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: 10-01-24 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.)

XCZTO 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.

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: 10-01-24 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.)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV384705 Hearing: Demurrer	Varick Partners, LLC vs Rana Rekhi et al	See Tentative Ruling. The Court will issue the final order.
LINE 2	23CV419789 Hearing: Demurrer	Yantong Wang vs LoanCare, LLC et al	See Tentative Ruling. The Court will issue the final order.
LINE 3	23CV419789 Motion: Strike	Yantong Wang vs LoanCare, LLC et al	See Tentative Ruling. The Court will issue the final order.
LINE 4	24CV433325 Hearing: Demurrer	FPP MB, LLC vs Jennifer Lewis et al	Off Calendar
LINE 5	24CV433325 Motion: Strike	FPP MB, LLC vs Jennifer Lewis et al	Off Calendar
LINE 6	22CV402216 Motion: Terminate Sanctions	Hassan Abpikar vs Sasan Momeni et al	See Tentative Ruling. Defendant will submit the final order within 10 days.
LINE 7	24CV430545 Motion: Stay	Edgefield Holdings, LLC vs Vahe Tashjian et al	Off Calendar. Judgment entered 9/20/24.
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			

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: 10-01-24 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.)

LINE 13			
LINE 14			
LINE 15			
LINE 16			
LINE 17			

- oo0oo -

Calendar Line 1
Case Name: *Varick Partners, LLC v. Rekhi, et al.*
Case No.: 21CV384705

This is an action for fraud. According to the first amended complaint ("FAC"), defendant Mark Gibbs ("Gibbs") approached members of plaintiff Varick Partners, LLC ("Plaintiff") regarding an acquisition of Rekhi Brothers d/b/a Wine Globe, and made certain misrepresentations regarding the company's sales, profits, tax returns and ability to legally ship its goods. (See FAC, ¶¶ 6-14.) Gibbs was employed by Plaintiff to manage day-to-day operations; however, Gibbs concealed the actual financial condition of the company, failed to provide essential information for the company, including its banking information and financial operations reports, attempted to withhold critical business information from Plaintiff, provided financials from a convicted felon, and improperly leveraged Wine Globe assets. (See FAC, ¶¶ 16-18.) As a result of these actions, Plaintiff removed Gibbs from any profit sharing, but Gibbs engaged in further concealment and provision of false information regarding the company's viability, operations, accounting and legality. (See FAC, ¶¶ 19-21.) Gibbs ultimately began withholding payments to their shipping company, FedEx, despite having sufficient funds to pay it, to further enrich himself. (See FAC, ¶¶ 22-25.) Gibbs also violated the terms of the shipping contract with FedEx that led to the cancellation of the contract and an investigation by the Ohio Attorney General for improper shipment of spirits. (See FAC, ¶ 26.) After an investigation by Plaintiff, Gibbs admitted that the company could no longer ship its products to several states, thereby limiting the value of the company. (See FAC, ¶¶ 28-31.) UPS also investigated Gibbs for the shipment of the company's products and likewise terminated the contract. (See FAC, ¶ 32.) Plaintiff terminated Gibbs; however, Gibbs has since accessed the company's property, taken assets and told Plaintiff's landlord that its other members were trespassing. (See FAC, ¶¶ 36-42.)

On June 25, 2021, Plaintiff filed the complaint against defendants Yellowwood Capital, Inc., Rana Rekhi and Gibbs. Gibbs failed to respond and default was entered against Gibbs on December 21, 2021. On October 6, 2022, Plaintiff filed the FAC. On October 23, 2023, Gibbs filed a motion for sanctions against Plaintiff and its counsel; on March 13, 2024, the Court filed its order that stated:

> On October 23, 2023, Defendant Mark Gibbs filed a motion for sanctions against Plaintiffs. A default was entered against Defendant Gibbs on Dec. 21, 2021. "After the default was entered, defendant was no longer an active party in the litigation and thus was not entitled to any further notices. 'The clerk's entry of default cuts off the defendant's right to take further affirmative steps such as filing a pleading or motion, and the defendant is not entitled to notices or service of pleadings or papers.'" *Sporn v. Home Depot USA, Inc*., 126 Cal.App.4th 1294, 1301 (citation omitted). As such, the motion is DENIED.

