

1. 5059 GREYSON CREEK DRIVE, LLC V. PERSEVERE LENDING INC. ET AL. 22CV1328

Plaintiff moves for a preliminary injunction restraining Defendants Persevere Lending, Inc. ("Persevere"), Pacific Premier Trust Custodian fbo Kenneth B. Berry IRA, Pacific Premier Trust Custodian fbo Burton Leitzell IRA, Dan Larkin and Mundi Larkin (collectively, "The Beneficiaries"), WFG National Title Insurance Company ("WFG"), The Foreclosure Company, Inc. ("TFC"), and all other persons or entities with interest in the real property at issue in the present matter (collectively "Defendants") from engaging in the following acts: (1) completing the foreclosure sale of the real property located at 5059 Greyson Creek Drive, El Dorado Hills, CA 94526 while the present action is pending; and (2) issuing or recording any new or amended Notice of Trustee's Sale in connection with the foreclosure of the real property located at 5059 Greyson Creek Dr., El Dorado Hills, CA 94526. Plaintiffs Motion, Memorandum of Points and Authorities, Declaration of Alejandro Martinez, Declaration of Brian Morrow, Request for Judicial Notice and Proposed Order were all filed and served on January 24, 2023.

The Beneficiaries filed and served their opposition papers on February 9th and 10th. Defendants' Opposition to Plaintiffs Motion for Preliminary Injunction is supported by a Declaration of Hillary A. Lehmann and a Declaration of Damon Bowers. Defendants also filed evidentiary objections to the declaration of Alejandro Martinez and to the declaration of Brian Morrow. The remaining defendants, WFT and TFC have not opposed the preliminary injunction. Plaintiff filed its Reply to Opposition, Evidentiary Objections to Declaration of Daman Bowers, and a Declaration of Alejandro Martinez on February 16, 2023; however, due to court error these documents were not received and reviewed by the court prior to the initial hearing date on this matter. The court issued its tentative ruling which became the order of the court on February 24, 2023. Thereafter, the reply documents were brought to the attention of the court. The court vacated its February 24th ruling and re-set the matter for the present hearing date.

Request for Judicial Notice

In support of its motion for a preliminary injunction, Plaintiff has requested the court take judicial notice of the following: (1) Notice of Default and Election to Sell Under Deed of Trust, recorded in the El Dorado County Recorder's Office on June 9, 2022, Document Number 2022-0025085; and (2) The Complaint filed in the present action. Plaintiff has attached copies of each of the subject documents as exhibits to its request. Defendants have not objected to the request.

Judicial notice is a mechanism which allows the court to take into consideration matters which are presumed to be indisputably true. California Evidence Code Sections 451, 452, and 453 govern the circumstances in which judicial notice of a matter may be taken. While Section 451 provides a comprehensive list of matters that *must* be judicially noticed, Section 452 sets forth matters which *may* be judicially noticed, including "[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States" and "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Cal. Ev. Code § 452 (d) & (h).

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Section 452 provides that the court “may” take judicial notice of the matters listed therein, while Section 453 provides a caveat that the court “shall” take judicial notice of any matter “specified in Section 452 if a party requests it and: (a) Gives each adverse party sufficient notice of the request...to enable such adverse party to prepare to meet the request; and (b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.” Cal. Evid. Code § 453.

The documents which are the subject of this request fall well within the confines of Section 452. Plaintiff complied with the requirements of Section 453, giving each party enough notice of the requests and giving the court sufficient information, including copies of the documents, to enable the court to take judicial notice thereof. Accordingly, Plaintiff’s request for judicial notice is granted.

Evidentiary Objections

Both parties submitted evidentiary objections to declarations submitted on either side. See attached rulings on evidentiary objections.

Preliminary Injunction

According to Plaintiff, Persevere, and The Beneficiaries loaned Plaintiff \$1,200,000 for the construction of a custom home on the property located at 5059 Greyson Creek Drive, El Dorado Hills, CA 94526. A Construction Deed of Trust and Assignment of Rents was filed to secure the loan on April 30, 2021 (the “Deed of Trust”). The Deed of Trust identified Defendant WFG as trustee. On or about December 19, 2021, Plaintiff submitted a draw request in the amount of \$290,000 which was estimated to cover the costs of labor and materials to complete the project such that a certificate of occupancy could be obtained. Persevere sent a general contractor, Mr. Silvani, to inspect the project prior to the approval of the draw request. Plaintiff maintains that Mr. Silvani missed his appointment to inspect the project and likely never inspected it at all. After the dispute over the alleged inspection by Mr. Silvani, Persevere agreed to wire an initial payment on the draw request in the amount of \$100,000. However, the \$100,000 was wired to the wrong account and was never received by Plaintiff. Plaintiff continued to send follow up communications requesting the \$100,000, though, according to Plaintiff, the only response received was a notice of default.

On June 9, 2022 a Notice of Default and Election to Sell Under Deed of Trust was filed by TFC on behalf WFG (“Notice of Default”). The Notice of Default cites Plaintiff’s alleged failure to make payments as the reason for the default. However, according to Plaintiff, this is in contrast to a notice of default letter (the “Default Letter”) delivered to Plaintiff which cites numerous other grounds for the default. The inconsistencies between the two, Plaintiff argues, causes the Notice of Default filed with the county to be fraudulent and defective and therefore, the property cannot be foreclosed upon. Additionally, Plaintiff denies each of the purported breaches as stated in the Default Letter. Even if Plaintiff had breached, Plaintiff argues the breach would have been excused due to the prior breach of Defendants.

Plaintiff argues further that it should not be required to tender the amount owing under the note in order to obtain the requested relief because a sale has not yet occurred, and the circumstances of the matter would make it unjust to require Plaintiff to pay a debt which

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includes \$100,000 that Plaintiff never received in the first place. Finally, Plaintiff points to the fact that the harm suffered by Defendants in the face of an injunction is nominal as they will continue to maintain the deed of trust until a final determination on the merits is made. In contrast, Plaintiff argues it will suffer irreparable harm if the property is sold since Plaintiff would have no right to set aside such a sale to a bona fide third party purchaser even if Plaintiff wins in the merits of the case.

The Beneficiaries maintain that Plaintiff defaulted on the loan over a year ago and the reason stated in the Notice of Default is correct. Simply because Persevere sent a letter identifying other defaults committed by Plaintiff, that does not render the filed Notice of Default unenforceable. The Beneficiaries argue that Plaintiff is unlikely to prevail on the merits of the case because it has been in default since March of 2022 and there is no legal basis to excuse the default. The Beneficiaries state that on March 15th a payoff demand letter was sent to Plaintiffs which stated a payoff amount of \$938,483.99. This amount did not include the \$100,000 that Plaintiff claims it did not receive, and still Plaintiff has not offered to reinstate the loan. The Beneficiaries state that there was no breach on their behalf which would excuse Plaintiff's default. According to The Beneficiaries, they had wide latitude to withhold payments after a breach and that is what they did.

Further, The Beneficiaries assert that Plaintiff has failed to establish that it would be irreparably harmed if the preliminary injunction were to be denied; whereas The Beneficiaries would suffer harm by the imposition of the injunction. According to The Beneficiaries, given the current status of the incomplete project on the property, the foreclosure and the present litigation, the Beneficiaries have been unable to obtain insurance for the property which leaves the value of their collateral at a substantial risk until the foreclosure can be completed. Notwithstanding the foregoing, if the court is inclined to grant the injunction, The Beneficiaries request the court require Plaintiff to post a bond in the amount of \$1,157,635.98 to protect The Beneficiaries from losing their security on the property in the event it is damaged before a determination on the merits of the claim is made.

Plaintiff's reply documents essentially reiterate its position that it is likely to prevail on the merits, especially in light of the fact that the opposition has revealed the imposition of \$5,011.90 per day in arguably unenforceable penalties. Plaintiff further notes the inconsistencies in the amount owed pursuant to the declaration of Mr. Bowers and that stated in the Notice of Sale. Plaintiff argues that it only stopped payments on the loan after the Beneficiaries had materially breached their obligations under the loan and therefore Plaintiff's performance under the contract was excused. Finally, Plaintiff notes that it contracted with a third-party purchaser ("Purchaser") to build the custom home and thereafter sold the property to the Purchaser. Plaintiff reveals that it is being sued for specific performance under its contract with Purchaser in a separate action in this county (Case No. 22CV0690)(the "Brost Action").

