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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ELI AGUILERA,
Plaintiff,
v.
LOANCARE, LLC, et al.,
Defendants.

No. 2:16-cv-2377-JAM-KJN PS

FINDINGS AND RECOMMENDATIONS

Presently pending before the court is defendants Loancare, LLC’s, Stearns Lending, LLC’s, Brian Hale’s, and Kim Bingham’s (collectively “defendants”) motions to dismiss plaintiff Eli Aguilera’s¹ (“plaintiff”) original complaint. (ECF Nos. 4, 5.)² Plaintiff has opposed both motions, and defendants filed reply briefs. (ECF Nos. 6, 8.)³ Also before the court is plaintiff’s motion for a temporary restraining order (“TRO”) enjoining defendants from carrying out a pending trustee’s sale of the real property that is the subject of plaintiff’s complaint. (ECF No.

¹ Based on his use of colons and other representative terminology throughout the complaint, plaintiff appears to be an adherent of the Sovereign Citizens movement and refers to himself as “eli: [House of Aguilera].” (See ECF No. 1.) The court declines to use such fictional names, and refers to plaintiff Eli Aguilera as “plaintiff” throughout this order.

² This action proceeds before the undersigned pursuant to Local Rule 302(c)(21).

³ On November 28, 2016, these motions were submitted without oral argument pursuant to Local Rule 230(g). (ECF No. 10.)

1 7.) For the reasons set forth below, the court recommends that defendants’ motions to dismiss be
2 granted, and the complaint be dismissed without leave to amend. The court recommends further
3 that plaintiff’s motion for a temporary restraining order be denied.

4 I. Plaintiff’s Allegations

5 Plaintiff’s complaint is rambling, confusing, and largely incomprehensible. A large
6 portion of the complaint consists of a recitation of “judicial and statutory definitions” that include
7 references to “Black’s Law Dictionary, Revised Fourth Edition,” “American Jurisprudence,” and
8 plaintiff’s own “custom,” which appears to be primarily made up of references to the Bible.
9 (ECF No. 1 at 14-20.) As best the court can tell, plaintiff alleges that he obtained a loan from
10 defendant Stearns Lending, LLC to purchase real property located at 672 Ware Court, Benicia,
11 California 94510, and that defendants engaged in unidentified wrongful conduct in servicing and
12 attempting to foreclose on that real property. More specifically, plaintiff alleges that “defendants
13 lack any right to foreclose against the . . . property, and are acting unlawfully to foreclose [on] the
14 . . . property under false pretenses, without any substance, acting with appearance or semblance of
15 legal right, with an intent to deprive or defraud the true owner.” (Id. at 3.) Plaintiff alleges
16 further that “[t]he California nonjudicial foreclosure process . . . is unconstitutional, because it
17 deprives and infringes on the plaintiff’s particular fundamental principles of the common law, to
18 the ‘Bill of Rights’ to the Constitution of the United States of America, Amendment IX – ‘Rights
19 Retained by the People,’ Amendment VII – trial by jury. (Id. at 4.) Plaintiff also alleges that the
20 nonjudicial foreclosure process infringes on “plaintiff’s particular natural, inherent, and
21 unalienable rights, and plaintiff’s right of personal security, the right of personal liberty, and the
22 right to acquire and enjoy property.” (Id.) Finally, plaintiff alleges that he sent correspondence
23 (characterized by plaintiff as “notices”) to defendants, which somehow imposed contractual
24 obligations on defendants, and that defendants’ subsequent silence regarding those
25 correspondence and efforts to collect on the loan or foreclose on the property breached those
26 obligations. (Id. at 4-10.) Based on these allegations, plaintiff appears to assert three distinct
27 causes of action. Specifically plaintiff seems to assert that: (1) defendants violated California
28 Civil Code § 2429.17; (2) the nonjudicial foreclosure procedure set forth in California Civil Code

1 2429 is unconstitutional as applied to plaintiff; and (3) defendants breached contractual
2 obligations owed to plaintiff.