(March 13, 2024 order re: Gibbs' motion for sanctions, p.2:2-8.)

On February 29, 2024, Gibbs filed a motion to vacate the default and default judgment. On April 2, 2024, Gibbs filed a demurrer to the FAC. On April 9, 2024, the Court heard the motion to vacate the default and default judgment and adopted the tentative ruling denying the

motion. The Court's May 3, 2024 order denying Gibbs' motion to vacate the default and default judgment, stated that "Defendant admits that his motion is untimely, as any motion to set aside the default should have been filed no later than May 21, 2022—nearly two years ago" and that "Defendant's claims of fraud and mistake relate to the underlying case, not to why he was not able to file an answer or responsive pleading in the case… [a]ll of the issues he now raises go to the merits of his case, but they have no bearing on why he failed to file a responsive pleading." (May 3, 2024 order re: denial of Gibbs' motion to vacate the default and default judgment, pp. 2:12-28, 3:1-28, 4:1-2.)

On April 16, 2024, Gibbs filed a motion for reconsideration of the order denying his motion to vacate the default and default judgment. On July 2, 2024, the Court denied the motion for reconsideration, stating that "Defendant has failed to set out any new facts or law, as required for a motion for reconsideration under CCP 1008… [and] Defendant has failed to address the untimeliness of his original motion or any of the bases for the Court's original decision."

Gibbs' instant demurrer to the FAC argues that the first through tenth causes of action fail to state facts sufficient to constitute a cause of action against Gibbs. In opposition, Plaintiff argues that Gibbs' demurrer "is untimely, improper, and has no merit… [because] Mr. Gibbs filed this Demurrer while he was in default and [it] should have been rejected by the Clerk." (Pl.'s opposition to demurrer, p.2:1-10.)

Whether the FAC opened the default as to Gibbs

While it is true that Gibbs would not be able to file any motion with regards to the initial complaint on which default was entered, "where, after the default of a defendant has been entered, a complaint is amended in matter of substance as distinguished from mere matter of form, the amendment opens the default, and unless the amended pleading be served on the defaulting defendant, no judgment can properly be entered on the default." (*Leo v. Dunlap* (1968) 260 Cal.App.2d 24, 27; see also *Sass v. Cohen* (2020) 10 Cal.5th 861, 880 (stating that "amending complaints in this fashion would open the default and give defendants another opportunity to respond"); see also *Brown v. Pacific Tel. & Tel. Co.* (1980) 105 Cal.App.3d 482, 486 (stating that "if, after a defendant's default has been entered, a plaintiff amends his complaint in some substantial manner, he 'opens the default" and defendant may then plead in timely fashion to the new complaint'"); see also *Freshman v. Super. Ct. (Kreuger)* (1985) 173 Cal.App.3d 223, 234 (stating that "even if a default has been entered default is considered as waived if the plaintiff later amends his complaint in a significant fashion"); see also *Weakly-Hoyt v. Foster* (2014) 230 Cal.App.4th 928, 934, fn. 2 (stating that "[w]hen, after a defendant's default has been entered, the plaintiff amends the complaint in a matter of substance, the amendment opens the default, it must be served on the defendant, and the defendant is entitled to an opportunity to respond… [t]his rule does not apply when the amendment is one of form, or one that is immaterial as far as the defaulting defendant is concerned").)

Because neither party addressed the question of whether the default was waived by the filing of the First Amended Complaint, in its July 11, 2024 order, the Court ordered parties to submit further briefing on the issue.

