call the cases of those who appear in person first. If you appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. You must use the current link.

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. **You may make an online reservation to reserve a date** before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Go to the Court's website at www.scscourt.org to make the reservation.

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV386089 OEX	Bella Cargile vs Power Bowl, LLC, a California limited liability company et al	It does not appear service was made. If the moving party appears, the matter may be continued to allow for proper service. If all parties appear, the Court will administer the oath and the examination will take place off line. If there is no appearance by the moving party, the matter will be ordered off calendar.
LINE 2	21CV382148 Hearing: Demurrer	Billy Lewis vs Franklin Credit Management Corporation et al	See Tentative Ruling. The Court will prepare the final order.
LINE 3	23CV422828 Motion: Strike	Dennis Hartman et al vs Mark McGwire Ferguson et al	Notice appearing proper and good cause appearing, the unopposed motion to strike is GRANTED. The failure to file a written opposition “creates an inference that the motion or demurrer is meritorious.” <i>Sexton v. Superior Court</i> (1997) 58 Cal.App.4th 1403, 1410. Defendant shall submit the final order within 10 days.
LINE 4	19CV345772 Motion: Summary Judgment/Adjudication	Thien Tran vs Tam Nguyen et al	See Tentative Ruling. The Court will prepare the final order.

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LINE 5	22CV396852 Motion: Compel	Stephen Ratto vs 7-Eleven, Inc. et al	See Tentative Ruling. Plaintiff shall submit the final order.
LINE 6	22CV404055 Motion: Approve Good Faith Settlement	JOSEPH CORNAGGIA et al vs GLOBAL LEISURE INVESTMENT HOLDINGS, INC. et al	The unopposed motion to approve the settlement of Plaintiffs and Defendant Ace Hardware of Watsonville daba Ace Hardward of Gilroy (“Defendant Ace”) is GRANTED. Defendant Ace shall submit the final order within 10 days.
LINE 7	23CV412660 Motion: Withdraw as attorney	TruMinds Tecnologies Inc. vs VM Global Partners LLC	Off calendar
LINE 8	23CV425109 Hearing: Pro Hac Vice Counsel	Kashe Row et al vs Tracy Row et al	The unopposed motion is granted. Moving Defendants shall submit the final order.

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LINE 9	22CV402276 Motion for Protective order	Barriball v. Hephinger	<p>Cross-Defendants Breaux and Absolute Care Referral Services (ACRS) request a protective order for any further deposition of Ms. Breaux. Opposing parties Barriball and Hephinger (“Opposing Parties”) at one point agreed to some of the parameters suggested by Cross-Defendants, such as a 3-hour limit (collectively for both Opposing Parties) and a discovery referee (though only if paid for by Cross-Defendants). Cross-Defendants do not want to pay for the entire cost of the referee. Opposing Parties claim that because Cross-Defendants filed a cross-claim on April 26, 2024, they now need more than 3 hours. They ask for the motion to be rejected entirely.</p> <p>The Court notes that the filing of 4/26/24 was rejected by the Court. Given Ms. Breaux’s medical condition, the Court will limit further deposition to 3 hours (for both opposing parties), not to include any time needed on any cross-claim that may be filed. In other words, if Ms. Breaux files a cross-claim, Opposing Parties will be entitled to further time related to issues raised exclusively by that cross-claim. A discovery referee is ordered, but the cost shall be borne by Cross-Defendants, as the court did not find evidence of harassing or demeaning behavior by the Opposing Parties at Ms. Breaux’s deposition. If Cross-Defendants do not want to pay for a referee, then they can choose not to have one at the deposition.</p> <p>No sanctions are awarded.</p>
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LINE 10	23CV412053 Motion for Assignment Order	Rossi Hamerslough v. Shah	See Tentative Ruling. Plaintiff shall submit the final order.
LINE 11			
LINE 12			
LINE 13			
LINE 14			
LINE 15			
LINE 16			
LINE 17			

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Calendar Line 2

Case Name: *Lewis v. Franklin Credit Management Corp., et al.*

Case No.: 21CV382148

I. Background

A. Facts

This action arises from a purported wrongful foreclosure sale.

Billy Ray Lewis (“Plaintiff”) brings this action against Franklin Credit Management Corporation, (“FCMC” or “Defendant”) Breckenridge Property Fund 2016 LLC, (“Breckenridge”) ZBS Law, LLP, (“ZBS”) (collectively, “Defendants”) and Does 1 through 10.

According to allegations in the Second Amended Complaint (“SAC,”) Plaintiff has been the owner of real property located at 2664 Senter Road, Unit No. 116, San Jose, California (“the Property”) since 1990. (SAC, ¶ 1.) FCMC is a collection agency and the “servicer of the beneficiary,” Wilmington Savings Fund, FSB (“Wilmington”). (SAC, ¶ 3.) Wilmington functions solely as a “Certificate of Trustee” of Bosco Credit VI Trust Series 2011-1. (*Ibid.*)

The SAC alleges Plaintiff signed a promissory note for a home equity line of credit (“Promissory Note”) in the amount of \$40,500 where Plaintiff was a “trustor” and First Magnus Financial Corporation (“Magnus”), a now defunct Arizona Corporation, was the original beneficiary. (SAC, ¶ 6.) In connection with the Promissory Note, Plaintiff signed a deed of trust secured by the Property recorded on September 8, 2006, to Magnus. (SAC, ¶ 7.)