3 II. Defendants' Motions to Dismiss

4 A. Legal Standards

5 A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6)
6 challenges the sufficiency of the pleadings set forth in the complaint. Vega v. JPMorgan Chase
7 Bank, N.A., 654 F. Supp. 2d 1104, 1109 (E.D. Cal. 2009). Under the “notice pleading” standard
8 of the Federal Rules of Civil Procedure, a plaintiff’s complaint must provide, in part, a “short and
9 plain statement” of plaintiff’s claims showing entitlement to relief. Fed. R. Civ. P. 8(a)(2); see
10 also Paulsen v. CNF, Inc., 559 F.3d 1061, 1071 (9th Cir. 2009). “To survive a motion to dismiss,
11 a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that
12 is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v.
13 Twombly, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads
14 factual content that allows the court to draw the reasonable inference that the defendant is liable
15 for the misconduct alleged.” Id.

16 In considering a motion to dismiss for failure to state a claim, the court accepts all of the
17 well-pled factual allegations in the complaint as true and construes them in the light most
18 favorable to the plaintiff. Corrie v. Caterpillar, Inc., 503 F.3d 974, 977 (9th Cir. 2007). The court
19 is “not, however, required to accept as true conclusory allegations that are contradicted by
20 documents referred to in the complaint, and [the court does] not necessarily assume the truth of
21 legal conclusions merely because they are cast in the form of factual allegations.” Paulsen, 559
22 F.3d at 1071. The court must construe a *pro se* pleading liberally to determine if it states a claim
23 and, prior to dismissal, tell a plaintiff of deficiencies in her complaint and give plaintiff an
24 opportunity to cure them if it appears at all possible that the plaintiff can correct the defect. See
25 Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000) (en banc); see also Hebbe v. Pliler, 627
26 F.3d 338, 342 & n.7 (9th Cir. 2010) (stating that courts continue to construe *pro se* filings
27 liberally even when evaluating them under the standard announced in Iqbal).

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1 B. Defendants' Motions

2 Defendants Loancare, LLC, Stearns Lending, LLC, and Brian Hale argue in their motion
3 to dismiss that plaintiff's complaint fails to comply with the basic pleading requirements set forth
4 in Federal Rule of Civil Procedure 8 and that plaintiff's specific claims are meritless as a matter
5 of law. Defendant Kim Bingham filed a separate motion to dismiss, wherein she argues that
6 plaintiff's claims against her are barred by the doctrine of claim preclusion. She also argues that
7 plaintiff's complaint fails to satisfy Federal Rule of Civil Procedure 8 and otherwise fails to state
8 a cognizable claim. The court addresses each motion in turn.

9 1. Loancare, LLC's, Stearns Lending, LLC's, and Brian Hale's Motion to
10 Dismiss

11 Defendants Loancare, LLC, Stearns Lending, LLC, and Brian Hale all argue that
12 plaintiff's complaint fails to state a cognizable claim for relief because plaintiff's allegations
13 demonstrate that those claims are meritless as a matter of law. The court addresses each of
14 plaintiff's claims in turn.

15 a. Claim that Defendants Violated California Civil Code
16 Section 2924.17

17 First, plaintiff appears to claim that defendants violated California Civil Code Section
18 2924.17 in their attempts to foreclose on the real property at issue. In particular, plaintiff alleges
19 that "[d]efendants failed to record or file a declaration or affidavit in any court relative to a
20 foreclosure proceeding as described in subdivision (a), and . . . have not provided an accurate and
21 complete and supported document by competent and reliable evidence to substantiate the alleged
22 borrower's default and the right to foreclose as required in subdivision (b)." (ECF No. 1 at 3.)
23 Defendants argue that the complaint in no way provides factual allegations that plausibly
24 substantiate plaintiff's claim. The court agrees.

25 California Civil Code § 2924.17 provides that a notice of default, a notice of sale, or other
26 specified documents, "recorded by or on behalf of a mortgage servicer in connection with a
27 foreclosure . . . shall be accurate and complete and supported by competent and reliable
28 evidence." Cal. Civ. Code § 2924.17(a). It provides further that, in recording such documents, "a

1 mortgage servicer shall ensure that it has reviewed competent and reliable evidence to
2 substantiate the borrower's default and the right to foreclose, including the borrower's loan status
3 and loan information." Id. § 2924.17(b).