Gibbs filed his brief on September 5, 2024 and noted that "[t]he amended complaint changed the focus off Defendant Gibbs and focused on new accusations against Rekhi Bros, as

stated in Rekhi Bros motion to strike, the purchase agreement and state approvals were in Defendant's name only." (Gibbs' brief, p.6:14-16.) Gibbs argues that the FAC is amended as a matter of substance by: the eighth cause of action, allegations regarding "[l]icensing, state laws, state codes and federal laws…[; t]he legal complaints filed against the Plaintiff and the alleged illegality of using Varick Partners as owner… [; and, t]he Plaintiff's failure to take appropriate actions to mitigate risks." (*Id*. at p.8:17-21.)

The eighth cause of action is asserted against Rekhi, not Gibbs

Gibbs argues that "[i]n the original complaint[,] the Eighth cause of action inducing breach of contract was against Defendant Rehi only… [but i]n the new amended complaint, it is against Gibbs and Yellowwood Capital, making this a significant new causes [sic] of action that the Defendant will need to address…." (Gibbs' brief, pp.8:24-26, 9:1.) However, while the FAC's eighth cause of action is *labeled* as being against Gibbs and Yellowwood Capital, the allegations clearly are asserted against Rekhi. Gibbs cites to paragraphs 123 through 127 but each of these paragraphs concern Rekhi (see FAC, ¶¶ 123 (alleging that "Defendant Rekhi knew of these contracts and intended Defendant Gibbs to breach those Membership Agreements"), 124 (alleging that "Defendant Rekhi intended to cause Gibbs to breach the Membership Agreements"), 126 (alleging that "[a]s a direct result of Defendant Rekhi's actions, Plaintiff has been actually damaged"), 127 (alleging that "as a proximate result of the action by Defendant Rekhi, as alleged above, Plaintiff has been damaged")), and while the eighth cause of action for inducing breach of contract alleges that Rekhi intended to cause Gibbs to breach the Membership Agreements, the FAC alleges that Gibbs was a party to the Membership Agreements (see FAC, ¶ 68), and thus could not be liable for inducement of breach of contract. (See *Dryden v. Tri-Valley Growers* (1977) 65 Cal.App.3d 990, 999 (stating that "it has been held that an action for inducing a breach of contract will not lie against the party to the contract"); see also *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 24 (stating that "[i]t is axiomatic, however, that there can be no action for inducement of breach of contract against the other party to the contract").) The eighth cause of action is not amended as to Gibbs in matter of substance, and thus is not a basis to open the default.

Licensing, state laws, state codes and federal laws

Gibbs argues that "Plaintiff is not entitled to file a complaint asking for compensation for losses as their made up Varick Partners amended version is only signed by the Plaintiff… [w]hich is not compliant with state and federal law." (Gibbs' brief, pp.13:7-28, 14:1.) Gibbs contends that Plaintiff violated Business and Professions Code section 23000, and state and federal liquor laws rendering Varick Partners' operating agreement illegal, void and unenforceable as shown in the exhibits. (See Gibbs' brief, pp.13:14-25, 14:3-27, 15:1-2.) Here, it is unclear as to which portion of the FAC Gibbs refers; however, these arguments do not address how they are material as far as the defaulting defendant is concerned. (See *Weakly-Hoyt v. Foster* (2014) 230 Cal.App.4th 928, 934, fn. 2 (stating that while an amendment can open the default, "[t]his rule does not apply when the amendment… is immaterial as far as the defaulting defendant is concerned").) Accordingly, allegations regarding licensing, state laws, state codes and federal laws are not a basis to open the default.