On July 9, 2021¹, FCMC recorded a “notice of default” and an “election to sell” in the Official Records of Santa Clara County, alleging a “breach of the obligation secured by the deed of trust had occurred, consisting of Plaintiff’s alleged failure to make payments in the amount of \$16,033.50.” (SAC, ¶ 8; see Ex. C.) As a result, FCMC (defendant beneficiary) “elected to sell...the trust property to satisfy that obligation.” (*Ibid.*)

On November 9, 2020, FCMC recorded the notice of trustee sale, indicating the auction sale was to occur on December 2, 2020, and that \$42,148.16 was the outstanding unpaid balance. (SAC, ¶ 9.) The sale took place on December 2, 2020, to satisfy the obligation secured by the deed of trust, on grounds of the alleged breach of the obligation and under the power of sale in the deed of trust. (*Ibid.*) ZBS accepted consideration from Breckenridge, buyer at the trustee sale, and then executed and delivered a trustee’s deed to Breckenridge. (*Ibid.*) On December 14, 2020, the trustee’s deed was recorded in the Santa Clara County Recorder’s Office. (*Ibid.*)

¹ Plaintiff’s allegation that FCMC recorded a notice of default on July 9, 2021, appears to be a mistake or typo. The “Notice of Default and Election to Sell Under Deed of Trust” document, attached as Exhibit C to the SAC, is dated July 7, 2020. The document was submitted for recording on July 9, 2020. (See Ex. C.) Consequently, this Court will assume the notice of default was recorded on or around July 9, 2020.

Plaintiff now alleges the Trustee Sale should be set aside because: 1) the assignment from Magnus to MERS² was defective upon Magnus filing for bankruptcy³; 2) MERS, acting solely as the nominee for Magnus, failed to properly substitute a trustee in compliance with the deed of trust; 3) neither MERS, Magnus, nor any other entity ever recorded an assignment or substitution of trustee in Santa Clara County where the Property is located; 4) the Promissory Note was never executed or transferred over to MERS and therefore, FCMC did not have a right to foreclose on the Property; and 5) FCMC never provided periodic statements of the account to Plaintiff as required by 12 C.F.R. section 1026.7. (SAC, ¶¶ 10-11, 14-17, 18.)

B. Procedural

Based on the foregoing allegations, Plaintiff initiated this action on May 5, 2021. Plaintiff later filed the first amended complaint (“FAC”) on July 6, 2023, alleging the following causes of action:

- 1) To Set Aside Sale [against all Defendants];
- 2) To Cancel Trustee’s Deed [against all Defendants];
- 3) Accounting [against FCMC];
- 4) Damages for Wrongful Foreclosure [against FCMC and ZBS]; and
- 5) Violation of 12 C.F.R. 1026.7 [against FCMC].

FCMC filed a demurrer to the entirety of the FAC on August 16, 2023. After the hearing on FCMC’s demurrer to the FAC, this Court issued a final order overruling the demurrer as to the first and second causes of action. The Court sustained the demurrer as to the third and fifth causes of action, without leave to amend, as Plaintiff did not oppose the demurrer to these claims. Finally, this Court sustained the demurrer as to the fourth cause of action, with ten days leave to amend. (See Court Order, Case No. 21CV382148 entitled *Billy Ray Lewis vs. Franklin Credit Management Corporation, et al.*, filed on December 13, 2023.)

On December 22, 2023, Plaintiff filed his operative pleading, the SAC, asserting the following causes of action:

- 1) To Set Aside Sale [against all Defendants];
- 2) To Cancel Trustee’s Deed [against all Defendants]; and
- 3) Damages for Wrongful Foreclosure [against FCMC and ZBS].

On January 31, 2024, FCMC filed a demurrer challenging the entirety of the SAC and the third cause of action, specifically. Plaintiff opposes the demurrer.

² Plaintiff does not define MERS within the SAC. As it did in its prior order, this Court will assume MERS refers to “Mortgage Electronic Registration Services, Inc.”

³ According to the SAC, Magnus entered into a “Chapter 11 Bankruptcy in Arizona” on August 21, 2007. (SAC, ¶ 11.) Plaintiff alleges, on May 15, 2008, the U.S. Bankruptcy Court for the State of Arizona appointed “a liquidation trustee for the affairs of Magnus.” (SAC, ¶ 13.) Plaintiff asserts any authority MERS may have had with regards to Magnus’s interest in the note and deed of trust terminated no later than May 15, 2008. (*Ibid.*)

I. Procedural Violation

As a preliminary matter, the Court notes Plaintiff's opposition is untimely filed and served. Code of Civil Procedure section 1005, subdivision (b) states, "[a]ll papers opposing a motion ... shall be filed with the court and a copy served on each party at least nine court days ... before the hearing." Based on a hearing date of May 9, 2024, Plaintiff's opposition had to be filed and served no later than April 26, 2024. Plaintiff did not file and serve the opposition until April 29, 2024.

California Rules of Court, rule 3.1300, subdivision (d) states, "[n]o paper may be rejected for filing on the ground that it was untimely submitted for filing. If the court, in its discretion, refuses to consider a late filed paper, the minutes or order must so indicate." That said, the court has discretion to consider a late filed paper. FCMC has not filed a reply to Plaintiff's opposition. To avoid the expenditure of any further judicial resources, the Court will look past this procedural violation and consider the opposition on its merits. However, Plaintiff is admonished for the procedural violation. Any future violation may result in the Court's refusal to consider the untimely filed papers.

II. FCMC's Request for Judicial Notice

In support of its demurrer, FCMC requests the Court take judicial notice of the following:

- 1) A "Substitution of Attorney"⁴ [sic], recorded on July 9, 2020 (Ex. 1);
- 2) An Assignment of Deed of Trust, recorded on June 30, 2020 (Ex. 2); and
- 3) A Trustee's Deed Upon Sale, Document No. 24747489 (Ex. 3).

