

**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: 12-12-23 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

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 strongly prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.

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

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. Phone lines are now open for you to call and reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: **408-882-2430** When you can call: **Monday to Friday, 8:30 am to 12:30 pm**

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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3.1312.)**

LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV382148 CMC	Billy Lewis vs Franklin Credit Management Corporation et al	Parties shall appear.
LINE 2	21CV382148 Hearing: OSC Dismissal Failure to Appear	Billy Lewis vs Franklin Credit Management Corporation et al	Parties shall appear.
LINE 3	21CV382148 Hearing: Demurrer	Billy Lewis vs Franklin Credit Management Corporation et al	See Tentative Ruling. Court will prepare the final order.
LINE 4	19CV343789 Hearing: Motion to Compel	Richard Pierce et al vs RAINCROSS FUEL & OIL, INC. et a	Notice appearing proper, Defendant Corporate Aviation Associate's unopposed motion to compel is GRANTED. Plaintiff is ordered to provide code- compliant verified responses to Defendant's Response to RPD, Set Two within 10 days of the final order. Defendant shall submit the final order.

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

LINE 5	19CV357874 Hearing: Demurrer	Santa Clara Valley Water District v. SDM Smith, Inc., CH2M Hill, Inc.	Motion withdrawn. The matter is off calendar.
LINE 6	22CV398252 Motion: Leave to File Amended Complaint	SUNBELT RENTALS, INC. vs SOL ELITE DESIGN, LLC et al	The unopposed motion is GRANTED. Plaintiff shall submit the final order and file its amended complaint within 10 days of the hearing.
LINE 7	23CV421060 Hearing: Confirm Arbitration Award	Law Office James Chau, PC vs. Andrew Luo	Notice appearing proper, the unopposed motion to confirm arbitration award is GRANTED. Plaintiff shall submit the final order.
LINE 8	23CV421698 Hearing: Motion on Petition for approval	In Re: J. G. Wentworth Originations, LLC	Notice appearing proper and good cause appearing, the unopposed petition is GRANTED. Moving party shall submit the final order.
LINE 9	2013-1-CV-249468 Motion: Vacate CCP 664.6 Dismissal	National Collegiate Student Loan Trust 2007-1 vs A. Westover	Notice appearing proper, the unopposed motion is GRANTED. Plaintiff shall submit the final order.
LINE 10			
LINE 11			
LINE 12			

Calendar Line 3**Case Name:** *Lewis v. Franklin Credit Management Corp., et al.***Case No.:** 21CV382148**I. Factual and Procedural Background**

Plaintiff Billy Ray Lewis (“Plaintiff”) brings this wrongful foreclosure 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 of the First Amended Complaint (“FAC”), Plaintiff has been the owner of real property located at 2664 Senter Road, Unit No. 116, San Jose California (“the Property”) since 1990. (FAC, ¶ 1.)

The FAC alleges Plaintiff signed a Promissory Note for a Home Equity Line of Credit (“Promissory Note”) in the amount of \$40,500 wherein Plaintiff was Trustor and First Magnus Financial Corporation (“Magnus”), a now defunct Arizona Corporation, was the original beneficiary. (FAC, ¶ 6.) In connection with the Promissory Note, Plaintiff signed a Deed of Trust secured by the Property recorded on September 8, 2006 to Magnus. (*Id.* at ¶ 7.)

On July 9, 2021, FCMC caused to be recorded a Notice of Default and an election to sell in the Official Records of Santa Clara County, alleging (a) 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 and (b) defendant beneficiary (Franklin) elected to sell, or cause to be sold, the trust property to satisfy that obligation. (FAC, ¶ 8.)

On November 9, 2020, defendant beneficiary and defendant trustee 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. (FAC, ¶ 9.) The sale did take 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 Santa Clara County Recorder’s Office. (*Ibid.*)

Plaintiff alleges the Trustee Sale should be set aside because: 1) the assignment from Magnus to MERS¹ was defective upon Magnus filing for bankruptcy; 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, or 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 CFR section 1026.7. (FAC, ¶¶ 10, 14-16, 18.)

On July 6, 2023, Plaintiff filed his FAC, 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 CFR 1026.7 [against FCMC].

On August 16, 2023, FCMC filed a demurrer to each cause of action in the FAC.

Plaintiff opposes the motion.

II. 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.)

b. FCMC's Request for Judicial Notice

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

- 1) Deed of Trust and Assignment of Rents, recorded on September 21, 2006 (Ex. 1);

¹ Plaintiff does not indicate what MERS is within the FAC. Nevertheless, the Court understands MERS refers to “Mortgage Electronic Registration Services, Inc.”