The legal complaints filed against the Plaintiff and the alleged illegality of using Varick Partners as owner

Gibbs argues that "Plaintiff created a new criminal act of identity theft using the defendants['] individual merits to qualify in justifying new causes of action against Rekhi Brothers without the defendants consent." (Gibbs' brief, p.15:15-17.) Here, again, Gibbs does not identify to which particular allegations of the FAC he refers, but rather merely states that "[t]he first amended complaint makes several reference [sic] in the Plaintiff running and the Defendant's interfering into running a liquor store." (*Id*. at p.15:17-19.) The *initial* complaint made those allegations in paragraphs 16 through 28; these allegations are identical to the allegations of the FAC in paragraphs 18 through 30. (See initial complaint, ¶¶ 16-28; compare with FAC, ¶¶ 18-30.) Gibbs fails to demonstrate the allegations regarding his interference with the day-to-day operations of Plaintiff are amendments in a manner of substance, and thus this likewise is not a basis to open the default.

Gibbs also argues that "[a]s recently as last month Attorney Drew Winghart allegedly used this amended complaint and the judgment to wiggle out of a criminal complaint with the bar… [and] is allegedly using the judgment to validate Varick Partners owning Wine Globe." (Gibbs' brief, p.15:24-27.) Gibbs contends that Plaintiff's usage of "Varick Partners in the wrong context of ownership" somehow "represents a new charge of perjury because both the Plaintiff and the attorney Drew Winghart signed a new document to the authenticity of the first amended complaint." (*Id*. at pp.16:1-27, 17:1-26.) However, this argument also does not concern amendments in a matter of substance; therefore, this argument also cannot be a basis to open the default.

Gibbs additionally argues that "the first amended complaint violated the Menace [pursuant to] Civil Code section 1570… [and] is a new form of mental coercion." (*Id*. at p.18:1-9.) As with the prior argument, this argument lacks relevance since it does not concern an amendment in a matter of substance; thus, this argument cannot be a basis to open up the default.

Plaintiff's purported failure to take appropriate actions to mitigate risks

Lastly, Gibbs argues that "Plaintiff's amended complaint is full of horrible decisions carried out by the Plaintiff… Plaintiff's actions interfered with the operation of the business and failure to mitigate those risks are newly stated in the amended complaint." (Gibbs' brief, p.18:16-20.) Gibbs cites to paragraph 125 and 131 of the FAC; however, these paragraph are identical to paragraphs 120 and 126, respectively, of the initial complaint. As neither paragraph 125 nor paragraph 131 of the FAC are amended as to Gibbs in matter of substance, they are not a proper basis to open the default.

Accordingly, as Gibbs fails to demonstrate that the FAC contains amendments in a matter of substance. The filing of the FAC does not open the default. Gibbs' demurrer is OFF CALENDAR.

Gibbs' request to vacate the judgment

In a separate part of Gibbs' brief regarding the issue of whether the defaulted has been opened, Gibbs "asks the court for leniency and to vacate the judgment." (Gibbs' brief, p.20:12-21.) Gibbs does not provide any authority to vacate the judgment. Default was entered on December 21, 2021, and thus, Gibbs may not seek such relief pursuant to Code of

Civil Procedure section 473, subdivision (b), which provides that such a request be made "no more than six months after entry of judgment." (Code Civ. Proc. § 473, subd. (b).)

As Gibbs has not identified any authority to vacate the judgment, Gibbs' request to vacate the judgment is DENIED.

The Court will prepare the Order.

- oo0oo -

Calendar Lines 2 and 3
Case Name: *Wang v. Loancare, LLC., et al.*
Case No.: 23CV419789

This is an action for wrongful foreclosure. According to the allegations of the first amended complaint ("FAC"), on August 22, 2013, plaintiff Yantong Wang ("Plaintiff") acquired property at 1084 Doheny Terrace #33 in Sunnyvale. (See FAC, ¶ 20.) On January 21, 2015, Plaintiff entered into a loan agreement with LoanCare, LLC ("LoanCare"), secured by a deed of trust. (See FAC, ¶ 21.) Defendant ZBS Law, LLP ("ZBS") recorded a notice of default for failure to keep the payments current; however, ZBS failed to serve the notice on Plaintiff. (See FAC, ¶ 23.) ZBS also recorded a notice of trustee sale against the property; however, ZBS failed to serve the notice of non-judicial foreclosure on Plaintiff. (See FAC, ¶ 28.) LoanCare and ZBS (collectively, "Defendants") also failed to attach an accurate or complete declaration of compliance to show the due diligence made to contact the borrower, failed to contact Plaintiff to assess his financial situation and explore options for the borrower to avoid foreclosure, and did not post the notice of trustee's sale in a conspicuous place. (See FAC, ¶¶ 25-27, 29.)