4 Here, plaintiff fails to allege facts in the complaint that show that any of the defendants
5 caused a notice of default, or any other document falling within the ambit of § 2924.17, to be
6 recorded. To the contrary, plaintiff alleges that defendants "*failed to record or file* a declaration
7 or affidavit in any court relative to a foreclosure proceeding." (ECF No. 1 at 3 (emphasis
8 added).) As discussed above, California Civil Code § 2924.17 subsections (a) and (b) set forth
9 requirements for certain documents that have been filed or recorded by a mortgage servicer in
10 connection with a foreclosure. Plaintiff alleges that no such filing or recording was made. When
11 plaintiff's allegations are taken as true, plaintiff cannot plausibly claim a violation under
12 subsection (a) or (b) of § 2924.17 as a matter of law because no declaration or affidavit was ever
13 filed or recorded, thus meaning that that statute's requirements that such a filing or recording be
14 "be accurate and complete and supported by competent and reliable evidence," and be based on a
15 review of "competent and reliable evidence" were inapplicable to defendants' alleged conduct.
16 Accordingly, plaintiff's complaint does not plausibly allege facts showing that defendants
17 violated California Civil Code Section 2924.17. Furthermore, amendment of the complaint with
18 regard to this claim would be futile because plaintiff's current allegations demonstrate that no
19 document subject to California Civil Code Section 2924.17 was filed or recorded, therefore
20 meaning that defendant's alleged conduct never fell within that statute's requirements. See Cahill
21 v. Liberty Mut. Ins. Co., 80 F.3d 336, 339 (9th Cir. 1996) (noting that district courts should
22 "consider factors such as bad faith, undue delay, prejudice to the opposing party, and the futility
23 of amendment" when determining whether to grant leave to amend a deficient complaint).

24 b. Claim that "California Civil Code Section 2924 State Law is
25 Unconstitutional Particular to Plaintiff"

26 Plaintiff appears to assert that the nonjudicial foreclosure process set forth in California
27 Civil Code § 2924 is unconstitutional as applied to him. Plaintiff also appears to assert that
28 defendants violated his federal constitutional rights by attempting to foreclose on the real property

1 at issue pursuant to that process. Defendants contend that plaintiff's allegations fail to provide a
2 proper basis on which to state a cognizable claim under these apparent theories. The court agrees.

3 First, plaintiff has not sued a proper defendant to the extent he seeks a declaration that
4 § 2924 is unconstitutional. For such relief, it is those officials who "by virtue of their offices
5 have some connection with the enforcement of the challenged law" that should be sued. Chaloux
6 v. Killeen, 886 F.2d 247, 251 (9th Cir. 1989) (citing Ex Parte Young, 209 U.S. 123, 157-61
7 (1908)); see Snoeck v. Brussa, 153 F.3d 984, 986 (9th Cir. 1998) (providing that an official's
8 connection to an allegedly unconstitutional state law must be "fairly direct," not just a generalized
9 duty or a general supervisory power). Here, the allegations in the complaint reveal that
10 defendants are private participants to the nonjudicial foreclosure of the property at issue, not state
11 officials. Indeed, the allegations indicate that there was no state actor involvement with regard to
12 any of defendants' purported conduct, and no state actors have been named as defendants to this
13 action. Accordingly, plaintiff's apparent claim that California Civil Code § 2924 is
14 unconstitutional as applied to him cannot be properly asserted against the defendants named in
15 the complaint.

16 Second, to the extent plaintiff attempts to allege through this claim that defendants'
17 utilization of the nonjudicial foreclosure process under California Civil Code § 2924 resulted in a
18 violation of plaintiff's constitutional rights, such a claim fails. In order to vindicate a federal
19 constitutional right, plaintiff must assert such a claim pursuant to 42 U.S.C. § 1983. "To state a
20 claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and
21 laws of the United States, and must show that the alleged deprivation was committed by a person
22 acting under color of state law." West v. Atkins, 487 U.S. 42, 48 (1988). In other words, two
23 factual elements must be pled: (1) "the plaintiff must allege that some person has deprived him of
24 a federal right," and (2) "he must allege that the person who has deprived him of that right acted
25 under color of state or territorial law." Gomez v. Toledo, 446 U.S. 635, 640 (1980). This
26 framing was adopted because "§ 1983 excludes from its reach merely private conduct, no matter
27 how discriminatory or wrong." Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50 (1999).