"An injunction may be granted in the following cases: ¶ (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually. ¶ (2) When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or

irreparable injury, to a party to the action. ¶ (3) When it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual. ¶ (4) When pecuniary compensation would not afford adequate relief. ¶ (5) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief. ¶ (6) Where the restraint is necessary to prevent a multiplicity of judicial proceedings. ¶ (7) Where the obligation arises from a trust.” Cal. Civ. Pro. § 526(a). The general purpose of such an injunction is to preserve the status quo until there is a final determination of the matter on the merits. The term “status quo” has been defined to include the last actual peaceable, uncontested status which preceded the pending controversy. Voorhies v. Greene, 139 Cal.App.3d 989, 995 (1983).

As a threshold issue, the moving party must establish that it will suffer irreparable harm in the absence of an injunction. See Cal. Civ. Pro. § 526(2) & (4); See also Butt v. State of Cal., 4 Cal. 4th 668, 677-678 (1992). Once the threshold issue has been satisfied, the court is to consider two separate but interrelated factors: (1) The likelihood the moving party will prevail on the merits; and (2) the balancing of the harm suffered by the moving party if the injunction were to be denied as opposed to the harm suffered by the opposing party if the injunction were to be granted. Smith v. Adventist Health System/West, 182 Cal. App. 4th 729, 749 (2010). The moving party bears the burden of establishing a prima facie showing of entitlement to injunctive relief. O’Connell v. Sup. Ct., 141 Cal. App. 4th 1452, 1481 (2006). Such a burden is not to be taken lightly as “[i]t is said: ‘To issue an injunction is the exercise of a delicate power, requiring great caution and sound discretion, and rarely, if ever, should [it] be exercised in a doubtful case...’ [Citations].” Ancora-Citronelle Corp. v. Green, 41 Cal. App. 3d 146, 148 (1974).

Irreparable Harm

“[T]he extraordinary remedy of injunction cannot be invoked without showing the likelihood of irreparable harm.’ [Citations]. ‘Irreparable harm’ does not mean ‘injury beyond the possibility of repair or beyond possible compensation in damages.” Donahue Schriber Realty Group, Inc. v. Nu Creation Outreach, 232 Cal. App. 4th 1171, 1184 (2014). An irreparable injury is established where the evidence submitted shows actual or threatened injury to property or personal rights which cannot be compensated by an ordinary damage award. See Brownfield v. Daniel Freeman Marina Hospital, 208 Cal. App. 3d 405, 410 (1989). In instances involving the conveyance of real property, the property is generally considered unique and therefore monetary damages are insufficient compensation. See Civ. Code § 3387; See also Stockton v. Newman, 148 Cal. App. 2d 558, 564 (1957). However, where the property holds only a marketing interest and Plaintiff intends to sell it, money damages are compensable and therefore no irreparable harm occurs as the result of a forfeiture sale. See Jessen v. Keystone Sav. & Loan Ass’n, 142 Cal. App. 3d 454, 458 (1983).

The threatened harm at hand is the selling of the property through a foreclosure auction. Plaintiff argues that real property is considered unique and therefore money damages are insufficient to compensate for its loss of the property. The court previously denied the injunction on the basis that Plaintiff essentially concedes that to Plaintiff, the value of the property rests in Plaintiff’s ability to sell it for financial gain and payoff the note. See Memo. of

Points and Auth., Jan. 24, 2023, pg. 10:22-24 (“Payment of the final draw under the Note is material to the entire Loan Agreement because without it, Plaintiff cannot complete the Project, *sell the Property and re-pay the Loan per the terms of the Note.*”) (Emphasis added). It was unclear to the court at that time that Plaintiff is in fact being sued in a separate lawsuit (Case No. 22CV0690) wherein the intended purchasers of the home are suing for specific performance under their contract with Plaintiff. This outstanding suit could potentially subject Plaintiff to a judgment for specific performance to build a custom home on the specific property located at 5059 Greyson Creek Drive, El Dorado Hills, CA 94526. Given that property in California is generally considered unique to the purchaser, such a judgment could not be satisfied if the property were sold off at auction. As such, Plaintiff has established the potential for irreparable injury and the court now turns to balancing the likelihood of prevailing on the merits against the harm suffered by each of the parties in the face of granting or denying the injunction.

Balancing – Potential Harm

With the potential for harm to Plaintiff having been established, the court must weigh that harm against the harm that may befall Defendants in the event the injunction is granted. Similar to the court’s analysis in determining the existence, or lack thereof, of a potential for irreparable harm, in balancing the potential harm to each of the respective parties, the court is to consider “...such things as the inadequacy of other remedies, the degree of irreparable harm, and the necessity of preserving the status quo.’ [Citations].” *Donahue, Supra* at 1177.

In the event the injunction is granted, the harm averred by Defendants is twofold. First, The Defendants will not be able to sell the property immediately and they would incur the cost and expense of beginning the foreclosure process again should a determination on the merits be in their favor. In other words, issuance of an injunction would impose a delay in Defendants’ ability to exercise their rights, not a divestment of those rights entirely. While the court is sympathetic to Defendants’ position, in light of the potential harm to Plaintiff, the delay to Defendants is rather insignificant.

The Defendants also indicate that that they have been unable to obtain insurance on the property thus leaving the property vulnerable to devaluation. Again, this argument is unconvincing. Courts have found that the mere possibility of a potential harm is not sufficient to warrant issuing an injunction. It stands to reason, that where Plaintiff has shown the potential for irreparable injury, the fact that Defendants surmise a mere possibility of harm is not sufficient to overcome Plaintiff’s need for an injunction. See *Hahn v. Curtis*, 73 Cal. App. 2d 382 (1946) (Stating the mere possibility of potential injury is not sufficient to warrant an injunction). That said, even if an injunction is issued and some damage to the property occurs while litigation is ongoing, the decreased value to the property is easily compensable by money damages.

Where, as here, Plaintiff’s potential harm is irreparable by money damages alone and Defendants’ is more tenuous and easily remedied by money damages, the facts weigh in favor of granting the requested injunction.

Balancing - Prevailing on the Merits

The second prong to be considered is whether Plaintiff has established either a “reasonable probability” or “some possibility” that it can prevail on the merits of its claim.

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Robbins v. Sup. Ct., 38 Cal. 3d 199 (1985); *See also* Jamison v. Dept. of Transp., Cal. App. 5th 356, 362 (2016). Where irreparable harm has been established by Plaintiff but there has been no showing that it will succeed on the merits, the injunction is to be denied. *See* 14859 Moorpark Homeowners Ass'n, 63 Cal. App. 4th 1396 (1998). The reason being, there is no justification in delaying the harm which, although irreparable, is likely unavoidable. *See Id.* Of course, “[t]he granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the right claimed by him. [Citations.] The general purpose of such an injunction is the preservation of the status quo until a final determination of the merits of the action. [Citations.]” Voorhies v. Greene, 139 Cal. App. 3d 989, 995 (1983).

The complaint in this matter asserts claims for breach of contract, negligence, intentional interference with contract, intentional interference with prospective economic relations, negligent interference with prospective economic relations, injunctive relief, accounting, declaratory relief and violations of Business and Professions Code § 17200 et. seq. There has quite clearly been a breakdown of the contractual relations between the parties. And while Defendants maintain that the issue is clear: Plaintiff stopped payment on its loan; therefore, Defendant was no longer required to issue disbursements and it has the right to foreclose on the property. In actuality, it appears to be much more complicated than that. Plaintiff argues that Defendant failed to perform under the contract prior to Plaintiff discontinuing payments. Therefore, according to Plaintiff, its performance was excused, and payments were not required to be made. There does appear to be sufficient factual basis that a trial on the merits may result in a judgment in favor of Plaintiff.

Even if a trial on the merits does not result entirely in favor of Plaintiff, the dispute regarding how much is owed on the loan and exorbitant amount of interest accruing on the loan may result in a judgment where Plaintiff is ordered to pay significantly less than the amount sought by Defendant. This is especially in light of the legal maximum allowable interest and the moratorium on penalties in a contract both of which require a factual determination that will need to be made by the jury as to whether the per diem amount of \$5,011.90 constitutes valid legal interest, or improper damages.