On June 21, 2023, the property was sold at a trustee's sale to Toeri Business & Investment, LLC, Luminary General Services, Inc. and Kaythan Investments, LLC (collectively, "Intervenors"). (Intervenors' memorandum of points and authorities in support of motion to expunge lis pendens, p.1:23-28; see also Intervenors' request for judicial notice in support of motion to expunge lis pendens, exh. 1 (trustee's deed upon sale conveying interest in subject property to intervenors)[1].) On August 18, 2023, an unlawful detainer judgment was entered in favor of Intervenors against Plaintiff regarding the subject property and was enforced by the Santa Clara County Sheriff's Office. (See Intervenors' request for judicial notice in support of motion to expunge lis pendens, exhs. 2-3.) On August 28, 2023, ZBS filed a declaration of nonmonetary status. On November 14, 2023, the Court [Hon. Kulkarni] granted Intervenors' motion for leave to intervene and Intervenors' motion to expunge lis pendens, and awarded attorney's fees and costs in the amount of $5,500 against Plaintiff and her counsel.

On April 2, 2024, Plaintiff filed the FAC against LoanCare only[2], asserting causes of action for:

1) Wrongful foreclosure; and,
2) Violation of Homeowner Bill of Rights.

Intervenors demur to the FAC on the ground that it fails to state facts sufficient to constitute a cause of action against them because: (1) despite the Court granting their motion to intervene, it neither names them nor alleges any facts about them; (2) as a matter of law, the

---

[1] The Court takes judicial notice of the documents which were previously noticed in support of the motion to expunge lis pendens and cited in Intervenors' memorandum of points and authorities in support of the demurrer. (See Evid. Code § 452, subds. (c), (d), (g), (h); see Intervenors' memorandum of points and authorities in support of demurrer, p.4:5-24.)
[2] The FAC states "Defendant ZBS Law, LLP, was originally named as a party in the subjection action. Pursuant to the Defendant's Declaration of Non-Monetary Status that was filed with the court, this party is no longer party to the action." (FAC, ¶ 4.)

FAC cannot state facts against them as bona fide purchasers of the subject property for value; (3) a nonjudicial foreclosure sale followed by the purchaser's unlawful detainer judgment and writ of possession collectively terminates Plaintiff's legal title and right of possession in the subject property; and (4) there can be no alleged violation of the Homeowner Bill of Rights because there is a conclusive presumption as to a bona fide purchaser that the sale has been conducted regularly and properly. Intervenors also move to strike paragraphs 38 and 44 of the FAC and paragraph 4 of the prayer of the FAC seeking to rescind the foreclosure of the property and to restore title to Plaintiff.

I. INTERVENORS' DEMURRER TO THE FAC

The FAC does not name Intervenors and does not allege any facts regarding Intervenors

As Intervenors argue, the FAC fails to name them and does not allege any facts regarding them. In opposition, Plaintiff argues that "[w]hile [Intervenors] were all innocent purchasers for value, the Plaintiff specifically alleged that each of the named parties were co-conspirators, aiders & abettors, or agents of the Defendants." (Plaintiff's opposition to Intervenors' demurrer to FAC ("Opposition"), p.2:10-13.) However, this argument lacks merit since Intervenors were not named parties.

