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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

JEAN PHLEGER,

No. C 07-01686 SBA

Plaintiff,

ORDER

v.

[Docket Nos. 200, 207, 211, 245]

COUNTRYWIDE HOME LOANS, INC.,
doing business as AMERICA'S
WHOLESALE LENDER, *et al.*,

Defendants.

And related cross-, counter-, and third-party suits

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INTRODUCTION

This matter arises from a dispute over a \$3.3 million mortgage and a \$550,000 home equity line of credit secured against plaintiff/counter-defendant Jean Phleger's home in San Francisco. Phleger has sued defendants/counter-plaintiffs (1) Countrywide Home Loans, Inc. dba America's Wholesale Lender, (2) Countrywide Bank, N.A., and (3) Reconstruct Company, N.A. (collectively, "Countrywide") for violating the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, *et seq.*, cancellation, and rescission. Countrywide has counter-sued Phleger for, inter alia, judicial foreclosure on the deeds of trust securing the mortgage and the line of credit. Phleger has sued third-party defendant Stewart Title of California, Inc. ("Stewart") for negligence, breach of fiduciary duty, and indemnity.

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Before the Court are five motions: (1) Phleger's Motion for Partial Summary Judgment (the "First Motion") [Docket No. 200]; (2) Phleger's Motion for Summary Judgment on the Issue of Liability on Her Second and Third Causes of Action against Stewart Title of California, Inc. (the "Second Motion") [Docket No. 207]; (3) Stewart's Motion for Summary Judgment, or in the alternative, Partial Summary Judgment (the "Third-Party-Motion") [Docket No. 211]; (4) Stewart's Administrative Motion Pursuant to Civil Local Rule 7-11 for Leave to File [1] Objections to

1 Evidence Proffered by Plaintiff, and [2] Motion to Strike Such Evidence [Docket No. 245]; and
2 (5) Stewart’s Motion to Strike [Docket No. 245, Attach. “1”].

3 The Court finds these matters appropriate for resolution without a hearing under Federal
4 Rule of Civil Procedure 78(b). For the reasons discussed below, the Court DENIES the First
5 Motion, GRANTS in part and DENIES in part the Second Motion and the Third-Party Motion,
6 GRANTS Stewart’s administrative motion, and DENIES Stewart’s Motion to Strike.

7 **BACKGROUND**

8 **I. Factual Developments**

9 Plaintiff/counter-defendant Jean Phleger is 70 years old and owns 2728 Green Street (“Green
10 Street”), her San Francisco home, and owns property in Woodside California. In July 2005, these
11 assets were purportedly worth approximately \$6.7 million and \$30.0 million, respectively. In early
12 2005, Phleger met cross-defendant/third-party defendant Michael Edison, owner of Private Wealth
13 Management. Edison represented that he could increase Phleger’s existing Wells Fargo home equity
14 line of credit to assist her with paying bills. His intent, however, was to siphon off for his own
15 benefit a substantial portion of any funds obtained, without Phleger’s knowledge. On May 6, 2005,
16 Phleger provided Edison with a full power of attorney over all of her legal, financial, and real estate
17 matters. In this same month, Edison established a joint account in Las Vegas in his and Phleger’s
18 name, using his mailing address.

19 On July 12, 2005, defendant/third-party plaintiff George W. Hannah II (“Hannah”), an
20 employee of defendant/third-party plaintiff First National Mortgage Sources, LLC (“First
21 National”), allegedly interviewed Phleger by telephone to complete a loan application. The
22 application recites an incorrect birth date for Phleger and an incorrect construction year for Green
23 Street. It also contains internal inconsistencies, such as reciting that Phleger is retired but also self-
24 employed. Phleger testified that she never met or spoke with Hannah prior to filing this suit in
25 August 2006.

26 In August 2005, Phleger’s home equity credit line balance was \$959,000. On or about
27 August 30, 2005, Edison obtained a new Wells Fargo home equity credit line for \$1.47 million, used
28 it to pay off the prior credit line, and had the \$500,384 remainder wired to the Las Vegas joint

1 account.