As to Exhibits 1 and 2, judicial notice is GRANTED as to the documents' existence. (See *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117 ["a court may take judicial notice of a recorded deed, or similar document" however, this does not mean "it may take judicial notice of factual matters stated therein"]; see also *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn. 1 (*Yvanova*) [Supreme Court took judicial notice of notices of default and deeds of trusts' "existence and contents, though not of disputed or disputable facts stated therein"].) Additionally, there is no opposition to FCMC's requests.

As to Exhibit 3, the request for judicial notice is GRANTED. While the Court would typically only take judicial notice of this document's existence, Exhibit 3 is attached to Plaintiff's SAC and therefore, the Court may rely on the document's contents. (See *Luera v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 56 [court accepts as true facts appearing in exhibits attached to the complaint].)

⁴ FCMC's request for judicial notice of a "Substitution of Attorney," appears to be a typo or mistake. Upon this Court's inspection of Exhibit 1, it will assume FCMC is requesting judicial notice of the "Substitution of Trustee" document. (See Ex. 1.)

III. Merits of Demurrer

A. Legal Standard

“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.) The only issue involved in a demurrer is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action. (*Griffith v. Department of Public Works* (1956) 141 Cal.App.2d 376, 381.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

B. Demurrer to Entire SAC

“The rule is well established that a general demurrer directed to the whole of the complaint should be overruled, if some portion of the complaint states a cause of action.” (*Jones v. Iverson* (1900) 131 Cal. 101, 104; see *Lord v. Garland* (1946) 27 Cal.2d 840, 850 [“[A] demurrer which attacks an entire pleading should be overruled if one of the counts therein is not vulnerable to the objection”]; see also *Warren v. Atchison, Topeka & Santa Fe Railway Co.* (1971) 19 Cal.App.3d 24, 36 [“[A] general demurrer directed to the whole of the complaint should be overruled if some portion of the complaint states a cause of action.”].) Thus, if any one of Plaintiff’s claims is not vulnerable to Defendant’s objections, the demurrer must be overruled.

FCCM argues, in both its notice of demurrer and demurrer that each cause of action fails because Plaintiff relies on “incorrect legal theories” and “unsupported legal conclusions.” (Notice of Demurrer, p. 2:3-7; Demurrer to SAC (“Dem.”) p. 6:17-19.)

As a threshold matter, FCCM’s demurrer is framed as being directed to the SAC as a whole. This is significant because a demurrer directed to the SAC in its entirety must be overruled if any of the causes of action alleged are not vulnerable to the objection(s) asserted in the demurrer.

To the extent that FCCM urges this Court to reconsider its prior ruling which overruled the demurrer as to certain claims, namely, to set aside sale and to cancel trustee’s deed, the Court declines to do so here. (See Court Order, Case No. 21CV382148 entitled *Billy Ray Lewis vs. Franklin Credit Management Corporation, et al.*, filed on December 13, 2023.)

Given FCCM does not make any arguments that this Court did not already reject in its prior order, FCCM’s demurrer to the entirety of the SAC is OVERRULED.

FCCM, again, urges this Court to disregard Plaintiff’s allegations involving a purported bankruptcy in Arizona. (Dem., p. 6:21-26, citing SAC, ¶ 11.) As noted in this Court’s prior order, the proper motion to address the adequacy or relevancy of individual allegations is a motion to strike, not a demurrer. (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 164 [adequacy of allegations tested by a motion to strike].) Thus, this Court similarly declines to disregard these allegations in the SAC.

C. Demurrer to Third Cause of Action – Wrongful Foreclosure

FCCM's demurrer also separately challenges the third cause of action, which this Court now addresses.

Wrongful foreclosure is a common law tort claim taking the form of either “an equitable action to set aside a foreclosure sale, or an action for damages resulting from the sale, on the basis that the foreclosure was improper. [Citation.]” (*Sciaratta v. U.S. Bank National Association* (2016) 247 Cal.App.4th 552, 561 (*Sciaratta*).)

“The basic elements of a tort cause of action for wrongful foreclosure track the elements of an equitable cause of action to set aside a foreclosure sale. They 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.’” (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 408.)

In his SAC, Plaintiff alleges FCCM, a “non-debtholder,” 1) lacked authority to foreclose on the Property; 2) was forbidden to record a notice of default; and 3) was forbidden to initiate a trustee sale because FCCM's assignment to the deed of trust was void. (SAC, ¶¶ 34-40.)

As it previously argued, FCCM maintains the “allegations in the Complaint are insufficient to prove any of these elements.” (Dem., p. 7:27-28.) Specifically, FCCM contends that Plaintiff does not allege: 1) an illegal, fraudulent, or willfully oppressive sale; 2) that he tendered the amount of his debt; and 3) that he suffered actual harm or prejudice. (Dem., pp. 7:27-28-8:1-2.) FCCM further asserts that Plaintiff's SAC allegations are conclusory and based on an “erroneous understanding” of FCCM's various loans and lenders. (Dem., p. 8:10-14.)

