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9 HS Independence LLC

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SAN DIEGO

HS INDEPENDENCE LLC, a California Limited Liability Company,

Plaintiff,

v.

Wafa Katto, a single woman; Ninus Malan, an unmarried man; and Does 1 through 6, inclusive,

Defendants.

\_\_\_\_\_  
Ninus Malan, an individual,

Cross-Complainant,

v.

Wafa Katto, a single woman; all persons unknown claiming an interest in the property; ROES 1 through 20, inclusive,,

Defendants.

CASE NO. 37-2019-00029739-CU-OR-CTL  
**REPLY TO DEFENDANT NINUS MALAN'S OPPOSITION TO PLAINTIFF'S MOTION FOR APPOINTMENT OF A RECEIVER**

Hearing:  
Date: 11/8/19  
Time: 10:30 AM  
Dept.: 68  
Hon.: Richard S. Whitney

To defendants and their attorneys of record:

HS INDEPENDENCE LLC ("Plaintiff") herein replies to Defendant/Cross-Complainant

Ninus Malan's Opposition to Plaintiff's Motion to Appoint Receiver:

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## I. INTRODUCTORY FACTS

Defendant Malan's credibility is Suspect. His Declaration in Support of His Opposition to Plaintiff's Motion to Appoint Receiver contradicts his Verified Cross-Complaint for: (1) Quiet Title (2) Accounting (3) Partition (4) Declaratory Relief, which he signed under penalty of perjury on July 19, 2019.

In paragraph 1 of the Verified Cross-Complaint, he says that Wafa Katto and he purchased the property together. In paragraph 4 of the Declaration in Support of His Opposition, he says that he and a Salam Razuki purchased the property together.

In paragraph 5 of the Verified Cross-Complaint signed on July 19, 2019, he says that only Wafa Katto has been receiving 100% of the rents. In paragraph 15 of the Declaration in Support of His Opposition, he says that "from June 2017 until at least January 2019, Katto and/or Razuki collected 100% of the rent". And, what does he mean by "at least January 2019"?

In paragraph 6 of the Verified Cross-Complaint signed on July 19, 2019, he says that he "has never received any rental profits from the Property." In paragraph 16 of the Declaration in Support of His Opposition, he says that the tenants are still paying approximately \$6,480 per month today. How would he know this amount if he is not collecting the rents? If he is not collecting the rents, why is he allegedly OK with making the loan payments?

In each of the causes of action of the Verified Cross-Complaint, he does not mention this person named Salam Razuki once. Yet in the Declaration in Support of His Opposition, he mentions this person throughout.

During the process of gathering information on the tenants living at the property, per the Court's ruling at the last hearing, a person who represented himself to be Brian Smith called Plaintiff's attorney in response to a letter that was sent to him. He said that he lived at 2021 Harrison Ave, San Diego, CA 92113 and gave Plaintiff his phone number. He seemed agitated with both Plaintiff's attorney and defendant Malan for putting him in a situation. He was extremely unhappy with the lack of repairs and improvements being done at the property. He

1 gave Plaintiff's attorney an "earful" of complaining about how things were not getting fixed, then  
2 he went on about some storage that he needed and was promised and never received. He was  
3 displeased with both the management and the condition of the property. If this was the same  
4 person from the Declaration of Brian Smith in defendant Malan's Request for Judicial Notice, he  
5 either did not read the declaration, signed it under some kind of manipulation, or he felt  
6 differently when Plaintiff's attorney spoke with him.

7 Plaintiff does not know a person named Salam Razuki. All of the paperwork and loan  
8 documentation given to Plaintiff had Wafa Katto as the borrower. The title company insured the  
9 property in the name of Wafa Katto with Plaintiff as lender.

10 The alleged story presented in Defendant Malan's declaration is exactly why a receiver  
11 needs to be appointed. Plaintiff is stuck in the middle of a situation where people may be trying  
12 to kill other people.

13 Plaintiff was not at any foreclosure sale with respect to the loan in this case.

14 Defendant Malan admitted that the loan contract was breached. Over and over again,  
15 Defendant Malan, sometimes by himself and sometimes through his attorney, represented that he  
16 would pay everything that the lender was asking to reinstate the loan and later to payoff the loan.  
17 Then, nothing would be paid. Defendant Malan admitted that the Due on Sale Clauses in the  
18 Note and Deed of Trust were violated. Defendant Malan admitted that Plaintiff's security was  
19 significantly impaired in his \$400,000 vs. \$435,000 comparison.