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1 Here, plaintiff has not satisfied either element of a § 1983 claim. The federal right or
2 rights defendants apparently violated are not identified in the complaint in any meaningful
3 fashion. Rather, plaintiff merely refers to nebulous violations of the “Bill of Rights,” the Ninth
4 Amendment, and the Seventh Amendment, and of plaintiff’s “natural, inherent, and unalienable
5 rights” to “personal security,” “personal liberty,” and “to acquire and enjoy property.” (ECF No.
6 1 at 4.) Plaintiff’s allegations in no way articulate the specific constitutional right or rights that
7 defendants violated in engaging in the nonjudicial foreclosure process, let alone set forth factual
8 allegations giving rise to a cognizable claim that defendants violated a constitutional right
9 individually held by plaintiff that may be vindicated pursuant to § 1983.

10 As to the second element, plaintiff does not plausibly explain how the private-actor
11 defendants were acting under color of state law through their involvement in foreclosure process,
12 especially when “[p]rivate parties are not generally acting under color of state law.” Price v.
13 Hawaii, 939 F.2d 702, 707-708 (9th Cir. 1991). In order to maintain this claim, plaintiff must
14 show that the actions complained of are “fairly attributable” to the state. See Rendell-Baker v.
15 Kohn, 457 U.S. 830, 838 (1982); Vincent v. Trend W. Technical Corp., 828 F.2d 563, 567 (9th
16 Cir. 1987) (observing that the United States Supreme Court considers four factors to determine
17 whether conduct is “fairly attributable” to the state: source of funding, impact of state regulation,
18 performance of a “public function,” and the existence of a “symbiotic relationship” between the
19 state and the actor). Here, plaintiff merely alleges that defendants engaged in the nonjudicial
20 foreclosure process set out in California Civil Code § 2924 in an attempt to foreclose on the real
21 property at issue. However, it is been held by both the California Supreme Court and the Ninth
22 Circuit Court of Appeals that a state’s nonjudicial foreclosure process does not constitute state
23 action and does not implicate constitutional due process protections when utilized by private
24 actors. Garfinkle v. Super. Ct., 21 Cal. 3d 268, 281 (1978); Apao v. Bank of N.Y., 324 F.3d
25 1091, 1094-95 (9th Cir. 2003). Accordingly, plaintiff also fails to meet the “color of state law”
26 requirement.

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1 In short, plaintiff's allegations utterly fail to assert a cognizable claim against defendants
2 that they violated plaintiff's constitutional rights in connection with their utilization of
3 California's nonjudicial foreclosure process, or that California's nonjudicial foreclosure process
4 is, in itself, unconstitutional as applied to plaintiff. Furthermore, further amendment of the
5 complaint with regard to such claims would be futile as plaintiff has named only private actors as
6 defendants to this action who the current allegations show did not act under color of state law.
7 See Cahill, 80 F.3d at 339.

8 c. Contract Claims

9 Finally, plaintiff alleges that defendants breached various contractual obligations to him
10 stemming from the "notices" he sent to them. To state a claim for breach of contract under
11 California law, plaintiff must allege: (1) the existence of a contract; (2) plaintiff's performance;
12 (3) defendant's breach of the contract; and (4) damages flowing from the breach. CDF
13 Firefighters v. Maldonado, 158 Cal. App. 4th 1226, 1239 (2008). To establish the existence of a
14 valid contract plaintiff must allege: (1) parties capable of contracting; (2) their consent; (3) a
15 lawful object; and (4) sufficient cause or consideration. United States ex rel. Oliver v. Parsons
16 Co., 195 F. 3d 457, 462 (9th Cir. 1999) (citing Cal. Civ. Code§ 1550; Marshall & Co. v. Weisel,
17 242 Cal. App. 2d 191, 196 (1966)).

18 Here, plaintiff fails to allege that any defendant consented to the purported contracts.
19 Plaintiff alleges that each of the notices he sent out to defendants that form the basis of the
20 purported contracts were "self-executing" and that defendants' failure to respond to them
21 constituted an "Acquiescence, Agreement, and Dishonor" of each of them. (ECF No. 1 at 7, 9.)
22 However, "[a]n offer made to another, either orally or in writing, cannot be turned into an
23 agreement because the person to whom it is made or sent makes no reply, even though the offer
24 states that silence will be taken as consent" Wold v. League of Cross of Archdiocese of San
25 Francisco, 114 Cal. App. 474, 480 (1931). Silence or a failure to act may constitute acceptance
26 only "where circumstances or the previous course of dealing between the parties places the
27 offeree under a duty to act or be bound." Circuit City Stores, Inc. v. Najd, 294 F.3d 1104, 1109
28 (9th Cir. 2002) (quoting Beatty Safeway Scaffold, Inc. v. Skrable, 180 Cal. App.2d 650, 655