- 2) A Substitution of Trustee, recorded on July 9, 2020 (Ex. 2);
- 3) An Assignment of Deed of Trust, recorded on June 30, 2020 (Ex. 3);
- 4) A Notice of Default, recorded on July 9, 2020 (Ex. 4); and
- 5) A Trustee's Deed Upon Sale, Document No. 24747489 (Ex. 5).

As to Ex. 1, Ex. 4, and Ex. 5, the request for judicial notice ("RJN") is GRANTED. While the Court would typically only take judicial notice of these documents' existence, Exs. 1, 4, and 5 are attached to Plaintiff's FAC and therefore, the Court may rely on the documents' contents.

As to Ex. 3, the request is GRANTED as to the document's 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 [Supreme Court took judicial notice of notices of default and deed to trust's "existence and contents, though not of disputed or disputable facts stated therein"].)

As to Ex. 2, the request is DENIED. While courts may take judicial notice of the fact that document was recorded, courts may not take judicial notice of the facts within the substitution of trustee because it is hearsay and it cannot be considered not reasonably subject to dispute. (*Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375 (*Herrera*).) Thus, while a Court has discretion to take judicial notice of the fact the document was recorded, the Court declines to do so here. Ex. 2 indicates that the document was submitted for recording and that recording was requested, but it does not state that it was recorded by Santa Clara County.

c. Standing

Defendant first argues that each cause of action fails because Plaintiff lacks standing to challenge Defendant's authority to foreclose on the Property. (Demurrer, p. 11:24-25.) FCMC contends that a borrower has standing to sue for wrongful foreclosure where an alleged defect in the assignment renders the assignment void, but a borrower does *not* have standing when the alleged defect in the assignment renders it merely voidable. (Demurrer, p. 12:23-26, citing *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 942-943 (*Yvanova*).) FCMC asserts that 1) the assignment may be voidable, but that Plaintiff claims "in purely conclusory fashion that the beneficiary's interest in the property is somehow improper" but offers no

specific facts to support this claim; and 2) even if Plaintiff could establish sufficient factual allegations, the causes of action still fail because Plaintiff cannot show he was prejudiced as a result of any lack of authority of the parties participating in the foreclosure process. (Demurrer, p. 13:13-22.)

i. Plaintiff's Allegations as to Void Assignment

“One basis for claiming that a foreclosing party did not hold the deed of trust is that the assignment relied upon by that party was ineffective. When a borrower asserts an assignment was ineffective, a question often arises about the borrower’s standing to challenge the assignment of the loan (note and deed of trust) – an assignment to which the borrower is not a party.” (*Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1094 (*Glaski*)). “California’s version of the principle concerning a third party’s ability to challenge an assignment has been stated . . . as follows: ‘Where an assignment is merely voidable at the election of the assignor, third parties, and particularly the obligor, cannot successfully challenge the validity or effectiveness of the transfer.’” (*Id.* at pp. 1094-1095, citing 7 Cal.Jur.3d (2012) Assignments, § 43, p. 70.) In 2016, the California Supreme Court “embrac[ed] *Glaski*’s rule that borrowers have standing to challenge assignments as void, but not as voidable[.]” (*Yvanova, supra*, 62 Cal.4th at p. 939.)²

In opposition, Plaintiff asserts that he alleges the assignment of the Promissory Note and deed of trust are void and that whether the Promissory Note and deed of trust are actually void and without force or effect is a factual issue not properly addressed at the pleading stage. (Opposition, pp. 8:26-9:2.)

“The theory that a foreclosure was wrongful because it was initiated by a nonholder of the deed of trust has also been phrased as (1) the foreclosing party lacking standing to foreclose or (2) the chain of title relied upon by the foreclosing party containing breaks or defects.” (*Glaski, supra*, 218 Cal.App.4th p. 1093.) “[P]roperly alleging a cause of action under this theory requires more than simply stating that the defendant who invoked the power of sale was not the true beneficiary under the deed of trust. Rather, a plaintiff asserting this theory must allege facts that show the defendant who invoked the power of sale was not the true

² “A void contract is without legal effect. A voidable transaction, in contrast, is one where one or more parties have the power, by a manifestation of election to so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.” (*Sciarratta v. U.S. Bank National Assn.* (2016) 247 Cal.App.4th 552, 563 [internal citations and quotations omitted].)

beneficiary.” (*Id.* at p. 1094; see also *Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1506 [plaintiff failed to plead specific facts demonstrating transfer of note and deed of trust were invalid].)