20 The non-judicial foreclosure is still pending. It is just being re-noticed based on the Due  
21 on Sale Clauses contained in both the Note and Deed of Trust. On September 30, 2019, a 30-  
22 Day Notice was sent to the attorneys of Wafa Katto and Ninus Malan regarding the lender's  
23 intent to accelerate the loan based on the Due on Sale Clauses contained in both the Note and  
24 Deed of Trust. The 30-day period has expired. Now, Defendant Katto's right to reinstate the  
25 loan has expired. It is Plaintiff's position that Defendant Malan never had a right to reinstate the  
26 loan, but even if he did, his right to reinstate the loan has expired too.

## II. LEGAL ARGUMENT

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2  
3 Defendant Malan admits that he does not have an interest in the Note and Deed of Trust.  
4 See paragraph 7 of the Declaration of Ninas Malan wherein he says, “[m]y name is not on the  
5 promissory note and deed of trust and my interest in the Property is not subject to those  
6 instruments.”

7 The recording number on the Deed of Trust is 2017-0271403. The recording number on  
8 the Grant Deed is 2017-0271404. The Grant Deed was recorded after the Deed of Trust.

9 Based on the proximity to each other, it is obvious that the Grant Deed was intentionally  
10 recorded after the Deed of Trust either in an attempt to defraud the Plaintiff, or to ensure that  
11 Plaintiff’s loan had priority, or both.

12 It should be noted that Ninus Malan was named in the foreclosure action as an interested  
13 party solely because of the current state of the title. But, he has no contractual or substantive  
14 interest in this case with respect to Plaintiff.

### 15 16 **1. Plaintiff has Priority over Defendant Malan**

17  
18 California Civil Code § 2897 states the following:

19 “Other things being equal, different liens upon the same property have  
20 priority according to the time of their creation, except in cases of bottomry and  
21 respondentia.”

22 California Civil Code §2897 creates a first in time rule that prioritizes liens based on their  
23 time of creation. See Roger Bernhardt, California Mortgages, Deeds of Trust, and Foreclosure  
24 Litigation §9.43 (4th ed. 2011); see also Thaler v Household Fin. Corp., (2000) 80 Cal. App. 4th  
25 1093. Pursuant to this standard, a deed of trust executed and delivered on June 1, 2011, will  
26 have priority over a deed of trust executed and delivered on July 1, 2011.

27 The recording number on the Deed of Trust is 2017-0271403. The recording number on  
28

1 the Grant Deed is 2017-0271404. The Grant Deed was recorded after the Deed of Trust.

2 Based on the proximity to each other, it is obvious that the Grant Deed was intentionally  
3 recorded after the Deed of Trust either in an attempt to defraud the Plaintiff, or to ensure that  
4 Plaintiff's loan had priority, or both.

5 Defendant Malan was named in the foreclosure action as an interested party solely  
6 because of the current state of the title. But, he has no substantive interest in this case with  
7 respect to Plaintiff. Plaintiff has priority and should be able to easily enforce the assignment of  
8 rents clause against Defendant Katto. Defendant Katto does not even oppose it.

9  
10 **2. Code of Civil Procedure §564(b)(2) Applies**

11 The debt is well over \$400,000 at this point. Property taxes, insurance payments, loan  
12 payments, interest, late fees, foreclosure costs and legal expenses have been adding up.  
13 The last payoff quote was discounted, because Defendant Malan said that he was going to pay it.  
14 When the roof and other items of disrepair are taken into account, the debt is well over both the  
15 \$435,000 appraised value and the \$429,000 purchase price.

16  
17 **3. Code of Civil Procedure §564(b)(9) Is On Point**

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19 Code of Civil Procedure §564(b)(9) is not a catchall provision as alleged by Defendant  
20 Malan. It is on point and as powerful as any of the other three cases under §564(b) that justify a  
21 receiver.

22 CCP §564(b)(9) states that a receiver may be appointed “[i]n all other cases where  
23 necessary to preserve the property or rights of any party.”

24 The statute uses the words, “**any party**”, not “**the party**”. The rights of Defendant Katto  
25 are directly at stake. Defendant Malan has ousted her from the property and taken over all of the  
26 rents. There is no standing requirement when the statute chooses the words “any party”.

27 And even if there were as standing requirement, Plaintiff has it. Defendant Katto is  
28

1 Plaintiff's borrower. Defendant Malan is interfering with Plaintiff's contract. Things were going  
2 well until Defendant Malan came along. Certainly this creates an interest that affords Plaintiff  
3 standing. Moreover, the Court has standing to move on its own.  
4

5 **4. Code of Civil Procedure §564(b)(11) Should Be Specifically Enforced**  
6

7 The Assignment of Rents Clause should easily be specifically enforced against Wafa  
8 Katto under Code of Civil Procedure §564(b)(11). Plaintiff bargained for the Assignment of  
9 Rents Clause. It selected an income property as security for its loan when making the decision to  
10 lend. The reason was so that it could enforce the Assignment of Rents Clause and make sure that  
11 the rents would be applied to the loan in this very specific set of circumstances. Plaintiff  
12 bargained for this protection, and should receive it, otherwise what was it for? Other than the  
13 trustee, Defendant Katto is the only other party to the loan contract, and she favors enforcement  
14 of the Assignment of Rents Clause.