Given the myriad of factual disputes between the parties, Plaintiff has established a reasonable chance of its prevailing on the merits of the case, whether it be in its entirety or at least with regard to the amount owed. That said, the court is of the opinion that it is proper to maintain the status quo until these disputes can be resolved on the merits. The preliminary injunction is granted. Defendants Persevere Lending, Inc., Pacific Premier Trust Custodian fbo Kenneth B. Berry IRA, Pacific Premier Trust Custodian fbo Burton Leitzell IRA, Dan Larkin and Mundi Larkin, WFG National Title Insurance Company, The Foreclosure Company, Inc., and all other persons or entities with interest in the real property at issue in the present matter are restrained from engaging in the following acts until a determination on the merits of the case has been reached: (1) completing the foreclosure sale of the real property located at 5059 Greyson Creek Drive, El Dorado Hills, CA 94526 while the present action is pending; and (2)

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issuing or recording any new or amended Notice of Trustee's Sale in connection with the foreclosure of the real property located at 5059 Greyson Creek Dr., El Dorado Hills, CA 94526.

Bond

On granting an injunction, the court must require a bond, or allow a deposit in lieu thereof, in an amount sufficient to account for the damages the restrained party "...may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction." Cal. Civ. Pro. § 529; Cal. Civ. Pro. § 995.710. "The trial court's function is to estimate the harmful effect which the injunction is likely to have on the restrained party, and to set the undertaking at that sum. [Citations]...In reviewing the trial court's estimation, the first step is to identify the types of damages which the law allows a restrained party to recover in the event that the issuance of the injunction is determined to have been unjustified. The sole limit imposed by the statute is that the harm must have been proximately caused by the wrongfully issued injunction. [Citations]" Abba Rubber Co. v. Seaquist, 235 Cal. App. 3d 1, 14 (1991). "The amount of damage on account of a decline in the adequacy of the security is the difference between the amount for which the security would have sold at the enjoined foreclosure sale and the amount for which it would have sold at a foreclosure sale immediately following the injunction period, not to exceed the difference between the amount of the obligation secured and the amount which would have been received from the later foreclosure sale..." Surety Sav. & Loan Assn. v. Nat'l Automobile & Cas. Ins. Co., 8 Cal. App. 3d 752 757 (1970) *citing* Yellen v. Fidelity & Cas. Co. of New York, 1115 Cal. App. 434 (1931). Amounts such as attorneys' fees proximately resulting from the injunction, as well as any fees and costs Defendant may incur for security services in protecting the property may also be recoverable and are to be considered in determining the bond amount. *See generally* Surety Sav. & Loan Assn., *Supra*.

Defendants request a bond in the amount of \$1,157,635 which is the amount due under the loan. They argue that a bond in this amount is the only way to ensure the Beneficiaries do not lose security on the loan in the event the property is damaged prior to the conclusion of the pending litigation. The court finds this to be too speculative. There is no pending danger that the property will be damaged or destroyed to the extent that it renders the property completely without value to secure the loan. Moreover, it would be inequitable to require Plaintiff to post the amount due under the loan when that amount is one of the factual disputes to be resolved at trial. Further, the court is concerned with the legal validity of the per diem interest on the loan and as such, it would be inequitable to require that amount be paid at bond as well.

Instead, the court recognizes the expense that Defendants may incur in seeking to dissolve the injunction as well as the potential for volatility in the value of real property which may affect its resale value at a later date. That said, the court finds that the amount of damages Defendant may reasonably foreseeably incur as a proximate result of the injunction is unlikely to exceed \$100,000.

Plaintiff is ordered to post a bond or submit a deposit in accordance with Civil Procedure Section 995.710, in the amount of \$100,000 by no later than April 17, 2023.

TENTATIVE RULING #1: PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE IS GRANTED. PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION IS GRANTED. PLAINTIFF IS ORDERED TO POST A

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BOND OR SUBMIT A DEPOSIT IN ACCORDANCE WITH CIVIL PROCEDURE SECTION 995.710, IN THE AMOUNT OF \$100,000 BY NO LATER THAN APRIL 17, 2023. DEFENDANTS PERSEVERE LENDING, INC., PACIFIC PREMIER TRUST CUSTODIAN FBO KENNETH B. BERRY IRA, PACIFIC PREMIER TRUST CUSTODIAN FBO BURTON LEITZELL IRA, DAN LARKIN AND MUNDI LARKIN, WFG NATIONAL TITLE INSURANCE COMPANY, THE FORECLOSURE COMPANY, INC., AND ALL OTHER PERSONS OR ENTITIES WITH INTEREST IN THE REAL PROPERTY AT ISSUE IN THE PRESENT MATTER ARE RESTRAINED FROM ENGAGING IN THE FOLLOWING ACTS UNTIL A DETERMINATION ON THE MERITS OF THE CASE HAS BEEN REACHED: (1) COMPLETING THE FORECLOSURE SALE OF THE REAL PROPERTY LOCATED AT 5059 GREYSON CREEK DRIVE, EL DORADO HILLS, CA 94526 WHILE THE PRESENT ACTION IS PENDING; AND (2) ISSUING OR RECORDING ANY NEW OR AMENDED NOTICE OF TRUSTEE'S SALE IN CONNECTION WITH THE FORECLOSURE OF THE REAL PROPERTY LOCATED AT 5059 GREYSON CREEK DR., EL DORADO HILLS, CA 94526.

NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999). NOTICE TO ALL PARTIES OF A REQUEST FOR ORAL ARGUMENT AND THE GROUNDS UPON WHICH ARGUMENT IS BEING REQUESTED MUST BE MADE BY TELEPHONE OR IN PERSON BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; El Dorado County Local Rule 8.05.07. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

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ATTORNEYS AT LAW

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Statements	Basis for Objection	Ruling
Declaration of Damon Bowers		
<p>1. Declaration of Damon Bowers in Opposition of Motion ("Bowers Decl."), ¶ 4</p> <p>"Without the Beneficiaries' knowledge, on or around May 3, 2021, less than one month after Plaintiff executed the Loan Agreement, Plaintiff recorded two junior deeds of trust on the Property totaling \$187,243.78. I am informed and believe that by recording these junior deeds of trust, Plaintiff had over-leveraged the Property and that there was no remaining equity for Plaintiff. A true and correct copy of a preliminary title report reflecting that two junior deeds of trust on the Property were recorded on May 3, 2021 is attached hereto as Exhibit B."</p>	<p>Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.)</p> <p>Improper Legal Conclusion; Improper Opinion. (Evid. Code §§ 800, 803.)</p> <p>Lacks Foundation. (Evid. Code §§ 403, 405.)</p> <p>No Personal Knowledge (Evid. Code § 702.)</p> <p>Document Speaks for Itself (Evid. Code § 1523.)</p>	<p>Sustained: <u> X </u></p> <p>Overruled: _____</p>
<p>2. Bowers Decl. ¶ 5</p> <p>"In or around February 2022, Plaintiff stopped paying the amounts due under the Loan."</p>	<p>Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.)</p> <p>Improper Legal Conclusion; Improper Opinion. (Evid. Code §§ 800, 803.)</p> <p>Lacks Foundation (Evid. Code §§ 403, 405.)</p> <p>No Personal Knowledge (Evid. Code § 702.)</p>	<p>Sustained: _____</p> <p>Overruled: <u> X </u></p>
<p>3. Bowers Decl. ¶ 7</p> <p>"By the time of the February 9 Letter, it had become clear to Persevere that Plaintiff had rendered the Property valueless and that it would not be able to complete the Project. Notwithstanding that Persevere had sole discretion to withhold the undisbursed Loan proceeds, Persevere had no choice but to do so in order to protect the Beneficiaries. Persevere was confident that disbursing the remaining Loan proceeds would be throwing good money after bad."</p>	<p>Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.)</p> <p>Improper Legal Conclusion; Improper Opinion. (Evid. Code §§ 800, 803.)</p> <p>Lacks Foundation (Evid. Code §§ 403, 405.)</p> <p>No Personal Knowledge (Evid. Code § 702.)</p>	<p>Sustained: <u> X </u></p> <p>Overruled: _____</p>