Intervenors also argue that "[i]t is important to note that [Intervenors] are in the business of purchasing distressed homes at foreclosure sales and reselling them at substantial profit… [and i]n the *Estate of Yates*, the Court found that a party who regularly attended foreclosure auctions and purchased multiple properties throughout the duration of his/her business was not a bona fide purchaser for value." (Opposition, pp.3:26, 4:1-6, citing *Estate of Yates* (1994) 25 Cal.App.4th 511, 523.)

In *Estate of Yates*, *supra*, the court stated that "[w]here as here, the trustee's deed recites that all requirements of law have been complied with, '... failure to comply with the notice requirements is a ground to cancel the sale only as against a party who is not a bona fide purchaser.'" (*Estate of Yates*, *supra*, 24 Cal.App.4th at p. 523, quoting *Napue v. Gor-Mey West, Inc*. (1985) 175 Cal.App.3d 608, 621; see also *Melendrez v. D & I Investment, Inc*. (2005) 127 Cal.App.4th 1238, 1256 (Sixth District stating that "the trustor cannot set aside a foreclosure sale to a BFP 'based on irregularities in the foreclosure sale process, except in the case of fraud'"); see also *Lona v. Citibank, N.A*. (2011) 202 Cal.App.4th 89, 102 (Sixth District stating that "[t]he purchaser at a foreclosure sale takes title by a trustee's deed… [i]f the trustee's deed recites that all statutory notice requirements and procedures required by law for the conduct of the foreclosure have been satisfied, a rebuttable presumption arises that the sale has been conducted regularly and properly; this presumption is conclusive as to a bona fide purchaser"); see also *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 831-832 (stating that "the purchaser at a nonjudicial foreclosure sale receives title under a trustee's deed free and clear of any right, title or interest of the trustor… [a] properly conducted nonjudicial foreclosure sale constitutes a final adjudication of the rights of the borrower and lender… [o]nce the trustee's sale is completed, the trustor has no further rights of redemption… [i]f the trustee's deed recites that all statutory notice requirements and procedures required by law for the conduct of the foreclosure have been satisfied, a rebuttable presumption arises that the sale has been conducted regularly and properly; this presumption is conclusive as to a bona fide purchaser… [t]hus, as a general rule, a trustor has no right to set aside a trustee's deed as against a bona fide purchaser for value by attacking the validity of the sale… [w]here the trustor is precluded from

suing to set aside the foreclosure sale, the trustor may recover damages from the trustee").) The *Estate of Yates* court then noted that "[w]hile mere inadequacy of price, standing alone, will not justify setting aside a trustee's sale, gross inadequacy of price coupled with even slight unfairness or irregularity is a sufficient basis for setting the sale aside." (*Id*.; but see *Dreyfuss v. Union Bank of Cal*. (2000) 24 Cal.4th 400, 409 (California Supreme Court stating that "[w]here there is no irregularity in a nonjudicial foreclosure sale and the purchaser is a bona fide purchaser for value, a great disparity between the sales price and the value of the property is not a sufficient ground for setting aside the sale… a sale price of only 25 percent of the value of the property was not grounds for invalidating the sale").)

First, as Intervenors argue, Plaintiff's argument has been expressly disapproved by the Sixth District as a misinterpretation of *Estate of Yates*:

> Borrowers claim that a purchaser at a nonjudicial foreclosure sale is not bona fide if the purchaser "(1) [is] a speculator who frequently purchases at foreclosure sales, and (2) pays substantially less than the value of the property." We disagree…. Nowhere did the court in *Yates* hold that the fact that the buyer is experienced in purchasing foreclosure properties necessarily disqualifies him or her from being a BFP under section 2924…. Further, we see no reasoned basis for a blanket rule that would preclude a buyer from being a BFP simply because he or she has experience in foreclosure sales and purchases the property at less than fair market value. The law is designed to protect outside buyers who part with value and have no knowledge or notice of a defect. In this respect, the presumption of section 2924 affords protection to the novice and experienced foreclosure buyer alike, and "was clearly designed to provide incentives to the public at large to attend the sales in order to obtain a better price at the sale." [Citation.] A holding that an experienced foreclosure buyer perforce cannot receive the benefits of the law as a BFP if he or she buys property for substantially less than its value would chill participation at trustees' sales by this entire class of buyers, and, ultimately, could have the undesired effect of reducing sales prices at foreclosure.