Here, the FAC alleges that Magnus failed to properly substitute a Trustee in accordance with the Deed of Trust (FAC, ¶ 14); the record in Santa Clara County is conclusive that neither MERS, Magnus, or any other entity ever recorded an assignment or substitution of trustee in Santa Clara County and therefore no substitution of Trustee occurred (*id.* at ¶ 15); foreclosure sale was wrongful and therefore void (*id.* at ¶ 18); the notice of default was defective and void (*id.* at ¶ 21); the trustee’s deed “appears valid on its face, [but] it is invalid, void and of no force or effect regarding plaintiff’s interests in the Property” (*id.* at ¶ 28); and that FCMC and ZBS were not proper trustees at time of sale and thus the sale was void (*id.* at ¶ 29).

Defendant contends that RJN Ex. 2 establishes that the substitution of trustee was valid and recorded with Santa Clara County. (Demurrer, p. 14:12-16.) However, the Court may not rely on the facts contained within Ex. 2 because they are “hearsay and [they] cannot be considered not reasonably subject to dispute.” (*Herrera, supra*, 196 Cal.App.4th at p. 1375 [court declines to take judicial notice of the facts within substitution of trustee document].)

Thus, based on the allegations within the FAC, Plaintiff has alleged that FCMC was not a proper trustee and therefore, the assignment was void. Accordingly, Plaintiff has pled sufficient facts to establish standing at the pleading stage. (See *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787 [in considering merits of a demurrer, the facts alleged in pleading are deemed true, however improbable they may be]; see also *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496 [court reviewing propriety of ruling on demurrer is not concerned with the “plaintiff’s ability to prove . . . allegations, or the possible difficulty in making such proof”].)

ii. Prejudice

Defendant next asserts that even if the FAC alleges the assignment was void, his causes of action still fail because he cannot show he was prejudiced as a result of any lack of authority of the parties participating in the foreclosure process, since the holder of the deed of trust could have foreclosed on the property. (Demurrer, p. 13:20-22, citing *Herrera, supra*, 205 Cal.App.4th at pp. 1507-1508.)³ The *Herrera* Court stated that “under *Fontenot [v. Wells*

³ *Herrera* and *Fontenot* were disapproved by *Yvanova* to the extent they held borrowers lack standing to challenge an assignment of the deed of trust.

Fargo Bank, N.A. (2011) 198 Cal.App.4th 256 (*Fontenot*)] plaintiffs must also show plaintiffs were prejudiced: ‘We also note 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 interest.’” (*Id.* at p. 1507.)

Plaintiff does not address this argument in opposition. (See *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is “equivalent to a concession”].) Nevertheless, the Supreme Court made it clear:

[A court is] concerned only with prejudice in the sense of an injury sufficiently concrete and personal to provide standing, not with prejudice as a possible element of the wrongful foreclosure tort. As it relates to standing, we disagree with defendants’ analysis of prejudice from an illegal foreclosure. A foreclosed-upon borrower clearly meets the general standard for standing to sue by showing an invasion of [his] legally protected interests—the borrower has lost ownership to the home in an allegedly illegal trustee’s sale. Moreover, the bank or other entity that ordered the foreclosure would not have done so absent the allegedly void assignment. Thus the identified harm—the foreclosure—can be traced directly to the foreclosing entity’s exercise of the authority purportedly delegated by the assignment.

(*Yvanova, supra*, 62 Cal.4th at p. 937.)⁴

Here, Plaintiff alleges he was foreclosed on by a party with no right to do so and therefore has suffered an invasion of his legal rights. This is sufficient to demonstrate standing. (See *Yvanova, supra*, 62 Cal.4th at p. 939 [“A homeowner who has been foreclosed on by one with no right to do so has suffered an injurious invasion of [his] legal rights at the foreclosing entity’s hands. No more is required for standing to sue”].)

Based on the foregoing, the demurrer to each cause of action on the ground Plaintiff lacks standing is OVERRULED.

d. Defendant’s Argument Regarding Arizona Bankruptcy

⁴ *Yvanova* addressed *Fontenot* but acknowledged that *Fontenot* was addressing prejudice as an element of the wrongful foreclosure cause of action.