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Statements	Basis for Objection	Ruling	
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	<p>4. Bowers Decl. ¶ 9</p> <p>“By way of background, Persevere wired the \$100,000 at issue, but Plaintiff claims that it never received it. In my capacity as Owner and President of Persevere, I oversaw an extensive forensic analysis of the email it received from Plaintiff’s General Manager, Alejandro Martinez, that provided the wire instructions for the \$100,000—Plaintiff alleged to me that these wire instructions were fraudulent. Persevere’s analysis concluded that there is no evidence that Persevere’s or Martinez’s email was hacked or otherwise compromised. Persevere provided Martinez ample opportunity to participate in its investigation of the matter and to demonstrate otherwise, but Martinez refused.”</p>	<p>Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.)</p> <p>Improper Legal Conclusion; Improper Opinion. (Evid. Code §§ 800, 803.)</p> <p>Lacks Foundation (Evid. Code §§ 403, 405.)</p> <p>Hearsay (Evid. Code § 1200.)</p> <p>No Personal Knowledge (Evid. Code § 702.)</p>	<p>Sustained: <u> X </u></p> <p>Overruled: _____</p>
	<p>5. Bowers Decl. ¶ 10.</p> <p>“The Loan became overdue in or around March 1, 2022. On or around March 15, 2022, Persevere sent Plaintiff the Beneficiary’s Demand for Payoff (the “March 15 Demand”) that set forth a payment amount of \$938,438.99—an amount that was more than \$37,000 lower than what Plaintiff claimed was due in its February 17 Letter. The payoff amount in the March 15 Demand did not include the disputed \$100,000 disbursement. A true and correct copy of the March 15 Demand is attached hereto as Exhibit C.”</p>	<p>Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.)</p> <p>Improper Legal Conclusion; Improper Opinion. (Evid. Code §§ 800, 803.)</p> <p>Lacks Foundation (Evid. Code §§ 403, 405.)</p> <p>No Personal Knowledge (Evid. Code § 702.)</p>	<p>Sustained: _____</p> <p>Overruled: <u> X </u></p>
	<p>6. Bowers Decl. ¶ 11</p> <p>“Despite its receipt of the March 15 Demand, Plaintiff did not make any additional Loan payments. Thus, on or around June 9, 2022, at Persevere’s direction, Defendant The Foreclosure Company, Inc. (“TFC”), in its capacity as an agent for Defendant WFG National Title Company (“WFG”), recorded a Notice</p>	<p>Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.)</p> <p>Improper Legal Conclusion; Improper Opinion. (Evid. Code §§ 800, 803.)</p> <p>Lacks Foundation (Evid. Code §§ 403, 405.)</p>	<p>Sustained: _____</p> <p>Overruled: <u> X </u></p>

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 ATTORNEYS AT LAW

Statements	Basis for Objection	Ruling
1 2 3 4 of Default and Election to Sell Under Deed of Trust in the El Dorado County Recorder's Office as Document Number 2022-0025085 (the "NOD"). A true and correct copy of the NOD is attached hereto as Exhibit D."	No Personal Knowledge (Evid. Code § 702.)	
5 6 7 8 9 10 11 12 7. Bowers Decl. ¶ 13 "As of the date of this filing, Plaintiff has not made any additional Loan payments, nor has it made any offer to reinstate the Loan. The Loan has a current outstanding balance of \$1,157,635.98. This amount includes per diem interest of \$5,011.90, a construction reserve credit of \$291,429.68, and a one month interest credit for \$8,990; the amount does not include the \$100,000 fund that is disputed by Plaintiff."	Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.) Improper Legal Conclusion; Improper Opinion. (Evid. Code §§ 800, 803.) Lacks Foundation (Evid. Code §§ 403, 405.) No Personal Knowledge (Evid. Code § 702.)	Sustained: _____ Overruled: <u> X </u>
13 14 15 16 17 18 19 20 21 22 23 8. Bowers Decl. ¶ 14 "I understand that Plaintiff has failed to obtain proper insurance for the Property. In response, I have attempted to obtain, on behalf of the Beneficiaries, insurance for the Property to protect its value and, thus, the security for the Loan. I have been unable to obtain any insurance for the Property because (a) the Project is incomplete; (b) the Property is in foreclosure; and (c) the Plaintiff has instituted the instant litigation. Thus, the longer the Property sits in foreclosure without a sale, the longer the Property is at risk of harm without insurance thereby putting the value of the Beneficiaries collateral in real and substantial danger."	Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.) Improper Legal Conclusion; Improper Opinion. (Evid. Code §§ 800, 803.) Lacks Foundation (Evid. Code §§ 403, 405.) Hearsay (Evid. Code § 1200.) No Personal Knowledge (Evid. Code § 702.)	Sustained: _____ Overruled: <u> X </u>

3/16/23

1 **EVIDENTIARY OBJECTIONS TO DECLARATION OF BRIAN MORROW; AND**
 2 **PROPOSED ORDER**

MATERIAL OBJECTED TO	GROUNDS FOR OBJECTION	RULING ON THE OBJECTION
3 4 1. Declaration of Brian Morrow 5 in Support of Motion ("Morrow 6 Decl."), ¶ 9. 7 "I received a letter, dated February 8 9, 2022, from counsel for 9 Persevere, titled " <i>Notice of Default 10 and Demand for Indemnification 11 Pursuant to 5059 Greyson Creek 12 Drive Loan Agreement and 13 Continuing Guaranty.</i> " ... Each of 14 the "defaults" identified in this 15 letter were false. I am informed and 16 believe that Persevere had no 17 intention to fund the rest of the 18 Loan and was simply looking for an 19 excuse to find a "default" so that it 20 wouldn't have to. Persevere 21 explicitly stated in its letter that it 22 would not be funding the balance of 23 the Loan." 24 25 26 27 28	Lacks Foundation (Evid. Code §§ 403, 405.) No Personal Knowledge (Evid. Code § 702.) Document Speaks for Itself (Evid. Code § 1523.) Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.) Improper Legal Conclusion; Improper Opinion. (Evid. Code §§ 800, 803.)	Sustained: <u> X </u> Overruled: <u> </u>

MATERIAL OBJECTED TO	GROUNDS FOR OBJECTION	RULING ON THE OBJECTION
<p>2. Morrow Decl., ¶ 11.</p> <p>“Pursuant to the written notice of default delivered to me and dated February 9, 2022, default was declared because: (1) the balance of the Loan was allegedly insufficient to complete the Project and the scope of the Project had purportedly been impermissibly reduced; (2) Plaintiff allegedly improperly used Loan funds; (3) Plaintiff has allegedly permitted junior liens to be recorded against the Property without lender’s consent; and (4) Plaintiff has allegedly failed to keep proper Project accounting. None of these assertions are true. Regardless, however, not one of these defaults matches the reason for default stated in the NOD (i.e. Plaintiff’s alleged failure to make monthly payments when due).”</p>	<p>Lacks Foundation (Evid. Code §§ 403, 405.)</p> <p>No Personal Knowledge (Evid. Code § 702.)</p> <p>Document Speaks for Itself (Evid. Code § 1523.)</p> <p>Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.)</p> <p>Improper Legal Conclusion; Improper Opinion. (Evid. Code §§ 800, 803.)</p>	<p>Sustained: _____</p> <p>Overruled: <u> X </u></p>
<p>3. Morrow Decl., ¶ 13.</p> <p>“Persevere is, and was at the time of refusing to fund the balance of the Loan due under the Note, well aware that the Property is in escrow with independent purchasers and that the Project must be in COO condition in order to close. Persevere was also well aware that the remainder of the agreed upon Loan funds were needed to timely complete the Project per Plaintiff’s contract with said independent third-party buyers. Without the full funds owing under the Note, Plaintiff cannot complete the Project, sell the Property and re-pay the Loan per the terms of the Note.”</p>	<p>Lacks Foundation (Evid. Code §§ 403, 405.)</p> <p>No Personal Knowledge (Evid. Code § 702.)</p> <p>Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.)</p> <p>Improper Legal Conclusion; Improper Opinion. (Evid. Code §§ 800, 803.)</p>	<p>Sustained: <u> X </u></p> <p>Overruled: _____</p>