1. Illegal, Fraudulent, or Willfully Oppressive Sale

The SAC incorporates allegations contained in the previous paragraphs into the third cause of action. (SAC, ¶ 34.) As previously alleged in the FAC, Plaintiff maintains the record in Santa Clara County is conclusive that no assignment or substitution of trustee was recorded in Santa Clara County and therefore, no substitution of trustee occurred. (SAC, ¶ 15.) He then similarly alleges that FCCM was not a proper trustee at the time of the sale and thus, the sale was void. (SAC, ¶¶ 16,18-19, 29.) Specifically, Plaintiff contends FCCM had no interest in the note and deed of trust, and the assignment to FCCM was void. (SAC, ¶ 35.) As a result, FCCM was “forbidden” to record a notice of default and to initiate a trustee sale. (SAC, ¶ 36.) Plaintiff additionally alleges that FCCM knew of these deficiencies and caused an illegal and willfully oppressive sale of the property. (SAC, ¶ 23.) As noted in this Court's prior ruling, Plaintiff has sufficiently alleged an illegal sale. (See Court Order, Case No. 21CV382148 entitled *Billy Ray Lewis vs. Franklin Credit Management Corporation, et al.*, filed on December 13, 2023.)

2. Tender

Next, FCCM argues that to state a cause of action for wrongful foreclosure, the plaintiff must allege tender or excuse from tendering. “Recognized exceptions to the tender rule include

when (1) the underlying debt is void, (2) the foreclosure sale or trustee's deed is void on its face, (3) a counterclaim offsets the amount 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.) Here, Plaintiff alleges the foreclosure sale was void. Therefore, he is not required to allege tender or an additional excuse from tendering.

3. Actual Harm or Prejudice

FCMC maintains that in a wrongful foreclosure action, "prejudice is the harm inflicted by wrongdoing that interferes with a borrower's ability to pay on a note or leads to a foreclosure that would not have otherwise occurred." (Dem., p. 8:5-14, citing *Herrera v. Deutsche Bank National Trust Co.* (2011) 205 Cal.App.4th 1495 at pp. 1507-1508 (*Herrera*).)

"[A] plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests." (*Herrera, supra*, at p. 1507, citing *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 86, fn. 4 [one attacking nonjudicial foreclosure sale must overcome common law presumption that sale was conducted fairly "by pleading . . . an improper procedure *and the resulting prejudice*"] [emphasis in *Herrera*].) The *Herrera* Court determined the plaintiff in that case did not sufficiently show prejudice. The Court noted that even "assuming plaintiffs can allege specific facts showing that [the assignment] of the [deed of trust] to [bank] and [bank's] assignment . . . was void, under *Fontenot*⁵ plaintiffs must also show plaintiffs were prejudiced[.]" (*Herrera, supra*, at p. 1507.) The *Herrera* Court continued that it was "difficult to conceive how plaintiff was prejudiced by MERS's purported assignment, and there is no allegation to this effect. Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor. As to plaintiff, an assignment merely substituted one creditor for another, without changing her obligation under the note. Plaintiff effectively concedes she was in default, and she does not allege that the transfer . . . interfered in any manner with her payment of the note . . . nor that the original lender would have refrained from foreclosure under the circumstances presented." (*Id.* at pp. 1507-1508, citing *Fontenot, supra*, 198 Cal.App.4th at p. 272.)

Here, the SAC alleges Plaintiff was prejudiced "by the purported assignment" received by FCMC, a "non-debtholder," because he was "denied ownership and possession of the Property that he owned and lived in for 30 years and has suffered financial damage to be proven at trial." It further alleges Plaintiff endured mental suffering, discomfort, and annoyance, because of the wrongful foreclosure. (SAC, ¶¶ 24, 37, 39.) The SAC, again, contains no further allegations pertaining to prejudice and, for similar reasons explained in *Herrera*, the Court does not find these allegations to be sufficient to establish prejudice.

In opposition, Plaintiff contends that the *Sciarratta* Court disregarded the holding in *Herrera* and held that "all elements of wrongful foreclosure are satisfied simply because the purported assignment allowed a 'non-debtholder' to pursue the foreclosure." (See Opposition to Dem. to SAC ("Opp.,")) p. 11; *Sciarratta, supra*, 247 Cal.App.4th at p. 555.) In light of

⁵ *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256 (*Fontenot*), disapproved on other grounds by *Yvanova, supra*, 62 Cal.4th 919 at p. 939.

Sciarratta, Plaintiff argues the purported assignment of the deed of trust to FCMC, a “non-debtholder,” establishes *all* elements of a wrongful foreclosure. (*Ibid.*) This Court does not find *Sciarratta* persuasive.⁶

California courts have recognized that borrowers can bring wrongful foreclosure actions that, like Plaintiff’s wrongful foreclosure cause of action, are based on allegations that the foreclosing party does not have the authority to foreclose due to a void assignment of a loan. (See *Yvanova, supra*, 62 Cal.4th 919 at pp. 942-943 [holding that a homeowner who alleges that a nonjudicial foreclosure sale was wrongful because of a void assignment has standing to sue for wrongful foreclosure].) However, California courts that have addressed these situations are split as to what a borrower must allege to sufficiently plead prejudice. (See *Sciarratta, supra*, 247 Cal.App.4th at p. 565 [the court concluded the borrower need not allege prejudice or harm other than the wrongful foreclosure itself]; but, see also *Fontenot, supra*, 198 Cal.App.4th at p. 272 [requiring a plaintiff to establish prejudice by showing that he or she could have avoided foreclosure but for the defendants’ wrongful acts]; similarly, see *Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 18 [concluding a borrower generally could not set aside a foreclosure based on upon sale irregularities absent showing that the imperfection was prejudicial to the borrower’s interest].)

The *Sciarratta* decision, which Plaintiff relies on, held that “where . . . it is alleged [that] the foreclosing beneficiary’s interest is void,” a borrower need not allege prejudice or harm “beyond the allegedly wrongful foreclosure itself” because a borrower “experiences prejudice or harm when . . . he or she has lost her home to an entity with no legal right to take it.” (*Sciarratta, supra* 247 Cal. App. 4th 552 at pp. 565-66.) In *Sciarratta*, like here, the plaintiff alleged that the entity attempting to foreclose allegedly had no interest in the deed of trust at all. (*Id.*, at p. 564.)