15 The fact that there is a dispute between Defendant Katto and Defendant Malan, and it is  
16 so convoluted, and one of the parties has been ousted from the property, and there is allegedly  
17 attempted murder involved, leaving Plaintiff feeling intimidated, and the property is in disrepair,  
18 and Defendant Malan is collecting rents, and the property expenses are being paid by Plaintiff,  
19 and Plaintiff is not being paid on its loan, means that there is no reason why a receiver should **not**  
20 be appointed.  
21

22 **5. Code of Civil Procedure §564(b)(12) Is Statutory In Nature**

23 Code of Civil Procedure §564(b)(12) is statutory based on Civil Code Section §2938 as  
24 opposed to equity based. There is an assignment of rents clause in the loan contract. Every party  
25 in the case agrees that there was a breach of that loan contract. The parties to the contract want  
26 the assignment of rents clause enforced. Code of Civil Procedure §564(b)(12) incorporates Civil  
27 Code Section §2938. There is no defense to Code of Civil Procedure §564(b)(12) in this case.  
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1 (There are no other factors, like property value involved)

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3 **6. Defendant Malan Never Tendered Payment**

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5 Defendant Malan complains about the reinstatement amounts and payoff amounts, but he  
6 never tendered an amount that he believed was the correct amount under Civil Code §2924c,  
7 subd.(a)(1).

8 Civil Code §2905 states the following:

9

10 “Redemption from a lien is made by performing, or offering to perform, the act  
11 for the performance of which it is a security, and paying, or offering to pay, the damages,  
12 if any, to which the holder of the lien is entitled for delay.”

13

14 *Miller & Starr, California Real Estate*, 4<sup>th</sup> §13:232, page 13-941-2 describes the  
15 “borrower’s” option of tendering payment this way:

16

17 “Whenever there is a curable default, reinstatement is accomplished by paying, **or**  
18 **tendering payment** [emphasis added], of the entire amount then due under the terms of  
19 the deed of trust or mortgage and the obligation secured thereby, including reasonable  
20 costs and expenses actually incurred in enforcing the terms of the obligation, deed of trust  
21 or mortgage, and trustee’s or attorney’s fees, other than the portion of the principal that  
22 would not then be due had no default occurred.”

23

24 Civil Code §2924c, subd.(a)(1) describes in excruciating detail what is necessary to  
25 include in the tender. Defendant Malan’s Declaration in Support of his Opposition to this  
26 Motion admits that he is only willing to make the monthly payments on the loan.

27 Even if Plaintiff were to refuse payment, Defendant Malan was still required to tender it

28

1 up. *Miller and Starr* describe it this way:

2  
3 “When the beneficiary fails or refuses to inform the trustor or other person  
4 seeking reinstatement of the amount necessary to cure the default, or the person seeking  
5 reinstatement believes that the beneficiary’s demand is excessive, reinstatement can be  
6 made by a tender of the amount that is actually due.” *Miller & Starr, California Real*  
7 *Estate*, 4<sup>th</sup> §13:232, page 13-942

8  
9 Civil Code §1493 requires that the offer be made in good faith. It states the following:

10  
11 “An offer of performance must be made in good faith, and in such manner as is  
12 most likely, under the circumstances, to benefit the creditor.”

13  
14 The tender is accomplished by an offer to pay all sums necessary to cure the default. *Still*  
15 *v. Plaza Marina Commercial Corp.*, 21 Cal. App. 3d 378, 385, 98 Cal. Rptr. 414 (5<sup>th</sup> Dist. 1971).


16 But none of this even applies in this case, because Defendant Malan did not make any  
17 tender at all. Defendant Malan did not disagree with the terms in the reinstatement notices or  
18 payoff quotes at the time. In fact, his attorney said that they were reasonable. Attorneys fees did  
19 not even show up until the third reinstatement amount in May 2019, and only in the amount of  
20 \$4,850.

21 Although it is difficult with all the “legal noise”, Plaintiff humbly requests that the Court  
22 bear in mind throughout these proceedings that Defendant Malan has no contractual rights  
23 against Plaintiff. He is not even the borrower. The borrower wants the receiver.

24 Dated: November 1, 2019

Respectfully submitted,

LAW OFFICES OF ROBERT A. STACK

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27 By:   
Robert A. Stack  
Attorney for HS INDEPENDENCE LLC