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MATERIAL OBJECTED TO	GROUNDS FOR OBJECTION	RULING ON THE OBJECTION
<p>4. Morrow Decl., ¶ 14.</p> <p>“Plaintiff has performed all, or substantially all, of the obligations required by Plaintiff to be performed under the terms of the Loan Agreement, except for those that Plaintiff has been prevented from performing due to the actions or omissions of the Beneficiaries.”</p>	<p>Lacks Foundation (Evid. Code §§ 403, 405.)</p> <p>No Personal Knowledge (Evid. Code § 702.)</p> <p>Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.)</p> <p>Improper Legal Conclusion; Improper Opinion. (Evid. Code §§ 800, 803.)</p>	<p>Sustained: _____</p> <p>Overruled: <u>X</u></p>
<p>5. Morrow Decl., ¶ 15.</p> <p>“As a direct result of the Beneficiaries’ refusal to fund the balance of the Loan per the terms of he Note, Plaintiff has been harmed in an amount no less than the balance of the Loan proceeds owed in the sum of no less than \$290,000.00. Furthermore, Plaintiff has been harmed by its having to come out of pocket to pay vendors, subcontractors, and material suppliers in order to prevent the filing of mechanics’ liens against the Property, due to increased cost of materials, by Plaintiff’s inability to complete the Project due to lack of required funds, and inability to obtain a new loan to complete the Project due to the presence of the recorded NOD, which has caused Plaintiff to suffer further damages in relation to its agreement with the third-party buyers.”</p>	<p>Lacks Foundation (Evid. Code §§ 403, 405.)</p> <p>No Personal Knowledge (Evid. Code § 702.)</p> <p>Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.)</p> <p>Improper Legal Conclusion; Improper Opinion. (Evid. Code §§ 800, 803.)</p>	<p>Sustained: _____</p> <p>Overruled: <u>X</u></p>

Dated: 3/16/23



 Judge of the Superior Court

**EVIDENTIARY OBJECTIONS TO DECLARATION OF ALEJANDRO MARTINEZ;
AND PROPOSED ORDER**

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MATERIAL OBJECTED TO	GROUNDS FOR OBJECTION	RULING ON THE OBJECTION
<p>1. Declaration of Alejandro Martinez in Support of Motion ("Martinez Decl."), ¶ 9.</p> <p>"The Beneficiaries were not very familiar the process of requesting and funding construction draws, so I had to spend a lot of time educating them on loan disbursements and draws for construction projects. Each time a draw was requested, it would take Persevere approximately 10 days to send a clerk from their office, with little to no knowledge of construction inspections, to the Project site to check on its progress and take pictures prior to disbursing the funds and I would still have to chase the wire transfer with Persevere's office manager. There have been persistent issues throughout the Project with the Beneficiaries' ability to fund the loan amounts, even necessitating me to expressly ask if they even had the funds to make the disbursements, which I was assured by Damon Bowers, president of Persevere, they did. Yet funding remained an issue, often taking upward of 10 days after delivery of the funds before it could actually clear and be withdrawn for use on the Project. These issues caused numerous repeated delays on the Project."</p>	<p>Lacks Foundation (Evid. Code §§ 403, 405.) Hearsay (Evid. Code § 1200.) Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.) Improper Opinion. (Evid. Code §§ 800, 803.) Argumentative (Evid. Code § 765.)</p>	<p>Sustained: <u> X </u></p> <p>Overruled: <u> </u></p>

	MATERIAL OBJECTED TO	GROUNDS FOR OBJECTION	RULING ON THE OBJECTION
1 2 3 4 5 6 7 8 9 10 11 12	2. Martinez Decl., ¶ 10. "Throughout the Project, I had many conversations and written communications with Mr. Bowers regarding changes to the budget costs of the Project. Supply chain issues had caused the prices of construction materials and lumber to increase unexpectedly. During these conversations, I came to an agreement with Mr. Bowers that Persevere would fund the balance of the Loan and Plaintiff would use the remainder of the Loan funds to complete the Project sufficiently to obtain a certificate of occupancy ("COO")."	Lacks Foundation (Evid. Code §§ 403, 405.) Hearsay (Evid. Code § 1200.) Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.)	Sustained: _____ Overruled: <u> X </u>
13 14 15 16 17 18 19 20 21 22	3. Martinez Decl., ¶ 11. "In accordance with this understanding and agreement, I submitted a draw request on or about December 19, 2021, in the amount of \$290,000.00 to cover the costs of labor and materials needed to timely complete the Project to COO. This was done on Persevere's form, and in the same manner as all prior draw requests. There was no request from Persevere or any Beneficiary for additional information or documentation following this draw request."	Lacks Foundation (Evid. Code §§ 403, 405.) Document Speaks for Itself (Evid. Code § 1523.)	Sustained: _____ Overruled: <u> X </u>
23 24 25 26 27 28	4. Martinez Decl., ¶ 12. "However, about a week after submitting this draw request, I received a call from a Marc Silvani ("Silvani"), a general contractor purportedly hired by Persevere to inspect the progress of the Project before the draw request could be	Lacks Foundation (Evid. Code §§ 403, 405.) Hearsay (Evid. Code § 1200.) Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.)	Sustained: _____ Overruled: <u> X </u>

	MATERIAL OBJECTED TO	GROUNDS FOR OBJECTION	RULING ON THE OBJECTION
1 2 3 4 5	approved, requesting an appointment to inspect the site. This was the first time I had ever heard of Mr. Silvani; he had no prior involvement in the Project or the Loan as far as I am aware."		
6 7 8 9 10 11 12 13 14 15 16 17 18	5. Martinez Decl., ¶ 13. "In my experience, it is not common practice in typical construction lending situations to hire a general contractor to inspect the progress of a project before issuing a draw, as they tend to attempt to undermine the work they are inspecting in hopes the project will be awarded to them instead. In typical construction lending situations, the lender sends a licensed inspector to inspect a project and deliver a report prior to disbursement of loan funds. The lender will review the percentage of completeness of each stage of the project from the inspector's report and disburse funds according to the construction budget."	Lacks Foundation (Evid. Code §§ 403, 405.) No Personal Knowledge (Evid. Code § 702.) Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.) Improper Opinion. (Evid. Code §§ 800, 803.)	Sustained: _____ Overruled: <u> X </u>
19 20 21 22 23 24 25 26 27 28	6. Martinez Decl., ¶ 14. "In my experience, it is also typical that the lender assigns an agent to follow the progress of the project throughout its evolution, adjusting the budget to reflect changes in prices of materials and labor. Persevere did none of these things. Instead, they engaged Silvani, a general contractor, to get involved at the 11 th hour. What is worse, Silvani never even inspected the site in person. He missed the appointment he had scheduled with me and later claimed that he inspected it the day prior to the	Lacks Foundation (Evid. Code §§ 403, 405.) No Personal Knowledge (Evid. Code § 702.) Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.) Improper Opinion. (Evid. Code §§ 800, 803.)	Sustained: _____ Overruled: <u> X </u>

	MATERIAL OBJECTED TO	GROUNDS FOR OBJECTION	RULING ON THE OBJECTION
1 2 3 4 5	scheduled appointment (which is highly unlikely given it was pouring rain the day he claims to have inspected the Project and he would not have been able to go inside)."		
6 7 8 9 10 11 12 13 14 15	7. Martinez Decl., ¶ 15. "During a subsequent joint call requested by Damon Bowers, it was evident Silvani had no idea what was going on with the Project given his many mistakes of fact and misunderstanding, seemingly conflating this Project with another. Silvani was openly and unnecessarily hostile and combative toward me during this call, to the point the conversation was cut short, and Mr. Bowers ended up apologizing to me for Silvani's behavior."	Lacks Foundation (Evid. Code §§ 403, 405.) No Personal Knowledge (Evid. Code § 702.) Hearsay (Evid. Code § 1200.) Document Speaks for Itself (Evid. Code § 1523.) Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.) Improper Opinion. (Evid. Code §§ 800, 803.) Argumentative (Evid. Code § 765.)	Sustained: _____ Overruled: <u> X </u>
16 17 18 19 20	8. Martinez Decl., ¶ 16. "Following this conversation, Mr. Bowers informed me that Persevere was going to pay \$100,000.00 of the requested \$290,000.00 disbursement and send another "inspector" to look at the Project."	Lacks Foundation (Evid. Code §§ 403, 405.)	Sustained: _____ Overruled: <u> X </u>
21 22 23 24 25 26 27 28			