2 On or about August 3, 2005, Hannah contacted Stewart to open an escrow transaction. He
3 provided a copy of Edison's power of attorney to Stewart and a copy to Countrywide.

4 On or before September 16, 2005, Countrywide prepared a Deed of Trust for a \$3.3 million
5 mortgage, and a Deed of Trust and Assignment of Rents for a \$550,000 line of credit ("LOC"), both
6 secured against Green Street. It also prepared one Notice of Right to Cancel ("NORTC") for the
7 mortgage on or before September 15, 2005, one NORTC for the LOC on or before September 16,
8 2005, and closing instructions on or before September 15, 2005. It sent these documents to Stewart.¹
9 On or before September 16, 2005, Stewart prepared escrow instructions.

10 The closing instructions require that all documents be signed before September 17, 2005.
11 They also require that the loan close "on or before the earliest to occur of (1) 09/21/2005 when the
12 dates in the loan documents will no longer be valid, or (2) 09/22/2005, when the interest rate lock
13 expires."

14 Stewart's agent testified that on September 15, 2005, Hannah sent her an e-mail, instructing
15 her to send all the transaction documents to Edison at a certain e-mail address and to a New York or
16 New Jersey address. Later on September 15 or on September 16, Hannah instructed that rather than
17 e-mail the documents, she should overnight them to Edison in Las Vegas for Saturday delivery. On
18 Friday, September 16, 2005, she sent the documents to Edison via overnight delivery. She testified
19 that she might have also e-mailed them, but she did not recall.

20 Notary Public Jeanie Hilario testified that on *Sunday*, September 16, 2005,² a woman
21 presented to her as Jean Phleger signed the deeds, the NORTCS, and the escrow instructions, and
22 that she notarized the documents this same day. These documents bear what purports to be
23 Phleger's signature and handwritten dates of September 16, 2005. Further, the notary documents
24 bear what purports to be Hilario's signature and handwritten dates of September 16, 2005. Hilario

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26 ¹ Prior to preparing the documents, Countrywide reviewed a Landsafe Credit Merge Report
27 and an appraisal. Although Phleger has alleged the report contains data which should have made
Countrywide suspicious, she has presented no expert testimony on this issue.

28 ² The Court takes judicial notice under Federal Rule of Evidence 201(b) that September 16,
2005 was a Friday.

1 also testified, however, that she was not licensed in California, and on the forms, all pre-printed
2 designations for a California signing have been stricken to reflect a Clark County, Nevada signing.

3 Phleger has denied signing the documents. She testified that she was in Los Angeles on
4 Friday, September 16, 2005, and that she was in Woodside, California on September 18, 2005.

5 Both NORTCs specify that the borrower has the right to cancel the transaction within three
6 business days of the latest of the following events: (1) the transaction date; (2) the receipt of Truth-
7 in-Lending disclosures; or (3) the receipt of the NORTC. Each NORTC has a handwritten
8 transaction date of "9/16/05[.]" Each NORTC also specifies that if the borrower cancels by mail,
9 telegram, or other delivery of written notice, he or she must send it by midnight of "9/20/05" or
10 midnight of the third business day following the latest of the three events. *Id.*

11 Stewart's agent testified she handwrote the "9/20/05" date on the NORTCs, after she
12 received the documents back from Edison, purportedly signed by Phleger and notarized by Hilario
13 on September 16, 2005. She also testified that she did not suspect any improprieties due to the
14 September 16, 2005 signature dates, as she believed at that time that she might have e-mailed the
15 documents to the e-mail Edison provided.

16 After the closing, Edison used the \$3.85 million to retire the \$1.47 million Wells Fargo home
17 equity credit line, and had the \$2.3 million remainder wired to the Las Vegas joint account. He then
18 transferred the funds to other accounts and used them for his own benefit.

19 **II. Procedural Developments**

20 On February 1, 2006, Phleger revoked Edison's power of attorney. On February 14, 2006,
21 she sued him and Private Wealth Management, in San Francisco Superior Court, and he defaulted.
22 On August 16, 2006, she sued Countrywide, First National, and Hannah.³

23 On February 13, 2007, Edison was indicted for wire fraud. On October 14, 2008, he pled
24 guilty to three counts of wire fraud, 18 U.S.C. § 1343, two counts of mail fraud involving another
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28 ³ First National and Hannah settled with Phleger, with the Court's approval, on November 11,
2008. *See* Docket No. 246.