But, as noted earlier, this Court adopts the approach in *Herrera* and cases of its ilk. The Court finds the *Herrera* court’s reasoning concerning the element of prejudice in a wrongful foreclosure to be sound and practical. Consequently, this Court follows the conclusion in *Herrera* that foreclosure errors must *actually* be prejudicial to the borrower’s interest, not tangentially. Because Plaintiff’s SAC does not allege any prejudice beyond the foreclosure itself, the Court finds that Plaintiff has failed to state a claim for wrongful foreclosure under California law. To illustrate, Plaintiff’s SAC does not plead facts suggesting that the allegedly void assignment from MERS to FCMS either affected Plaintiff’s payment obligations or “interfered in any manner with” Plaintiff’s ability to meet his payment obligations. (See *Fontenot, supra*, 198 Cal.App.4th at p. 272; see also *Herrera, supra*, 205 Cal.App.4th at pp. 1507-1508.) Nor does Plaintiff’s SAC contain factual allegations indicating that the true owner of the loan “would have refrained from foreclosure under the circumstances presented,” and Plaintiff does not deny defaulting on his payment in July 2020. (SAC, ¶¶ 8-9; *Fontenot, supra*, at p. 272; *Herrera, supra*, at p. 1507-1508.) Thus, under the facts alleged, the

⁶ “Pursuant to *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, the decisions of every division of the District Court of Appeal are binding on all superior courts of this state.” (*Cuccia v. Superior Court* (2007) 153 Cal.App.4th 347, 353.) “As a practical matter, a superior court ordinarily will follow an appellate opinion emanating from its own district even though it is not bound to do so. Superior courts in other appellate districts may pick and choose between conflicting lines of authority.” (*McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 316, fn. 4.)

only “true victim” that has suffered prejudice is the true owner of the loan. (*Fontenot, supra*, at p. 272; *Herrera, supra*, at p. 1507-1508.) In other words, although Plaintiff alleges that FCMC does not have the authority to foreclose on the property because of a void assignment, Plaintiff offers no facts demonstrating prejudice, caused by having one lender, rather than another, carry out the foreclosure. Accordingly, this Court declines to adopt *Sciarratta*’s approach to what a borrower must allege to demonstrate prejudice.

Next, in support of his assertion that the SAC alleges facts sufficient to establish prejudice, Plaintiff relies on four federal district court cases – three of which pertain to the issue of standing to bring a pre-foreclosure cause of action. These federal decisions are not binding authority and Plaintiff does not otherwise explain how the holdings in these cases are instructive as to prejudice. (See *Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1432, fn. 6; see also *Hargrove v. Legacy Healthcare, Inc.* (2022) 80 Cal.App.5th 782, 789, fn. 4 [the decisions of lower federal courts are not binding on this court].) Finally, although *Barrionuevo v. Chase Bank, N.A.* (2012) 885 F.Supp.2d 964 is relevant to the issue of prejudice in a borrower’s wrongful foreclosure suit, the Court declines to consider it because the case does not speak to the standard required to allege prejudice. (See *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 [points asserted without reasoned argument need not be considered].)

Based on the foregoing, FCMC’s demurrer to the third cause of action is SUSTAINED WITHOUT LEAVE TO AMEND. “Generally[,] it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. [Citation.] . . . Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. [Citations.]” (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Here, Plaintiff does not explain how he could amend his SAC to cure the defect discussed above, and, as FCMC’s prior demurrer was sustained on this ground, this was his second opportunity to do just that. (See *Davies v. Sallie Mae, Inc.* (2008) 168 Cal.App.4th 1086 at p. 1097 [appellate court determined that trial court did not abuse its discretion in sustaining demurrer without leave to amend after plaintiff had two previous opportunities to amend the complaint].)

IV. Conclusion and Order

FCMC’s demurrer to the entirety of the SAC is OVERRULED.

FCMC’s demurrer to the third cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

The Court shall prepare the final order.

Calendar line 4**Case Name:** *Tran v. Nguyen, et al.***Case No.:** 19CV345772

According to the allegations of the complaint, plaintiff Thien Tran (“Plaintiff”) is the owner of property at 2131 Main Street in Santa Clara. (See complaint, ¶ 1.) Defendant Tam T.B. Nguyen (“Tam”) is Plaintiff’s relative in the second degree of consanguinity. (See complaint, ¶ 2.) On December 27, 2016, Tam made a false statement to induce Plaintiff to appoint Tam as her attorney in fact to ultimately convert Plaintiff’s interest in the property to Tam. (See complaint, ¶¶ 8-9.) On January 13, 2017, Tam caused a grant deed (“Grant Deed 1”) to be recorded in the Santa Clara County Recorder’s Office that purported to state that Plaintiff had granted and delivered to Tam a share of Plaintiff’s property for no consideration in joint tenancy with Tam. (See complaint, ¶ 5.) However, Plaintiff never agreed to give Tam a share of the property. (*Id.*) On August 17, 2017, defendant Comerica Financial Services Company (“Comerica”) conspired with Tam and defendant Jenny L. Nguyen (“Jenny”) to defraud Plaintiff by depriving her of her property by falsely acknowledging that the Trust Deed to secure performance of the terms of the HELOC had been personally executed by Plaintiff, and by advancing Tam funds per the HELOC despite Plaintiff’s instruction to not advance any funds. (See complaint, ¶¶ 11-13.) On August 24, 2017, Comerica caused a deed of trust to be recorded in the County Recorder’s Office that falsely represented that Plaintiff had granted her interest in the property to Comerica in trust as security for repayment of sums loaned pursuant to a HELOC entered into between Plaintiff and Comerica. (See complaint, ¶ 6.) However, Plaintiff never granted her interest in the property to Comerica nor entered into any HELOC or other agreement with Comerica. (*Id.*) On February 12, 2019, Tam caused a grant deed (“Grant Deed 2”) to be recorded in the County Recorder’s Office that purported to state that Plaintiff had granted all of her interest in the property to Tam in consideration of a payment by Tam in the sum of \$412,500. (See complaint, ¶ 7.) However, Plaintiff never granted her interest in the property to Tam. (*Id.*) Moreover, Plaintiff never received any sums from the HELOC. (See complaint, ¶ 15.)