	MATERIAL OBJECTED TO	GROUNDS FOR OBJECTION	RULING ON THE OBJECTION
<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p>	<p>9. Martínez Decl., ¶ 18.</p> <p>“I was informed on Friday, January 7, 2022, that said \$100,000.00 was going to be wired to Plaintiff’s bank account. When the funds were still not received by January 11, 2022, I followed up on the status of the funds via an email sent to Michelle Pedrotti, office manager of Persevere, in which I re-provided the correct wire instructions. The instructions were to wire funds to Plaintiff’s Bank of America account. However, the funds were not wired until January 12, 2022, and were wired to the wrong account, as evidenced by the wire confirmation provided to me by Mr. Bowers upon my request. The wire confirmation subsequently provided by Mr. Bowers for the funds wired on January 12, 2022 shows the funds were wired to a JB [sic] Morgan Chase Bank account. This was clearly the wrong account.”</p>	<p>Lacks Foundation (Evid. Code §§ 403, 405.)</p> <p>Hearsay (Evid. Code § 1200.)</p> <p>Document Speaks for Itself (Evid. Code § 1523.)</p> <p>Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.)</p> <p>Improper Opinion. (Evid. Code §§ 800, 803.)</p>	<p>Sustained: _____</p> <p>Overruled: <u> X </u></p>
<p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p>	<p>10. Martínez Decl., ¶ 19.</p> <p>“When I informed Mr. Bowers that Plaintiff had never received the funds purportedly wired to it on January 12, 2022, it was insisted by Mr. Bowers that I had either provided the wrong wire instructions or that someone had hacked Persevere’s computer system and had changed the wire instructions after the fact. Mr. Bowers suggested that Plaintiff was responsible in some way for this alleged hacking. Dubious, but willing to provide whatever assistance I could to get to the bottom of the issue, I had independent IT personnel</p>	<p>Lacks Foundation (Evid. Code §§ 403, 405.)</p> <p>No Personal Knowledge (Evid. Code § 702.)</p> <p>Hearsay (Evid. Code § 1200.)</p> <p>Document Speaks for Itself (Evid. Code § 1523.)</p> <p>Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.)</p> <p>Improper Legal Conclusion; Improper Opinion. (Evid. Code §§ 800, 803.)</p>	<p>Sustained: <u> X </u></p> <p>Overruled: _____</p>

MATERIAL OBJECTED TO	GROUNDS FOR OBJECTION	RULING ON THE OBJECTION
<p>investigate the issue and they determined that I had provided the correct wire instructions and that if there was any breach of Persevere's system, it was not from Plaintiff's end. I am informed and believe that the Beneficiaries were looking for excuses not to distribute any more funds for the Project because they themselves lacked the requisite funds despite their prior affirmative representations that they had the funds necessary to fulfill their obligations under the Note."</p>		
<p>11. Martinez Decl., ¶ 20. "Regardless, Plaintiff never received the \$100,000.00 that was purportedly wired on January 12, 2022. Persevere was fully aware of this."</p>	<p>Lacks Foundation (Evid. Code §§ 403, 405.) No Personal Knowledge (Evid. Code § 702.) Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.)</p>	<p>Sustained: _____ Overruled: <u> X </u></p>
<p>12. Martinez Decl., ¶ 21. "I continued to send follow up communications to Mr. Bowers regarding the \$100,000.00 wire but Persevere responded by sending Brian Morrow, Manager of Plaintiff, on or about February 9, 2022, a "Notice of Default and Demand for Indemnification Pursuant to 5059 Greyson Creek Drive Loan Agreement and Continuing Guaranty", listing as purported grounds for default the numerous inaccuracies cited by Mr. Silvani related to the progress of the Project ... It was clear upon receipt of this letter that Persevere had no intention of re-sending the \$100,000.00 draw and was looking for excuses to declare a default and proceed with foreclosure of the Property without any real cause or</p>	<p>Lacks Foundation (Evid. Code §§ 403, 405.) No Personal Knowledge (Evid. Code § 702.) Document Speaks for Itself (Evid. Code § 1523.) Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.) Improper Legal Conclusion; Improper Opinion. (Evid. Code §§ 800, 803.) Argumentative (Evid. Code § 765.)</p>	<p>Sustained: <u> X </u> Overruled: _____</p>

	MATERIAL OBJECTED TO	GROUNDS FOR OBJECTION	RULING ON THE OBJECTION
1 2 3 4	justification. Persevere explicitly stated in its letter that it would not be funding the balance of the Loan.”		
5 6 7 8 9 10 11 12 13	13. Martinez Decl., ¶ 22. “Following receipt of this Notice of Default letter, I requested a payoff demand from persevere. The demand I received in response included the \$100,000.00 wired to the wrong account on or about January 12, 2022. When this was brought to Persevere’s attention, it refused to remove the \$100,000.00, knowing that it had been wired to the wrong account and that Plaintiff had received no portion of said funds.”	Lacks Foundation (Evid. Code §§ 403, 405.) No Personal Knowledge (Evid. Code § 702.) Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.) Improper Legal Conclusion;	Sustained: _____ Overruled: <u>X</u>
14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	14. Martinez Decl., ¶ 24. “Pursuant to the written notice of default delivered to Mr. Morrow and dated February 9, 2022, default was declared because: (1) the balance of the Loan was allegedly insufficient to complete the Project and the scope of the Project had purportedly been impermissibly reduced; (2) Plaintiff allegedly improperly used Loan funds; (3) Plaintiff has allegedly permitted junior liens to be recorded against the Property without lender’s consent; and (4) Plaintiff has allegedly failed to keep proper Project accounting. None of these assertions are true. Regardless, however, not one of these defaults matches the reason for default stated in the NOD (i.e. Plaintiff’s alleged failure to make monthly payments when due).”	Lacks Foundation (Evid. Code §§ 403, 405.) No Personal Knowledge (Evid. Code § 702.) Document Speaks for Itself (Evid. Code § 1523.) Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.) Improper Legal Conclusion; Improper Opinion. (Evid. Code §§ 800, 803.)	Sustained: _____ Overruled: <u>X</u>

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MATERIAL OBJECTED TO	GROUNDS FOR OBJECTION	RULING ON THE OBJECTION
<p>15. Martínez Decl., ¶ 25.</p> <p>“Persevere is, and was at the time of refusing to fund the balance of the Loan due under the Note, well aware that the Property is in escrow with independent purchasers and that the Project must be in COO condition in order to close. Persevere was also well aware that the remainder of the agreed upon Loan funds were needed to timely complete the Project per Plaintiff’s contract with said independent third-party buyers. Without the full funds owing under the Note, Plaintiff cannot complete the Project, sell the Property and re-pay the Loan per the terms of the Note.”</p>	<p>Lacks Foundation (Evid. Code §§ 403, 405.)</p> <p>No Personal Knowledge (Evid. Code § 702.)</p> <p>Hearsay (Evid. Code § 1200.)</p> <p>Inadmissible Speculation and Conclusions (Evid. Code §§ 400, 403, 410.)</p> <p>Improper Legal Conclusion; Improper Opinion. (Evid. Code §§ 800, 803.)</p>	<p>Sustained: <u> X </u></p> <p>Overruled: <u> </u></p>

Dated: 3/16/23



Judge of the Superior Court

2. CAPITAL ONE BANK V. DAVID SILVA

PCL20210464

Plaintiff seeks an order for judgment on the pleadings entered against Defendant. The moving papers were served on January 23, 2023 and filed thereafter on January 25, 2023. Defendant has not opposed the motion.

Request for Judicial Notice

Plaintiff requests judicial notice of Plaintiffs Request for Admissions propounded to Defendant; and the November 18, 2022 court order deeming admitted Plaintiffs Requests for Admissions. Defendant has not opposed the request.

Judicial notice is a mechanism which allows the court to take into consideration matters which are presumed to be indisputably true. California Evidence Code Sections 451, 452, and 453 govern the circumstances in which judicial notice of a matter may be taken. While Section 451 provides a comprehensive list of matters that *must* be judicially noticed, Section 452 sets forth matters which *may* be judicially noticed, including "[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States" as well as "facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute." Cal. Ev. Code § 451.

Section 452 provides that the court "may" take judicial notice of the matters listed therein, while Section 453 provides a caveat that the court "shall" take judicial notice of any matter "specified in Section 452 if a party requests it and: (a) Gives each adverse party sufficient notice of the request...to enable such adverse party to prepare to meet the request; and (b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter." Cal. Evid. Code § 453.

The documents which are the subject of this request fall within the confines of Section 452. Defendant complied with the requirements of Section 453, by giving each party enough notice of the requests and giving the court sufficient information, including copies of the documents, to enable the court to take judicial notice thereof. After such notice given to Defendant, there has been no opposition filed. Accordingly, Defendant' request for judicial notice is granted.

Motion for Judgment on the Pleadings

The crux of Plaintiff's argument rests on the Requests for Admission which were deemed admitted by court order on November 18, 2022. Among the admissions were requests establishing the truth of all statements and allegations set forth in the complaint, and a request establishing the total amount due to Plaintiff is \$10,149.93.