1 victim, 18 U.S.C. § 1341, conspiracy to obstruct justice,⁴ 18 U.S.C. §§ 371, 1519, and obstruction of
2 justice, 18 U.S.C. §§ 2, 1519. He is currently incarcerated and faces up to 25 years in prison. He
3 has agreed he owes \$2,309,830 to Phleger as restitution. In his plea, he did not discuss any parties
4 to this matter, other than Phleger.

5 On March 8, 2007, Phleger filed a second amended complaint (the “SAC”). She sued
6 Countrywide for a TILA violation, negligence,⁵ cancellation of contract, and rescission of contract
7 based on mistake, incapacity, and failure of consideration. The SAC recites that “Jean Phleger
8 hereby intends service of this [SAC] in this action to serve as notice of rescission of the [Mortgage]
9 and [LOC] Loan Agreements, to the extent those agreements relate to or concern Jean Phleger
10 and/or [the Property].” Docket No. 202, Ex. “F” at 1. ¶ 84. She also seeks a declaration and
11 injunction against Countrywide, consequential and punitive damages, and attorneys’ fees and costs.

12 On March 23, 2007, Countrywide removed the matter to this Court based on the TILA claim,
13 first raised in the SAC. *See* Docket No. 1. On June 18, 2007, Countrywide counterclaimed against
14 Phleger and cross-complained against Edison. *See* Docket No. 80. Against Phleger, it asserts claims
15 for judicial foreclosure of the Mortgage and LOC, money owed on notes, breach of contract, unjust
16 enrichment, equitable subrogation, and declaratory relief, and asserts she owes \$3.85 million. *See*
17 *id.* Against Edison, it claims equitable indemnity. *See id.* On July 26, 2007, Phleger filed a third-
18 party complaint against Stewart, alleging negligence, breach of fiduciary duty, and indemnity. *See*
19 Docket No. 87.

20 On November 16, 2007, the Court granted Phleger’s application for a temporary restraining
21 order to prevent Countrywide from selling Green Street at public auction. *See* Docket No. 144. On
22 December 17, 2007, the Court approved a stipulated preliminary injunction between Phleger and
23 Countrywide against Green Street’s non-judicial sale pending disposition of this matter. *See* Docket
24 No. 185. On January 4, 2008, the Court denied Stewart’s motion to strike (construed by the Court as
25 a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)), except to the extent Phleger

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27 ⁴ Edison had his wife prepare false documents for the United States Attorney indicating
28 Phleger had loaned him \$2.25 million.

⁵ The Court dismissed this claim on June 4, 2007. *See* Docket No. 72.

1 had alleged a TILA violation. *See* Docket No. 188. In October and November 2008, the parties
2 filed the motions currently before the Court.

3 LEGAL STANDARD

4 Summary judgment is appropriate if no genuine issue of material fact exists and the moving
5 party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*,
6 477 U.S. 317, 322-23 (1986). The party moving for summary judgment must demonstrate that there
7 are no genuine issues of material fact. *See Horphag v. Research Ltd. v. Garcia*, 475 F.3d 1029,
8 1035 (9th Cir. 2007). An issue is “genuine” if the evidence is such that a reasonable jury could
9 return a verdict for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
10 (1986); *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005). An issue is “material” if
11 its resolution could affect the outcome of the action. *Anderson*, 477 U.S. at 248; *Rivera*, 395 F.3d
12 at 1146.

13 In responding to a properly supported summary judgment motion, the non-movant cannot
14 merely rely on the pleadings, but must present specific and supported material facts, of significant
15 probative value, to preclude summary judgment. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith*
16 *Radio Corp.*, 475 U.S. 574, 586 n.11 (1986); *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th
17 Cir. 2002); *Fed. Trade Comm’n v. Gill*, 265 F.3d 944, 954 (9th Cir. 2001). In determining whether a
18 genuine issue of material fact exists, the court views the evidence and draws inferences in the light
19 most favorable to the non-moving party. *See Anderson*, 477 U.S. at 255; *Sullivan v. U.S. Dep’t of*
20 *the Navy*, 365 F.3d 827, 832 (9th Cir. 2004); *Hernandez v. Hughes Missile Sys. Co.*, 362 F.3d 564,
21 568 (9th Cir. 2004).