On April 5, 2019, Plaintiff filed the complaint against defendants Tam, Jenny and Comerica (collectively, “Defendants”), asserting causes of action for:

- 1) Cancellation of Grant Deed 1;
- 2) Cancellation of Trust Deed;
- 3) Cancellation of Grant Deed 2;
- 4) Quiet title;
- 5) Fraud and deceit; and,
- 6) Civil conspiracy.

Tam moves for summary judgment, or, in the alternative, for summary adjudication.⁷

⁷ The notice of motion does not indicate what Tam seeks to summarily adjudicate. (See Cal. Rule of Court 3.1350, subd. (b) (stating that “[i]f summary adjudication is sought, whether separately or as an alternative to the motion for summary judgment, the specific cause of action, affirmative defense, claims for damages, or issues of duty must be stated specifically in

DEFENDANT TAM'S MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION

Defendants' burden on summary judgment

"A defendant seeking summary judgment must show that at least one element of the cause of action cannot be established, or that there is a complete defense to the cause of action. ... The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72 (internal citations omitted; emphasis added).)

"The 'tried and true' way for defendants to meet their burden of proof on summary judgment motions is to present affirmative evidence (declarations, etc.) negating, as a matter of law, an essential element of plaintiff's claim." (Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2007) ¶ 10:241, p.10-91, *citing* *Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334; emphasis original.) "The moving party's declarations and evidence will be strictly construed in determining whether they negate (disprove) an essential element of plaintiff's claim 'in order to avoid unjustly depriving the plaintiff of a trial.'" (*Id.* at § 10:241.20, p.10-91, *citing* *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.)

"Another way for a defendant to obtain summary judgment is to 'show' that an essential element of plaintiff's claim cannot be established. Defendant does so by presenting evidence that plaintiff 'does not possess and cannot reasonably obtain, needed evidence' (because plaintiff must be allowed a reasonable opportunity to oppose the motion.) Such evidence usually consists of admissions by plaintiff following extensive discovery to the effect that he or she has discovered nothing to support an essential element of the cause of action." (*Id.* at ¶ 10:242, p.10-92, *citing* *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855.)

Tam's motion for summary judgment on the ground that Plaintiff cannot show elements of her claims against Tam because Plaintiff has made numerous admissions

Tam meets her initial burden to demonstrate that each of Plaintiff's causes of action cannot be established against Tam

Tam argues that Plaintiff cannot establish any causes of action against her because Plaintiff has admitted that: Tam committed no fraud or deceit; there was no breach of contract; Plaintiff has not suffered any economic or non-economic damages; and, Plaintiff cannot recover attorney's fees, punitive damages and will not obtain a judgment against Tam.

Here, Tam served requests for admission ("RFAs") on Plaintiff on July 25, 2022. (See Parr decl. in support of Tam's motion for summary judgment ("Parr decl."), ¶ 4, exh. A.) After Plaintiff failed to respond to the RFAs, Tam moved for an order deeming the truth of facts

the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts").)

admitted against Plaintiff on October 28, 2022. (See Parr decl., ¶¶ 4-5, exh. B.) On March 3, 2023, the Court granted Tam's motion; the Order was filed on March 6, 2023. (See Parr decl., ¶ 6, exh. C.) The Court GRANTS Tam's request for judicial notice of the March 3, 2023 order. (Evid. Code § 452, subd. (d).)

In opposition, Plaintiff objects to Tam's separate statement of undisputed material facts numbers 10, 11, 21, 22, 32, 33, 43, 44, 54 and 55 on the grounds of "relevance, materiality and speculation." First, the undisputed material facts are not evidence. Second, the objections lack merit and are OVERRULED.

"Any matter admitted in response to a request for admission is conclusively established against the party making the admission in the pending action, unless the court has permitted withdrawal or amendment of that admission under Section 2033.300." (Code Civ. Proc. § 2033.410, subd. (a).) Here, it has been deemed admitted that: no breach of contract was committed by Tam against Plaintiff in the purchasing or financing of the property, in the transfer of title of the property from Plaintiff to Tam, or by giving a power of attorney to Tam for the property following close of escrow on the purchase of the property; no fraud or deceit was committed by Tam against Plaintiff in the purchase or financing of the property, in the transfer of title of the property from Plaintiff to Tam, or by giving a power of attorney to Tam for the property following close of escrow on the purchase of the property; Plaintiff has not suffered any economic or non-economic damages as a result of any conduct by Tam against Plaintiff in connection with the property; and, Plaintiff cannot recover attorney's fees or punitive damages from Tam.

Each of the causes of action are premised on the alleged fraud, and Plaintiff admits that no fraud or deceit as alleged by the complaint was committed by Tam. Additionally, an element of a fraud cause of action is resulting damages (see *Lazar v. Super. Ct. (Rykoff-Sexton, Inc.)* (1996) 12 Cal. 4th 631, 638), and Plaintiff also admits that she has not suffered any economic or non-economic damages as a result of any conduct by Tam. Here, Tam meets her initial burden to demonstrate that each of the causes of action cannot be established against her. Accordingly, the burden shifts to Plaintiff to demonstrate the existence of a triable issue of material fact.