A party may move for judgment on the pleadings on the basis "...that the complaint states facts sufficient to constitute a cause or causes of action against the defendant and the answer does not state facts sufficient to constitute a defense to the complaint." Cal. Civ. Pro. § 438(c)(1)(A). The grounds for such a motion must appear on the face of the pleading or from any matter of which the court takes judicial notice. *Id.* at (d). When ruling on a motion for judgment on the pleadings, the court is to accept as true all material allegations contained in the challenged pleading but not those facts which are contrary to matters which have been

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judicially noticed. Mechanical Contractors Assn. v. Greater Bay Area Assn., 66 Cal. App. 4th 672 (1998). “The courts...will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed. [Citations].” Del E. Webb Corp. v. Structural Materials Co., 123 Cal. App. 3d 593, 604 (1981). In instances where a party’s Request for Admission responses are incontrovertible, the court may properly take judicial notice thereof and may consider them in ruling on a motion for judgment on the pleadings. Del E. Webb Corp. v. Structural Materials Co., 123 Cal. App. 3d 593, 604 (1981) *citing* Stencel Aero Engineering Corp. v. Sup. Ct., 56 Cal. App. 3d 978 (1976) *and* Able v. Van Der Zee, 256 Cal. App. 2d 728 (1967).

Here, the admitted responses have been conclusively established by court order. See Cal. Civ. Pro. § 2033.410(a). Defendant simply cannot refute the admitted facts without first obtaining leave of court to withdraw the admission. Defendant has made no attempt to do so. Further, he has not opposed the Request for Judicial notice or provided the court any reason why the admissions are disputable and should not be judicially noticed.

Taking into consideration the admissions, it has been conclusively established that “[e]very statement or allegation contained in Plaintiff’s Complaint is true and correct” and “[t]he principal amount of \$10,149.93 due set forth in the Complaint filed in this matter is correct.” Memo of Points & Auth., filed Jan. 25, 2023, p. 4:1-4:7.

A motion for judgment on the pleadings may be granted with or without leave to amend. Cal. Civ. Pro. § 438(h)(1). Generally speaking, leave to amend is to be liberally granted. Mendoza v. Continental Sales Co., 140 Cal. App. 4th 1395 (2006) (“When there is a reasonable possibility that a defect in pleading can be cured by amendment, the trial court considering the motion for judgment on the pleadings abuses its discretion by not granting leave to amend...”). However, where the defective pleading is not reasonably susceptible to cure, it is proper for the court to decline leave to amend. *Id.* When leave to amend is not granted, “...then judgment shall be entered forthwith in accordance with the motion granting judgment to the moving party.” Cal. Civ. Pro. § 438(h)(3).

In the matter at hand, Defendant is precluded from admitting any evidence in dispute of the claims set forth in the Complaint simply by way of his discovery admissions. While Defendant may seek leave to withdraw the admissions, in the four months since the court’s order, Defendant has made no effort to do so. Thus, it does not seem reasonably likely that he has any intention of doing so, even if he were granted leave to amend.

In light of the foregoing, Plaintiff’s Motion for Judgment on the Pleadings is granted without leave to amend.

TENTATIVE RULING #2: PLAINTIFF’S REQUEST FOR JUDICIAL NOTICE IS GRANTED. PLAINTIFF’S MOTION FOR JUDGMENT ON THE PLEADINGS IS GRANTED WITHOUT LEAVE TO AMEND. NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT’S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999). NOTICE TO ALL PARTIES OF A REQUEST FOR ORAL ARGUMENT AND THE GROUNDS UPON WHICH ARGUMENT IS BEING REQUESTED MUST BE MADE BY TELEPHONE

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OR IN PERSON BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; El Dorado County Local Rule 8.05.07. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

3. DONALD OLDS DAVIES vs. CSAA INSURANCE GROUP

22CV1145

MOTION TO COMPEL FURTHER RESPONSES TO FORM INTERROGATORIES, SET ONE
MOTION TO COMPEL FURTHER RESPONSES TO SPECIAL INTERROGATORIES, SET ONE
MOTION TO COMPEL FURTHER RESPONSES TO REQUEST FOR PRODUCTION OF DOCUMENTS,
SET ONE

On February 14, 2023, pursuant to Code of Civil Procedure Sections 2031.310 and 2030.300, Defendants filed a Motion to Compel responses to the following items of discovery:

- (1) Form Interrogatories, Set One;
- (2) Special Interrogatories, Set One; and
- (3) Request for Production of Documents, Set One.

Defendant also requests sanctions against Plaintiff in the amount of \$880 pursuant to Code of Civil Procedure Sections 2023.010 and 2023.030.

According to Defendants' Motion and supporting documents, the discovery requests at issue were propounded on October 27, 2022, and Plaintiff served verified responses on November 26, 2022. Defendants sent a detailed meet and confer letter on January 9, 2023 with a January 11, 2023 deadline to respond. On January 11, 2023, the parties agreed to extend the deadline for 30 days. Although Defendants' counsel telephoned Plaintiff and left a voice message as well as sending an email on February 14, 2023, Plaintiff has not further responded to discovery, nor has he responded to the Defendants' communications.

Defendants' counsel filed this Motion on February 14, 2023, each of which included a proof of service via U.S. mail and email to Plaintiff's email and postal address on record. As of the date of this Tentative Ruling there has been no opposition filed to the Motion.

The court has reviewed in detail the discovery requests and responses that are the subject of this Motion to Compel, and finds that Defendants' discovery is, in general, relevant to the subject matter of the litigation and either admissible or reasonably calculated to lead to admissible evidence. Cal. Code Civ. Pro. § 2017.010. Plaintiff responded to most of the requests that are the subject of this Motion that such requests were vague, overbroad or irrelevant, or simply failed to respond at all. While Plaintiff is entitled to raise objections to discovery requests, Plaintiff's responses at issue are inadequate, incomplete, or evasive, and Plaintiff's stated objections are too general. Cal. Code Civ. Pro. § 2031.310. Nor is there any evidence in the record that Plaintiff engaged with Defendants counsel to narrow or define the scope of the requests so that Plaintiff could provide meaningful and/or relevant responses. Accordingly, the court finds that Plaintiff has failed to make a good faith effort to respond to the discovery requests specified in the motion. Defendants' motion included a meet and confer declaration demonstrating a reasonable and good faith attempt to informally resolve the issues as required by Code of Civil Procedure Section 2016.040, to which Plaintiff has not responded.

Sanctions

Code of Civil Procedure Section 2023.030 provides that, following notice and an opportunity for a hearing, monetary sanctions may be imposed against a party who unsuccessfully makes or opposes a Motion to Compel unless the court finds substantial justification or other circumstances that would make such sanctions unjust. The amount requested represents attorney fees at the rate of \$175 per hour for four hours, as well as \$180 in filing fees. See, Declaration of Joel C. Knaack, February 14, 2023.

TENTATIVE RULING #3: DEFENDANT'S MOTIONS TO COMPEL FURTHER RESPONSES TO FORM INTERROGATORIES, SET ONE, SPECIAL INTERROGATORIES, SET ONE AND REQUESTS FOR PRODUCTION SET ONE ARE GRANTED. PLAINTIFF IS ORDERED TO PROVIDE AMENDED RESPONSES TO THE AFOREMENTIONED DISCOVERY NO LATER THAN MARCH 31, 2023. PLAINTIFF IS FURTHER ORDERED TO PAY SANCTIONS IN THE AMOUNT OF \$880. SANCTIONS ARE TO BE PAID TO PLAINTIFF'S COUNSEL NO LATER THAN MARCH 31, 2023.

NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999).