22 These same standards apply when parties file cross-motions for summary judgment. *See*
23 *Lenning v. Commercial Union Ins. Co.*, 260 F.3d 574, 581 (6th Cir. 2001); *ACLU of N.M. v.*
24 *Santillanes*, 506 F. Supp. 2d 598, 624 (D.N.M. 2007).

25 ANALYSIS

26 I. Phleger’s Motion for Partial Summary Judgment against Countrywide

27 A. Phleger’s TILA Claim

28 Because there is a factual dispute as to whether the transaction closed on September 16 or

1 18, 2005, Phleger is not entitled to summary adjudication. In her Motion for Partial Summary
2 Judgment (the “First Motion”), Phleger asserts that the undisputed evidence shows her mortgage and
3 LOC documents were signed on September 18, 2005. First Mot. at 10. She thus asserts the
4 NORTCs only provided two business days for rescission, rather than three, as mandated by the
5 TILA, triggering a three-year rescission period under the TILA, ending September 18, 2008. *Id.*
6 She thus argues that if she had signed the mortgage and LOC documents she could not be held liable
7 to Countrywide, as she rescinded the transaction in her SAC, within this three-year period. *Id.*

8 “The TILA was enacted by Congress to “ ‘avoid the uninformed use of credit.’ ” *Jackson v.*
9 *Grant*, 890 F.2d 118, 120 (9th Cir. 1989) (quoting *Mourning v. Family Publ’ns Serv. Inc.*, 411 U.S.
10 356, 377 (1973) (quoting 15 U.S.C. § 1601)). “In order to effectuate this purpose, the TILA has
11 been liberally construed in this circuit. *Jackson*, 890 F.3d at 120. “Even technical or minor
12 violations of the TILA impose liability on the creditor. *Id.* Thus, “ ‘[t]o insure that the consumer is
13 protected . . . [the TILA and accompanying regulations must] be *absolutely complied with and*
14 *strictly enforced.*’ ” *Id.* (quoting *Mars v. Spartanburg Chrysler Plymouth, Inc.*, 713 F.2d 65, 67 (4th
15 Cir. 1983)) (emphasis added).

16 Applicable here, section 125(a) of the TILA, 15 U.S.C. § 1635(a), provides that in any
17 consumer credit transaction in which a security interest in a consumer’s principal dwelling is
18 retained, the consumer:

19 shall have the right to rescind the transaction until midnight of the *third business day*
20 following the consummation of the transaction or the delivery of the information and
21 rescission forms required under this section together with a statement containing the
22 material disclosures required under this subchapter, whichever is later

23 15 U.S.C. § 1635(a); *Jackson*, 890 F.3d at 120 (emphasis added).

24 Section 1635(a) also requires that the creditor “clearly and conspicuously disclose, in
25 accordance with regulations of the [Federal Reserve] Board, to any obligor in a transaction subject
26 to this section the rights of the obligor under this section.” 15 U.S.C. § 1635(a). In turn,
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1 section 226.23(b)(1)(v) of Regulation Z of the Federal Reserve Board⁶ provides that notice of the
2 right to rescind “shall clearly and conspicuously disclose . . . [t]he date the rescission period
3 expires.” 12 C.F.R. § 226.23(b)(1)(v); *Jackson*, 890 F.2d at 120. “If the required notice or material
4 disclosures are not delivered, the right to rescind shall expire *3 years after consummation*, upon
5 transfer of all of the consumer’s interest in the property, or upon sale of the property, whichever
6 occurs first.” 12 C.F.R. § 226.23(a)(3) (emphasis added); *Jackson*, 890 F.2d at 120. Thus, in
7 *Semar v. Platte Valley Federal Savings & Loan Ass’n*, the Ninth Circuit affirmed rescission of a
8 loan 14 months after commencement, where the loan documents stated the loan could be rescinded
9 three days after July 16, 1982, but failed to provide the deadline, leaving the entry blank. 791 F.2d
10 699, 701-05 (9th Cir. 1986).