Defendant next requests the Court disregard Plaintiff's allegations regarding a purported bankruptcy in Arizona. (Demurrer, p. 15:7-12, citing FAC, ¶ 11.) 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, the Court declines to disregard these allegations in the FAC.

e. Cancellation of Instruments – Second Cause of Action

Civil Code section 3412 states: “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.” In order to state a claim for cancellation of instrument, a plaintiff must specifically allege the particular instrument he asserts constitutes a cloud on his title and state facts “showing the apparent validity of the instrument designated, and point out the reason for asserting that it is actually invalid.” (*Ephriam v. Metropolitan Trust Co. of Cal.* (1946) 28 Cal.2d 824, 833-34 (*Ephriam*).) A plaintiff must also allege he restored everything of value received in the transaction, even if execution of the instrument was procured through fraud in the inducement. (*Fleming v. Kagan* (1961) 189 Cal.App.2d 791, 796.)

Defendant argues: 1) Plaintiff has not alleged why the statutory foreclosure documents or assignments are void; 2) Plaintiff has failed to allege tender or offer of tender of the amounts borrowed.

i. Allegations Written Instruments are Void

“One who alleges that he is the owner of certain described real property, that defendants claim an interest therein adversely to him, that such claim is without right, and that the defendants have no estate, title or interest whatever in said premises or any part thereof pleads all that the law requires in an action to quiet title and, in such an action, the complaint need not particularly state the facts in regard to the asserted invalidity nor attack the instrument which is claimed to be a cloud against the title of the plaintiff.” (*Ephriam, supra*, 28 Cal.2d at p. 833.)

Here, the FAC alleges Plaintiff is the owner of the Property (FAC, ¶ 1); FCMC claims an interest adverse to him (*id.* at ¶ 27); that the claim is not valid because FCMC was not a proper trustee at time of sale and thus, the sale is void (*id.* at ¶ 29); that FCMC's claim is without right (*id.* at ¶¶ 29, 30); and that FCMC does not have an estate, title, or interest in the

Property (*id.* at ¶ 27). Thus, for pleading purposes, Plaintiff has sufficiently alleged cancellation of an instrument.

ii. Tender

In opposition to Defendant’s tender argument, Plaintiff contends he has properly alleged the Tender Rule does not apply. (Opposition, p. 8:4-12, citing FAC, ¶ 43.)⁵

“[B]ecause a cause of action to cancel a written instrument under section 3412 sounds in equity, a debtor must generally allege tender or offer of tender of the amounts borrowed as a prerequisite to such claims.” (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 819.) However, the “tender rule is not absolute; tender is not required to cancel a written instrument that is *void* and not merely voidable.” (*Ibid.* [emphasis original]; see also *Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 877 [stating that in the context of overcoming a voidable sale, debtor must tender any amounts due under the deed of trust]; *Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1273 [“Nothing in the language of [Homeowners Bill of Rights] suggests that a borrower must tender the loan balance before filing suit based on a violation of the requirements of the law”].)

Here, as explained in detail above, Plaintiff alleges the assignment was void. (See e.g., FAC, ¶¶ 29, 31.) Accordingly, Plaintiff is not required to allege tender or offer of tender to state a cause of action for cancellation of instrument.

As such, the demurrer to the second cause of action is OVERRULED.

f. Accounting – Third Cause of Action

Defendant demurs to the third cause of action for accounting on the ground it does not owe Plaintiff money and the FAC does not allege it owes Plaintiff money. (Demurrer, p. 16:18-20.) Plaintiff’s opposition does not address the third cause of action. As such, the Court will treat this argument as unopposed. (See *Sexton v. Superior Ct.*, 58 Cal. App. 4th 1403, 1410 [failure to oppose creates an inference that the demurrer is meritorious]; see also *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal. App. 4th 507, 529 [failure to challenge a contention in a brief results in the concession of that argument].)

Accordingly, the demurrer to the third cause of action is SUSTAINED without leave to amend.

⁵ Plaintiff directs the Court to Paragraph 43, however, the quoted language appears in Paragraph 39 of the FAC.

g. Wrongful Foreclosure – Fourth Cause of Action

“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.)