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LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

4. J.G. WENTWORTH ORIGINATIONS, LLC V. PAYEE

23CV0090

Prior to approving a petition for the transfer of payment rights, this court is required to make a number of express written findings pursuant to Cal. Insurance Code § 10139.5, including the following:

1. That the transfer is in the best interests of the Payee, taking into account the welfare and support of Payee's dependents.
2. That the Payee has been advised in writing by the Petitioner to seek independent professional advice) and has either received that advice or knowingly waived in writing the opportunity to receive that advice. This finding is supported by Exhibits B and E, to the Petition. See *a/so*, Petition at p. 10.
3. That the transferee has complied with the notification requirements and does not contravene any applicable statute or the order of any court or government authority. In this case, it is not clear that the required disclosure statement was provided at least ten days prior to the execution of the transfer agreement, as required by Cal., Ins. Code § 10136, because both documents were executed on January 16, 2023. See Exhibits A and B.
4. That the transfer does not contravene any applicable statute or the order of any court or government authority. In this case, the Petition (which is verified by a Vice President of J.G. Wentworth) at page 8 represents that Payee has no court-ordered child support obligations. However, the payee's Affidavit, attached as Exhibit D, is silent as to any court-ordered child or spousal support obligations, although the Affidavit does say that "there are no other interested parties that are entitled to notice of this transfer . . ." Exhibit D, para. 7.

In addition to the express written findings required by the applicable statutes, Cal. Ins. Code § 10139.5(b) requires the court to determine whether, based on the totality of the circumstances and considering the payee's age, mental capacity, legal knowledge, and apparent maturity level, the proposed transfer is fair and reasonable, and in the payee's best interests. The court may deny or defer ruling on the petition if the court believes that the payee does not fully understand the proposed transaction, and/or that the payee should obtain independent legal or financial advice regarding the transaction.

The Petition submitted generally contains the information required by the Insurance Code for court approval of this transaction; however, its representations are verified by the Petitioner, not by the payee. The Petition asserts that certain information, such as employment information for the payee that would establish that the payee and her dependent children are not reliant on the payments proposed to be transferred for their support, will be submitted in an accompanying declaration, but no such declaration was filed.

Some information required by the statutes was included in the Petition through a verified statement of the Petitioner, but without any representation by the payee herself, such as:

1. Whether there are any court orders for child or spousal support;

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2. The purpose of the proposed transfer;
3. The payee's financial/economic situation;
4. Whether the payments to be transferred are required for future medical care or necessary living expenses;
5. Whether the payee was satisfied with the terms of prior payment transfer agreements that she had entered into;
6. Whether, within the past five years, the payee has attempted to enter into any such agreement with this Petitioner or any other entity that were denied by a court, or that were withdrawn or dismissed prior to a determination on the merits;
7. Whether the payee or her family are facing a hardship situation.

This court cannot grant this Petition in compliance with the applicable statutes, without more information as described above, either through submittal of a declaration of the payee, or by her appearance and testimony.

TENTATIVE RULING #4: THIS MATTER IS CONTINUED TO APRIL 14, 2023 AT 8:30 A.M. IN DEPARTMENT 9. THE PARTIES ARE ORDERED TO SUBMIT A DECLARATION OF THE PAYEE ADDRESSING THE AFOREMENTIONED DEFICIENCIES AT LEAST TEN DAYS PRIOR TO THE CONTINUED HEARING DATE. IN THE ALTERNATIVE, IF THE PARTIES WISH TO CALL FOR A HEARING BY REQUESTING ORAL ARGUMENT AS NOTED BELOW, THE ISSUES MAY BE ADDRESSED ORALLY.

NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999).

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**TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING
INFORMATION WILL BE PROVIDED.**

5. JILL RUSSI V. TRAIL BROTHERS, LLC

21CV0315

On February 2, 2023, judgment creditor filed an Application and Order for Appearance and Examination to require judgment debtor Zachary Leyden to appear on March 17, 2023. Personal service of notice of the examination hearing, meeting the requirements of Code of Civil Procedure § 415.10, is required. Cal. Code Civ. Pro. § 708.110(d).

Counsel for the judgment creditor has filed a declaration stating that there have been multiple attempts to personally serve the judgment debtor and attached two declarations by process servers stating that attempts to effectuate personal service have been unsuccessful. Accordingly, the judgment creditor requests postponement of the examination hearing date to give more time to accomplish personal service.

TENTATIVE RULING #5: THE HEARING ON THIS MATTER IS CONTINUED TO MAY 19, 2023, AT 8:30 A.M. IN DEPARTMENT 9.

NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999).

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6. MICHAEL SPEEGLE V. MOTHER LODE, LLC

PC20150072

A Writ of Execution was issued in this case on July 22, 2022. Pursuant to Code of Civil Procedure § 706.105(b), the judgment debtor filed a Claim of Exemption ("COE") and accompanying financial statement with the Los Angeles County Sheriff as the levying officer. According to the Opposition to the COE that was filed with the court, the COE was mailed to the judgment creditor on February 14, 2023, in accordance with Code of Civil Procedure § 706.105(c).

On February 22, 2023, the judgment creditor filed an Opposition to the COE. The matter was set for hearing on March 17, 2023. The Notice of Hearing on Claim of Exemption included a proof of service directed to the judgment creditor, dated February 22, 2023, but there is no record of service of the documents making up the Opposition to the COE on the Los Angeles County Sheriff, as is required by Code of Civil Procedure § 706.1055(d)-(e).

Accordingly, having failed to meet the statutory requirements to oppose the COE there are no grounds for a hearing on the matter.

TENTATIVE RULING #6: THE MATTER IS DROPPED FROM CALENDAR DUE TO LACK OF PROPER SERVICE ON THE LEVYING OFFICER. THE LEVYING OFFICER IS DIRECTED TO COMPLY WITH CIVIL PROCEDURE SECTION 706.105(f).

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7. NAME CHANGE OF DEBRA YOUNG

22CV1731

TENTATIVE RULING #7: THE PETITION FOR NAME CHANGE IS GRANTED.

NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999).

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**8. NAME CHANGE OF WARREN MICHAEL ANDERSON
STEVIE ROSE MARIE ANDERSON 23CV0123**

Petitioner Amy Simons filed a Petition for Change of Name and Order to Show Cause (OSC) on January 27, 2023 on behalf of her two minor children, Warren Michael Anderson (age 5) and Stevie Rose Marie Anderson (age 3). The Proof of Publication was filed on March 1, 2023.

Upon review of the file, the court has yet to receive the background check for Petitioner's children, which is required under the law. Although the children are very young to have any criminal history, neither the name change statutes, nor the registered sex offender statutes make age exceptions for very young children. The matter is continued to May 12, 2023 at 8:30 a.m. in Department 9.

TENTATIVE RULING #8: THE HEARING ON THIS MATTER IS CONTINUED TO MAY 12, 2023, AT 8:30 A.M. IN DEPARTMENT 9.

NO HEARING ON THIS MATTER WILL BE HELD UNLESS A REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999).

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9. THE PEOPLE OF THE STATE OF CALIFORNIA VS US CURRENCY

22CV0916

The People have filed a petition for forfeiture of cash and other property seized by the El Dorado County Sheriff's Department. Both individuals claiming ownership of the property were served on August 26, 2022 and both have since filed their respective Claim Opposing Forfeiture.

According to The People, the property became subject to forfeiture pursuant to Health and Safety Code § 11470(f). Claimants oppose the forfeiture of the property and seek reimbursement for the costs of suit.

Pursuant to Section 11470(f), items which are subject to forfeiture include all moneys and other items of value which are furnished or intended to be furnished in exchange for a controlled substance or which are used or intended to be used to facilitate a violation of a number of enumerated Penal and Health and Safety Code sections. Health & Safety § 11470(f). "[C]onduct which is the basis for the forfeiture [must have] occurred within five years of the seizure of the property, or the filing of a petition under this chapter, or the issuance of an order of forfeiture of the property, whichever comes first." Health & Safety § 11470(f). "Any person claiming an interest in the property seized pursuant to Section 11488 may... within 30 days after receipt of actual notice, file with the superior court of the county in which the defendant has been charged with the underlying or related criminal offense or in which the property was seized ... a claim, verified in accordance with Section 446 of the Code of Civil Procedure, stating his or her interest in the property." Health and Safety Code, § 11488.5(a)(1). "If a verified claim is filed, the forfeiture proceeding shall be set for hearing on a day not less than 30 days therefrom, and the proceeding shall have priority over other civil cases." Health & Safety §11488.5(c).

It appears that all procedural matters have been complied with. The People have filed and served their petition. Claimants have filed their oppositions. While there is no Proof of Service on file for either of the opposition claims, the court finds The People and Claimants to have appeared at the December 9th hearing date and as such, any defect in service has been waived. There is no reference to a pending criminal trial in the file. Accordingly, the parties are ordered to appear to select trial dates.

TENTATIVE RULING #9: THE PARTIES ARE ORDERED TO APPEAR TO SELECT TRIAL DATES. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.