11 The only admissible evidence before the Court tending to show when the deeds, the
12 NORTCs, and escrow instructions were signed are the documents themselves and Phleger’s and
13 Hilario’s testimony.⁷ Phleger testified she was not in San Francisco on September 16 or 18, 2005.
14 Hilario testified a woman identified as Jean Phleger signed the documents in San Francisco, on
15 *Sunday*, September 16, 2005. The Court notes that *September 16, 2005* was not a Sunday, but
16 *September 18, 2005* was. The documents are all dated September 16, 2005, and Stewart entered a
17 cancellation deadline of September 20, 2005 in the NORTCs premised thereon.⁸ If the documents
18 were signed on the 18th, rather than the 16th, then the cancellation deadline did not provide three
19 business days to rescind as required by the TILA. As a result, the mortgage and LOC transactions
20 could be rescinded up through September 18, 2008, which Phleger allegedly did, on March 8, 2007.
21 The Court, however, may not resolve this issue as a matter of law, because whether the documents

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23 ⁶ “[A]bsent some obvious repugnance to the statute, the . . . regulation [of the Federal
24 Reserve Board implementing the TILA] should be accepted by the courts, as should the Board’s
25 interpretation of its own regulation.” *Jackson*, 890 F.3d at 120 n.3 (quoting *Anderson Bros. Ford*
v. Valencia, 452 U.S. 205, 219 (1981)).

26 ⁷ In their pleadings, the parties refer to other evidence which is inadmissible, such as unsworn
27 statements, statements witnesses may make in the future, non-existent exhibits, and deposition
28 testimony unsupported by transcripts or supported by uncertified transcripts.

⁸ Countrywide asserts that unlike the NORTCs in *Semar*, its had cancellation dates, and thus
Semar is not controlling here. Docket No. 220 at 18. Countrywide fails to consider, however, that
Stewart’s agent testified to adding the dates, *after* Phleger purportedly signed *blank* NORTCs.

1 were signed on the 18th is a genuine issue of material fact in dispute.⁹ *See Anderson*, 477 U.S.
2 at 248. The Court thus DENIES Phleger’s motion to summarily adjudicate her claim for a TILA
3 violation.

4 **B. Countrywide’s First and Second Claims for Judicial Foreclosure**

5 Section 1635(b) of Title 15 states that “[w]hen an obligor exercises his right to rescind under
6 subsection (a) of this section, he is not liable for any finance or other charge, and any security
7 interest given by the obligor, including any such interest arising by operation of law, becomes void
8 upon such a rescission.” 15 U.S.C. § 1635(b); *Semar*, 791 F.2d at 702 n.7, 705. Phleger asserts that
9 because she has provided a timely and proper notice of rescission under 15 U.S.C. § 1635(a),
10 Countrywide’s security interests became void. First Mot. at 10-11. The Court DENIES summary
11 adjudication in favor of Phleger on Countrywide’s claims for judicial foreclosure, given the factual
12 dispute underlying Phleger’s ability to rescind over a three-year period.

13 **C. Phleger’s Evidentiary Objections**

14 Phleger filed seven evidentiary objections [Docket No. 236] to statements made in a
15 declaration filed by Countrywide employee Brian McClure [Docket No. 221] and twelve objections
16 to statements made in a declaration filed by Countrywide’s counsel, Kenneth R. Styles, Esq. [Docket
17 No. 222]. The Court OVERRULES all of Phleger’s objections as she fails to support them with any
18 legal analysis, and as the basis for resolving them is not readily apparent on their face.¹⁰

19 **II. Phleger’s and Stewart’s Cross-Motions for Summary Judgment**

20 After Countrywide counter-sued Phleger, she sued Stewart for indemnity, negligence, and
21 breach of fiduciary duty. Phleger then filed a motion for summary adjudication (the “Second
22 Motion”) of the issue of liability on her negligence and breach of fiduciary duty claims. Stewart
23 then filed a motion for summary judgment or alternatively summary adjudication (the “Third-Party
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25 ⁹ Countrywide asserts that if Phleger signed the documents on September 18, 2008, then she
26 could not prevail under the TILA, because she *must* have backdated them. Docket No. 220 at 15-17.
27 Countrywide points to no specific evidence to support the predicate condition, nor considers that the
evidence could just as easily support a finding of backdating by persons other than Phleger.