1 (1960). Here, there are no allegations in the complaint indicating that there existed a previous
2 course of dealing between plaintiff and any of the defendants that would suggest that defendants'
3 failure to respond to plaintiff's notices constituted their consent to be bound by the alleged terms
4 contained in those notices. Nor are any special circumstances alleged that plausibly indicate
5 defendants' alleged failures to act served as acceptance of an offer. To the contrary, the alleged
6 facts suggest that plaintiff merely sent the notices to defendants under a flawed belief that he
7 would no longer have an obligation to continue making payments under the terms of the mortgage
8 at issue if defendants failed to respond. Such facts cannot establish the existence of a valid
9 contract.

10 Plaintiff's alleged facts also show that there was no sufficient consideration. "A contract
11 is supported by sufficient consideration if there is some benefit to the promisor or detriment to
12 the promisee." VasoNova, Inc. v. Grunwald, 2012 WL 6161041, at *5 (N.D. Cal. Dec. 11, 2012)
13 (quoting Sandrini v. Branch, 32 Cal. App. 2d 707, 709 (1939)). A review of the alleged language
14 in each of the purported contracts demonstrates that plaintiff was not required to perform any act
15 in exchange for defendants' performance. Rather, plaintiff merely demanded that defendants
16 verify his debt on the mortgage and determined that their failure to perform such an action
17 resulted in the release of plaintiff's obligation to repay his debt under the mortgage and the
18 removal of any security interest defendants had in the real property at issue. Accordingly,
19 allegations of the complaint show that no sufficient consideration was given with regard to any of
20 the purported contracts.

21 In short, plaintiff's alleged facts demonstrate that the fundamental prerequisites for the
22 formation of a valid contract were not present with regard to any of the purported agreements
23 between plaintiff and defendants. Assuming the facts of the complaint are true, no contract was
24 ever formed between plaintiff and any of the defendants. Because no valid contract was formed,
25 plaintiff cannot plausibly claim that defendants breached their contractual obligations to plaintiff.
26 Accordingly, the court recommends plaintiff's contract claims against defendants be dismissed
27 without leave to amend as further amendment would be futile. See Cahill, 80 F.3d at 339.

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1 U.S. 880, 891 (2008); Heiser v. Woodruff, 327 U.S. 726, 733 (1946).⁴ The Ninth Circuit Court of
2 Appeals has identified four factors that should be considered by a court in determining whether
3 successive lawsuits involve an identity of claims:

4 (1) whether rights or interests established in the prior judgment
5 would be destroyed or impaired by prosecution of the second
6 action;

7 (2) whether substantially the same evidence is presented in the two
8 actions;

9 (3) whether the two suits involve infringement of the same right;
10 and

11 (4) whether the two suits arise out of the same transactional nucleus
12 of facts.

13 See C.D. Anderson & Co. v. Lemos, 832 F.2d 1097, 1100 (9th Cir.1987); accord Headwaters Inc.
14 v. United States Forest Serv., 399 F.3d 1047, 1052 (9th Cir. 2005); Littlejohn v. United States,
15 321 F.3d 915, 920 (9th Cir. 2003). “The central criterion in determining whether there is an
16 identity of claims between the first and second adjudications is whether the two suits arise out of
17 the same transactional nucleus of facts.” Owens, 244 F.3d at 714.

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20 ⁴ Here, plaintiff asserts in his complaint a claim that California Civil Code § 2934 violates the
21 Seventh and Ninth Amendments, and more nebulously the “Bill of Rights,” to the United States
22 Constitution as that statute is applied to him. (ECF No. 1 at 3-4.) Plaintiff also alleges that this
23 court has jurisdiction in this case pursuant to 28 U.S.C. § 1331. (ECF No. 1 at 2.) Similarly,
24 plaintiff asserted what appear to be federal claims in her judicially-noticed complaint in the
25 previous action. (See generally ECF No. 5-1, Exh. 1.) Accordingly, the court construes the
26 complaint in both the present and previous action as asserting at least one federal law claim, thus
27 giving rise to this court’s federal question jurisdiction in both actions. While defendant Kim
28 Bingham asserts her claim preclusion argument under California State law’s claim preclusion
standards, which differ slightly from the federal standards set forth below, the court finds that
federal claim preclusion standards apply in this instance in light of plaintiff’s apparent federal law
claims and the fact that the prior action was brought in federal court and apparently attempted to
assert federal claims. Nevertheless, to the extent California’s claim preclusion standards do apply
in this instance, the ultimate outcome of the motion to dismiss is the same as it would be under
federal claim preclusion standards. To the extent there are analytical differences between
California and federal claim preclusion standards with respect to the claims at issue here, the
court briefly addresses them in subsequent footnotes as they arise in its discussion below.