In opposition, Plaintiff fails to demonstrate the existence of a triable issue of material fact.

Plaintiff argues in opposition that "Plaintiff's own motion for summary adjudication outlines compelling evidence of the Defendant's breach of fiduciary duty and exertion of undue influence which would itself warrant grant of summary judgment and does not require vitiation to any of the RFAs." (Pl.'s opposition to Tam's motion for summary judgment ("Opposition"), pp.4:17-28 (also stating that "[t]he Defendant, as a licensed real estate broker and fiduciary to the Plaintiff, owed a duty of utmost good faith, loyalty, and full disclosure"), 5:1-3, 5:20-28 (stating that "[t]he Requests for Admission (RFAs) do not absolve Tam Nguyen of her breach of fiduciary duty"), 6:1-28 (stating that "attempt of Nguyen to retain ownership of the property post-repayment exploits Tran's generosity and ignores the substantial fiduciary duties owed by Nguyen, a licensed real estate broker to Tran... [a]s a fiduciary, a real estate broker must disclose to the broker's client all material information that the broker knows or could reasonably obtain regarding the property or relating to the transaction... Defendant failed to act as a reasonably careful real estate agent would have acted under the same or similar

circumstances, to Plaintiff's detriment, and in doing so, violated fiduciary duties owed to Plaintiff"), 7:1-27 (stating that "[t]his violation of fiduciary duty owed by Tam Nguyen to Thien Tran makes any such transaction material to this relationship subject to cancellation... [a] fiduciary duty was owed here by Defendant to Plaintiff... [t]he relationship between a real estate agent and principal is fiduciary in nature and imposes on the agent the duty of acting in the highest good faith toward the principal... [u]nder California law, real estate brokers are fiduciaries to their clients and owe duties of utmost good faith, loyalty, and full disclosure... Defendant Tam, as a real estate broker, held a fiduciary duty to Plaintiff Thien Tran... [h]ere, Tam's actions constitute a breach of fiduciary duty"), 8:1-28 (stating that "[t]hese actions taken by Defendant, including the violation of fiduciary duty owed by Tam Nguyen to Thien Tran, voids the transaction they emanate from upon public policy grounds alone... [t]hese actions provide grounds for cancellation of the wrongful transactions under Civ. Code § 3412 due to breach of fiduciary duties"), 9:1-28 (stating that "[t]he core issue of undue influence exerted by Tam Nguyen on Thien Tran remains unaddressed and unresolved by the RFAs... Tam Nguyen leveraged her fiduciary position as a licensed real estate broker, and her personal relationship with Thien Tran, to have Thien consent to property grants that inured only her detriment and to the benefit of Tam... Tam Nguyen's actions have betrayed the trust and authority bestowed upon her by Thien Tran, not only breach her fiduciary duties... but also manipulating familial bonds for personal gain"), 10:1-10 (stating that these actions provide grounds for cancellation under California Civil Code section 3412 due to the void and/or voidability of that grant as a product of undue influence and breach of fiduciary duty").)

However, "[t]he pleadings delimit the issues to be considered on a motion for summary judgment." (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1253; see also *Hejmadi v. AMFAC, Inc.* (1988) 202 Cal.App.3d 525, 536 (stating that "[o]n summary judgment motions, the pleadings always define the issues"); see also *Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 172 (stating that "[t]he pleadings define the issues to which a summary judgment motion may, or need, be directed").) "Thus, a 'defendant moving for summary judgment need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers.'" (*Laabs, supra*, 163 Cal.App.4th 1242, 1253; see also *California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 637, fn. 3 (stating that "[a] party may not oppose a summary judgment motion based on a claim, theory, or defense that is not alleged in the pleadings... [e]vidence offered on an unpleaded claim, theory, or defense is irrelevant because it is outside the scope of the pleadings"); see also *Berlanga v. University of San Francisco* (2024) 100 Cal.App.5th 75, 87 (stating that "[a] plaintiff opposing summary judgment may not raise facts or legal theories not encompassed by his complaint to defeat a summary judgment motion"); see also *Ignat v. Yum! Brands, Inc.* (2013) 214 Cal.App.4th 808, 820 (stating that "[i]n a motion for summary judgment, the complaint limits the issues... [a] plaintiff opposing such a motion cannot defeat it by proffering new, unpleaded theories or issues").) "A moving party seeking summary judgment or adjudication is not required to go beyond the allegations of the pleading, with respect to new theories that could have been pled, but for which no motion to amend or supplement the pleading was brought, prior to the hearing on the dispositive motion." (*Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 421; see also *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 444 (stating same).) Here, the complaint does not allege any breach of fiduciary duty or undue influence. The complaint does not mention Code of Civil Procedure section 3412 or allege that Tam was a real estate broker. Plaintiff's arguments are outside the allegations of the complaint and are not relevant to the

motion. Plaintiff fails to demonstrate the existence of a triable issue of material fact as against Tam.

Tam's motion for summary judgment is GRANTED.

The Court notes that on the same day that Plaintiff filed her opposition to Defendant's MSJ, she filed her own MSJ. Plaintiff failed to obtain a motion's date as is now required (by going online and reserving a date). Mistakenly believing the motion was related to Defendant's motion for MSJ, the Court indicated in the register of action that it was to be heard on May 9, 2024. Hearing the motion on May 9, 2024 would not leave sufficient time for Defendant to respond. There is no need to set a hearing date, as the motion is mooted by the granting of Defendant's MSJ. Even if the Court were to consider the motion, it would be denied for the same reasons that Plaintiff's opposition does not defeat Defendant's motion for summary judgment.