(*Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1252-1253.)

Further, in *Estate of Yates*, the property was valued at $120,000 with $100,000 in equity in the property, and the buyer, who had purchased between 300 to 500 properties in foreclosure in the past 16 years, purchased the property for $12,000—a tenth of its value. (*Id*. at pp.515-523.) The court noted that "the court was entitled to conclude that Diamond had notice of an irregularity in the sale and of the estate's interest in the property… [b]ased [on the above, and] particularly the gross inadequacy of the sales price." (*Id.* at p.523.) Unlike *Estate of Yates*, Plaintiff neither argues nor alleges that the amount paid by Intervenors was grossly inadequate. The trustee's deed upon sale indicates that the amount paid by Intervenors was $1,287,000. (See Intervenors' request for judicial notice in support of motion to expunge lis pendens, exh. 1.) Further, the FAC fails to allege the value of the condominium unit, the number of prior purchases at foreclosure sales made by Intervenors, or any other facts

suggesting an irregularity of the sale or unfairness. Thus, even if *Estate of Yates* stands for the proposition asserted by Plaintiff, it is nevertheless clearly distinguishable from the instant case.

Moreover, it does not appear that Plaintiff can amend the FAC so as to state a cause of action against Intervenors. Here, as previously stated, Plaintiff has already characterized Intervenors as "all innocent purchasers for value." (Opposition, p.2:10-11.) Plaintiff's counsel has also "offered to dismiss these parties from the action" (*id*. at p.2:16-17), effectively conceding that she cannot show in what manner she can amend the FAC. (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 (stating that "Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading"); see also *Hendy v. Losse* (1991) 54 Cal.3d 723, 742 (stating same); see also *Vann v. City and County of San Francisco* (2023) 97 Cal.App.5th 1013, 1020 (stating same).)

Intervenors' demurrer to the FAC on the ground that it fails to name Intervenors and fails to allege facts regarding Intervenors is SUSTAINED without leave to amend.

II. INTERVENORS' MOTION TO STRIKE PORTIONS OF THE FAC

Intervenors move to strike paragraphs 38 and 44 of the FAC and paragraph 4 of the prayer of the FAC on the ground that the allegations are irrelevant, false or improper. These portions of the FAC seek the rescission of the foreclosure sale and the restoration of the possession to Plaintiff. As previously indicated, the California Supreme Court has stated that "a trustor has no right to set aside a trustee's deed as against a bona fide purchaser for value by attacking the validity of the sale." (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 831.) Instead, "[w]here the trustor is precluded from suing to set aside the foreclosure sale, the trustor may recover damages from the trustee." (*Id*. at p.832.)

Here, Plaintiff fails to allege or demonstrate that Intervenors are not purchasers for value. Instead, Plaintiff complains that:

> Any reasonably [sic] litigant or attorney representing that client would have accepted the Request for Dismissal and leave it that [sic]. Yet, not only did Hoffman refuse to accept dismissal, he went out of his way to have his client joined as third party Defendants. Through their insistence to remain as parties to this action, the only reasonable inference to be drawn is that the Toeri Defendants, by their conduct, manifested [its] adoption or [its] belief in [the statements'] truth" as to the allegations pleaded by Ms Wang[.]

(Opposition, pp.5:23-27, 6:1-2.)

Plaintiff is confused. Here, Intervenors are necessary parties to the FAC since the FAC seeks to rescind the foreclosure sale and restore title and possession to Plaintiff and from Intervenors. (See FAC, ¶¶ 38. 44, prayer, ¶ 4.) Intervenors' "insistence" to be parties to the FAC is not the manifestation of any adoption or belief as to Plaintiff's allegations; rather, Intervenors are properly seeking involvement in a lawsuit that affects their rights and property.