1 i. Identity of Claims

2 The judicially noticed documents show that plaintiff filed a complaint in this court on
3 August 25, 2015 against Kim Bingham asserting the following six causes of action: (1) breach of
4 written contract); (2) invading my personal liberty; (3) invading my personal security;
5 (4) invading my pursuit of happiness; (5) violation of the Constitution for the United States of
6 America; and (6) violation of Federal Law. (ECF No. 5-1, Exh. 1.) In that complaint, plaintiff
7 alleged that these causes of action were based on Kim Bingham’s alleged conduct in connection
8 with the servicing of and attempts to foreclose on the mortgage loan, “loan number: 005275615,”
9 on the real property located at 672 Ware Court, Benicia, California 94510. (Id.) Plaintiff alleged
10 further in that action that his loan obligation was “fraudulent” because he had sent three “notices”
11 to Kim Bingham, who was acting as “Senior Vice President and Loan Administration Servicing
12 Manager” of Loancare, LLC. (Id.) Plaintiff also alleged that the language of those notices
13 created a binding, self-executing contract, which Kim Bingham breached in ignoring them, and
14 that her breach of those contracts resulted in a concession that the balance due on the mortgage
15 loan was \$0.00. (Id.)

16 The allegations of plaintiff’s present complaint demonstrate that there is an identity of
17 claims between this action and the prior action. First, plaintiff’s claims with regard to Kim
18 Bingham all relate to her alleged involvement in the servicing of and attempted foreclosure on
19 “loan number: 005275615” on the real property located at 672 Ware Court, Benicia, California
20 94510, while acting in her role as “Senior Vice President and Loan Administration Servicing
21 Manager” of Loancare, LLC. (ECF No. 1.) Furthermore, the three “notices” plaintiff alleged in
22 both the present complaint and the complaint in the prior action were allegedly sent to Kim
23 Bingham on the same dates and contain the exact same language. (Compare ECF No. 1 at 7-10
24 with ECF No. 5-1, Exhibit 1.) Plaintiff alleges claims for breach of contract against Kim
25 Bingham on the exact same alleged contracts and on the exact same alleged factual basis as he did
26 in the prior case. While plaintiff also asserts claims in the present action that defendants violated
27 California Civil Code § 2924 and plaintiff’s constitutional rights in pursuing a nonjudicial
28 foreclosure on the real property at issue, the factual allegations of the complaint make it clear

1 that, to the extent those additional claims are brought against Kim Bingham, they are asserted on
2 the basis of the same alleged factual predicate presented in the original action. Accordingly,
3 plaintiff appears to assert identical claims arising out of the same transactional nucleus of facts as
4 the previously dismissed action. Therefore, the court has little difficulty in concluding that there
5 is an identity of claims between the prior action and the instant action.⁵

6 ii. A Final Judgment on the Merits

7 In the prior action, a magistrate judge issued findings and recommendations
8 recommending that a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) be
9 granted and all of plaintiff's claims be dismissed with prejudice. (ECF No. 5-1, Exh. 2.) The
10 district judge subsequently adopted those findings and recommendations in full and ordered a
11 final judgment in that case. (Id., Exh. 3.)⁶ The district court's dismissal of the prior action with
12 prejudice and entry of final judgment was plainly a final judgment on the merits. Nnachi v. City
13 of San Francisco, 2010 WL 3398545 at *5 (N.D. Cal. Aug. 27, 2010) (citing Headwaters Inc. v.
14 U.S. Forest Serv., 399 F.3d 1047, 1052 (9th Cir. 2005) ("Dismissal of an action with prejudice, or
15 without leave to amend, is considered a final judgment on the merits."). Accordingly, there was a
16 final adjudication on the merits in the prior case.