Defendant argues the “allegations in the Complaint are insufficient to prove any of these elements.” (Demurrer, p. 17:23-24.) However, on demurrer, a court is not concerned with Plaintiff’s ability to prove his allegations. (See e.g., *Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1291 [“purpose of demurrer is to test the sufficiency of the pleadings to state a cause of action as a matter of law” and court is “not concerned with plaintiff’s ability to prove the allegations or with any possible difficulties in making such proof”].) Defendant further 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. (Demurrer, p. 17:24-26.)

i. Allegations of Illegal, Fraudulent, or Willfully Oppressive Sale

The FAC incorporates prior allegations into the fourth cause of action. (FAC, ¶ 36.) Plaintiff alleges 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. (*Id.* at ¶ 15.) He then alleges that FCMC was not a proper trustee at the time of the sale and thus, the sale was void. (*Id.* at ¶¶ 16, 18-19, 29.) Plaintiff additionally alleges that FCMC knew of these deficiencies and caused an illegal and willfully oppressive sale of the property. (*Id.* at ¶ 23.) Thus, Plaintiff has sufficiently alleged an illegal sale.

ii. Tender

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.) As previously explained, Plaintiff alleges the foreclosure sale was void. Therefore, he is not required to allege tender or excuse from tendering.

iii. Actual Harm or Prejudice

Defendant argues 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. (Demurrer, p. 18:3-6, citing *Herrera, supra*, 205 Cal.App.4th at pp. 1507-1508.)

“‘[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. Goherty* (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 plaintiff 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* plaintiffs must also show plaintiffs were prejudiced[.]” (*Herrera, supra*, at p. 1507.) The 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 FAC alleges Plaintiff was prejudiced 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. (FAC, ¶ 24.) The FAC contains no further allegations pertaining to prejudice and, for similar reasons explained in *Herrera*, the Court does not find this

allegation to be sufficient to establish prejudice. Additionally, Plaintiff does not address prejudice in opposition. Accordingly, the demurrer may be sustained on this basis.

Based on the foregoing, the demurrer to the fourth cause of action is SUSTAINED with 10 days leave to amend.

h. Violation of 12 CFR 1026.7

The fifth cause of action is a claim for violations of 12 CFR 1026.7 of the Truth in Lending Act (“TILA”).

Defendant argues the fifth cause of action fails for various reasons not applicable to this case. For example, Defendant contends that Plaintiff’s fraud-based claims are time-barred (Demurrer, p. 18:18); however, the FAC does not contain fraud-based claims. Likewise, Plaintiff does not allege a breach of contract claim or “RESPA” claim. (See *Id.* at pp. 18:27-28; 19:2-3.) Defendant additionally asserts that Plaintiff did not file suit until 2023 and therefore *all* of Plaintiff’s claims are time-barred. (*Id.* at p. 18:15-17.) While the FAC was filed in 2023, the initial complaint in this case was filed in May 2021, thus Defendant’s argument is unavailing.

In addition to these irrelevant arguments, Defendant asserts that any claim that it violated the TILA is time-barred as it must be brought within one year from the date of the occurrence of the violation. (Demurrer, p. 19:17-19, citing 15 U.S.C § 1640(e).) TILA requires borrowers to file an action within one year from the date of the occurrence of the violation. (*Pacific Shore Funding v. Lozo* (2006) 138 Cal.App.4th 1342, 1355.)

Here, the FAC alleges “Plaintiff in effect does not recall receiving any funds from the Home Equity Loan much less the amount of \$40,500. In never receiving any statements from . . . [FCMC] or any other Trustee, Plaintiff was unaware that he was in default on the loan and had no way of knowing what to pay or who to pay it to.” (FAC, ¶ 41.) The FAC, however, includes Exhibit B which indicates that Plaintiff’s principal obligation under the agreement was \$40,500, which was signed by Plaintiff in 2006. (See FAC, Ex. B.) The FAC also includes Exhibit C, a Notice of Default sent by ZBS on July 7, 2020, notifying Plaintiff that he was in default. Thus, Plaintiff’s exhibits directly contradict allegations in Paragraph 41 of the FAC. (*Mead v. Sanwa Bank California* (1998) 61 Cal.App.4th 561, 568 [“For purposes of demurrer, we accept as true both facts alleged in the text of the complaint and facts appearing in exhibits attached to it. If the facts appearing in the attached exhibit contradict those expressly alleged,

those in the exhibits are given precedence”].) Moreover, Plaintiff has not opposed the demurrer to the fifth cause of action and the Court may therefore treat it as unopposed and meritorious.

Accordingly, the demurrer to the fifth cause of action is SUSTAINED without leave to amend.

i. Conclusion and Order

The demurrer to the first and second causes of action is OVERRULED. The demurrer to the fourth cause of action is SUSTAINED with 10 days leave to amend. The demurrer to the third and fifth causes of action is SUSTAINED without leave to amend as Plaintiff did not oppose the demurrer to these causes of action and therefore does not meet his burden of proving a reasonable possibility of amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [burden of proving a reasonable possibility of amendment is “squarely on the plaintiff”].)

The Court shall prepare the final Order.

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