Intervenors are correct that Plaintiff may not set aside the foreclosure sale as they are "innocent purchasers for value." Instead, Plaintiff's recourse is to recover damages from the trustee. Intervenors' motion to strike paragraphs 38 and 44 of the FAC and paragraph 4 of the prayer of the FAC is hereby GRANTED without leave to amend.

Paragraphs 38 and 44 of the FAC and paragraph 4 of the prayer of the FAC is hereby stricken.

The Court will prepare the Order.

- oo0oo -

Calendar Line 6
Case Name: Hassan Abpikar vs Sasan Momeni et al
Case No.: 22CV402216

Defendant has made a motion for terminating sanctions due to Plaintiff's failure to provide discovery and sanctions as ordered by the Court on July 28, 2023. Plaintiff filed an opposition, but filed it five days late.

Defendant first asks this Court to strike the opposition for being untimely. Because Defendant has not been prejudiced by Plaintiff's failure to file a timely opposition, the Court will consider the opposition. Plaintiff is now warned, however, that going forward the Court will not accept late filings or filings not in compliance with the rules, absent extraordinary circumstances.

Plaintiff asks this court to deny Defendant's motion, claiming that he provided the discovery in August of 2023 and that he provided the monetary sanctions last week. The proofs of service attached to Plaintiff's motion to demonstrate that the discovery and the sanctions were all sent to the wrong address for Defendant. Accordingly, Plaintiff has failed to show that he timely provided the discovery to Defendant.

Defendant seeks terminating sanctions and dismissal of the action for Plaintiff's failure to abide by the Court's order. Yet, terminating sanctions are severe and are to be used sparingly. Terminating sanctions may be appropriate "where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules . . ." *Mileikowsky v. Trent Healthsystem* (2005) 128 Cal.App.4th 262, 279-80. Discovery sanctions are to be imposed incrementally and are meant to ensure that a party provides discovery, not to be punitive. "Discovery sanctions are intended to remedy discovery abuse, not to punish the offending party. Accordingly, sanctions should be tailored to serve that remedial purpose, should not put the moving party in a better position than he would otherwise have been had he obtained the requested discovery, and should be proportionate to the offending party's misconduct." (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223.) Two facts are generally needed before a court orders sanctions: (1) a failure to comply; and (2) the failure must be willful. (*Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1102; see also *New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1426 [typical requirement of a prior order "provides some assurance that such a potentially severe sanction will be reserved for those circumstances where the party's discovery obligation is clear and the failure to comply with that obligation is clearly apparent"]; *Moofly Productions, LLC v. Favila* (2020) 46 Ca1.App.5th 1, 11 ["[i]n general, a court may not impose issue, evidence, or terminating sanctions unless a party disobeys a court order," citing *New Albertsons*].)

In this case, Plaintiff did violate the Court's order, as he did not send the sanctions within 30 days and Defendant did not receive the discovery within 30 days. While it is possible that Plaintiff attempted to comply in a timely fashion and simply erred in sending the discovery to the wrong address, it seems unlikely. If that were the case, it would seem that the parties would have discovered the error before now.

In any event, because the discovery is attached to Plaintiff's opposition, Defendant now has the discovery. As such, the Court is not inclined to grant terminating sanctions, as that

would put Defendant in a better position that he is in with the discovery. The Court agrees with Defendant, however, that some sanction is warranted for Plaintiff's failure to provide the discovery absent a second motion and nine additional months. As sanction for his tardiness and failure to abide the Court's order, Plaintiff shall be precluded from admitting at trial any documentary evidence not now provided on the issues currently before the Court. Plaintiff shall send Defendant the amount of sanctions previously ordered forthwith. Defendant shall submit the final order.

- oo0oo -