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19 ⁵ Under California law, the answer to whether there exists an identity of claims between two
20 actions is based on the concept of whether the same "primary rights" were at stake, i.e., whether
21 the "two actions involve the same injury to the plaintiff and the same wrong by the defendant,"
22 rather than the "same transactional nucleus of facts" standard employed under federal law.
23 Eichman v. Fotomat Corp., 147 Cal. App. 3d 1170, 1174 (1983) (citing Slater v. Blackwood, 15
24 Cal. 3d 791, 795 (1975)). Here, there would still exist an identity of claims when analyzed under
California law because plaintiff's claims in both cases with regard to Kim Bingham all revolve
around the same alleged wrong by the defendant, i.e., Kim Bingham's alleged actions discussed
above, and the same alleged harm suffered by plaintiff, i.e., the initiation of nonjudicial
foreclosure proceedings against the real property at issue.

25 ⁶ Although Kim Bingham does not specifically request the court to take judicial notice of the
26 district judge's order in the prior action adopting the judicially-noticed findings and
27 recommendations, the court takes judicial notice of that ruling *sua sponte* on the basis that it is a
28 public court record not subject to reasonable dispute. See Reyn's Pasta Bella, LLC v. Visa USA,
Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006); Fed. R. Evid. 201(b).

1 on the merits, . . . likely to suffer irreparable harm in the absence of preliminary relief, . . . the
2 balance of equities tips in his [or her] favor, and . . . an injunction is in the public interest.”
3 Winter, 555 U.S. at 20; see also Stuhlbarg Int’l Sales Co. v. John D. Brush & Co., 240 F.3d 832,
4 839 n.7 (9th Cir. 2001) (analysis for temporary restraining orders and preliminary injunctions is
5 “substantially identical”).

6 “Under the sliding scale approach . . . the elements . . . are balanced, so that a stronger
7 showing of one element may offset a weaker showing of another.” Pimentel v. Dreyfus, 670 F.3d
8 1096, 1105 (9th Cir. 2012) (citations and internal quotation marks omitted); see also Alliance for
9 the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011) (preliminary injunction
10 appropriate when a moving party demonstrates that “serious questions going to the merits were
11 raised and the balance of hardships tips sharply in the [moving party’s] favor,” assuming other
12 Winter elements are also met). However, ““at an irreducible minimum, the moving party must
13 demonstrate a fair chance of success on the merits, or questions serious enough to require
14 litigation.”” Guzman v. Shewry, 552 F.3d 941, 948 (9th Cir. 2008) (quoting Dep’t of Parks &
15 Recreation v. Bazaar Del Mundo, Inc., 448 F.3d 1118, 1124 (9th Cir. 2006)). Where a party has
16 not shown likelihood of success on the merits, or at least the existence of serious questions going
17 to the merits, the court need not address the remaining Winter elements. See Pimentel, 670 F.3d
18 at 1111.

19 Here, plaintiff fails to make the fundamental showing that there is a likelihood of success
20 on the merits of his claims. As discussed in detail above with regard to defendants’ motions to
21 dismiss, all of plaintiff’s claims asserted in the complaint are without merit, and further
22 amendment of the complaint would be futile. Therefore, plaintiff cannot show that there is a
23 likelihood of success on the merits of any of the claims he asserts in this action. Because plaintiff
24 cannot meet this basic requirement, issuance of a TRO would be improper. See Pimentel, 670
25 F.3d at 1111. Accordingly, the court recommends that plaintiff’s motion for a TRO be denied.

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1 IV. Conclusion

2 Accordingly, IT IS HEREBY RECOMMENDED that:

- 3 1. Defendants' motions to dismiss (ECF Nos. 4, 5) be GRANTED and plaintiff's
4 complaint be DISMISSED WITHOUT LEAVE TO AMEND;
5 2. Plaintiff's motion for a temporary restraining order (ECF No. 7) be DENIED;
6 3. The Clerk of Court be directed to close this case.

7 These findings and recommendations are submitted to the United States District Judge
8 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)
9 days after being served with these findings and recommendations, any party may file written
10 objections with the court and serve a copy on all parties. Such a document should be captioned
11 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
12 shall be served on all parties and filed with the court within fourteen (14) days after service of the
13 objections. The parties are advised that failure to file objections within the specified time may
14 waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th
15 Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

16 Dated: November 29, 2016

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19 KENDALL J. NEWMAN
20 UNITED STATES MAGISTRATE JUDGE
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