The Court will prepare the Order.

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Calendar Line 5

Case Name: Ratto v. 7-Eleven, Inc. et al.

Case No.: 22CV396852

Plaintiff brings a motion to compel related to special interrogatories 13, 14, and 19. All other discovery issues raised in Plaintiff's motion have been resolved.

SI 13

SI 13 states: "Please IDENTIFY all the individuals by name, address, and telephone number of the individuals you located outside the store and returned with to then assault Plaintiff as depicted in the 7-11 store video and described in the First Amended Complaint."

Defendant objects claiming that this question was already asked because Plaintiff asked Defendant to identify all witnesses. This question is different as it asks Defendant to identify those individuals who were outside the store and returned with Defendant into the store and are then seen in the video. While those identified may overlap with witnesses, witnesses may be a broader category than those in this group. As such, Defendant is required to respond, at least so as to identify which of the witnesses are those that were outside the store and then returned with Defendant into the store and can be seen on the video.

The Court notes that the question is needlessly argumentative. Defendant shall identify which witnesses, as identified in FI 12.1 and SI 3, were those that you located outside the store and brought into the store and can then be seen on the video and described in the FAC. The request is PARTIALLY GRANTED.

SI 14

SI 14 states: Please describe any and all training you received from either of the other DEFENDANTS that relates to customer relations and interactions.

Defendant objects that he answered this question at deposition. This is not a valid objection. This request is GRANTED.

SI 19

SI 19 states : Please describe all the reasons you hit Plaintiff with a baseball bat multiple times while he was unarmed and laying on the ground inside the 7-11 store.

This is argumentative and is DENIED.

While the Court is glad that the parties were able to work out most of the disputed issues, because of Defendant's delay in fully responding and then objecting to SI 13 and 14

without substantial justification, necessitating the need for this motion, the Court awards Plaintiff sanctions in the amount of \$410 (1 hr + filing fee). Plaintiff shall submit the final order.

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Calendar line 10

Case Name: Rossi Hamerslough v. Shah

Case No.: 23CV412053

Rossi, Hamerslough, Reischl & Chuck (Plaintiff) brings an application for assignment order and for order restraining Dipali Shah, the judgment debtor (hereinafter “Shah” or “Defendant”) from encumbering, assigning, disposing or otherwise transferring any amounts owed to her from her brokerage.

Plaintiff obtained a judgment against Shah for \$215,203.13, which includes the arbitration awarded to it plus prejudgment interest. Of that amount, Plaintiff received \$175,966.27 in satisfaction of the judgment. A debt of \$50,425.39 remains outstanding, which includes accrued interest. See Ex. F attached to Guillen Dec. of 4/11/24.

Shah works as a real estate agent previously associated with Coldwell Banker and now associated with Compass California II, Inc. Shah does not dispute that she earns commissions from real estate sales.

Plaintiff now moves for an order assigning to it commissions due to Shah, under CCP § 708.510. Defendant opposes the motion, claiming that Judge Rosen should be disqualified from the case and is biased against her, that Plaintiff’s demands are unreasonable and fraudulent, that the case is stayed pending her appeal, that Plaintiff has unclean hands, and that there is no urgency and no such assignment order is necessary given that Plaintiff already received \$175,966 toward the judgment.

First, Defendant has not shown that Judge Rosen’s involvement creates a substantial conflict or that she is biased against Defendant. Shah presents no facts, as opposed to allegations, in support of her claims. To the extent she filed a motion under CCP § 170.1, it has not been properly served on the Judge such that it need not and has not been ruled on.

Defendant has also failed to provide any factual basis in support of her claim that Plaintiff’s financial demands are unreasonable or fraudulent. Plaintiff has a lawful judgment against Defendant, with an outstanding amount due of approximately \$50,000.

Enforcement of the judgment is not stayed pending Defendant’s appeal, as Defendant has failed to post an undertaking, as required by CCP § 917.1(a)(1). CCP § 917.1(d) is not applicable to this case, as the judgment is not solely for costs.

Shah has not provided any factual basis for her claims that Plaintiff has unclean hands.

While the original urgency in this case that warranted an ex parte hearing--the pending sale of a property listed by Shah--no longer exists, this Court set a hearing in this case and allowed for further briefing, such that Shah has not been prejudiced in any way by the shortened time frame given for this motion. Moreover, the fact that Plaintiff has been able to recover a substantial portion of the judgment, is not a reason to deny it the ability to collect the outstanding portion that remains due and owing to them.

As such, Defendant has failed to raise any valid defense to the assignment motion for brought by Plaintiff. The assignment motion is GRANTED.

In addition to the assignment order, Plaintiff requests a restraining order “to prevent Judgment Debtor from dissipating, concealing or otherwise” making the funds unavailable. Memo, p3. A restraining order pursuant to CCP § 708.520 is available only upon a showing of good cause. *Specialty Labs. Inc. v. Advanced Biomedical, Inc. (In re Advanced Biomedical, Inc.)* (2016) 547 B.R. 337, 344. Here, Plaintiff has failed to show need or good cause and simply asserts that such an order is needed to prevent Defendant from dissipating her commissions. A conclusory statement such as that given here is not sufficient. Therefore, the motion for a restraining order is DENIED.

Judgment Debtor’s right to future commissions from Compass California II, Inc., are assigned to Plaintiff, up to the amount outstanding on the judgment, but not to exceed \$50,425.39. Plaintiff shall submit the final order within 10 days.

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