28 ¹⁰ Moreover, the Court OVERRULES as moot all of her objections to McClure’s statements
and her fourth, seventh, and eighth objections to Styles’ statements, as the Court did not rely on
them in disposing of the First Motion.

1 Motion”).

2 **A. Phleger’s Claim for Indemnification**

3 Stewart seeks summary adjudication of Phleger’s indemnification claim. Stewart is entitled
4 to summary adjudication of three of the eight grounds that Phleger asserts in support of her
5 indemnification claim, but it is not entitled to summary adjudication of her five other grounds.
6 Phleger alleges that if she is found liable to Countrywide, Stewart should indemnify her, because it
7 followed the instructions of someone other than her or Countrywide in distributing the mortgage and
8 LOC funds, and/or because Stewart failed to follow the escrow or closing instructions.¹¹ Second
9 Mot. at 1. Stewart asserts that if a factfinder finds that Phleger is liable to Countrywide for
10 borrowing the mortgage and the LOC funds, then logically, that factfinder would also find that
11 Phleger signed the mortgage and LOC documents. Third Party Mot. at 1. Stewart further asserts
12 that on such findings, it could not have done anything wrong, as Phleger by definition would be a
13 party to the escrow, and it followed her attorney-in-fact’s instructions. *Id.*

14 For support, both parties rely on *Summit Financial Holdings, Ltd. v. Continental Lawyers*
15 *Title Co.*, 27 Cal.4th 705, 1160A, 117 Cal.Rptr.2d 541, 41 P.3d 548 (2002). *Summit* held that:

16 An escrow holder is an agent and fiduciary of the parties to the escrow. The agency
17 created by the escrow is limited--limited to the obligation of the escrow holder *to*
18 *carry out the instructions of each of the parties to the escrow.* If the escrow holder
19 fails to carry out an instruction it has contracted to perform, the injured party has a
20 cause of action for breach of contract.

21 *Id.*, 27 Cal.4th at 711 (citations omitted) (emphasis added).

22 In delimiting the scope of an escrow holder’s fiduciary duties, then, we start
23 from the principle that an escrow holder must *comply strictly with the instructions of*

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25 ¹¹ Phleger also alleges that Stewart improperly removed Green Street from a trust, Docket
26 No. 87 ¶ 11.b(3), but the evidence suggests that Phleger did this on August 22, 2005, Docket No.
27 209, Ex. “A” at 118:8-120:20; Docket No. 226, Ex. “A” at 204-205; Docket No. 224, Ex. “J”
28 Phleger also asserts that her indemnification claim will not be “ripe” for adjudication until she is
found liable to Countrywide. “Ripeness” implicates jurisdiction. *See Thomas v. Union Carbide*
Agr. Prods. Co., 473 U.S. 568, 579-80 (1985). Phleger provides no legal authority for the
proposition that this Court lacks subject matter jurisdiction over her indemnity claim, until liability
has been established.

1 *the parties.* [Nonetheless,] . . . an escrow holder has no general duty to police the
2 affairs of its depositors; rather, an escrow holder’s obligations are limited to faithful
3 compliance with the depositors’ instructions. *Absent clear evidence of fraud, an*
4 *escrow holder’s obligations are limited to compliance with the parties’ instructions.*
5 *Id.* at 711 (citations and quotation marks omitted) (emphasis added).

6 The Court agrees with Stewart that in order for Phleger to be found liable to Countrywide, a
7 factfinder must find that she signed the mortgage and the LOC documents. If this finding is made,
8 then by definition, she will be a party to the escrow. Thus, under *Summit*, the question becomes
9 whether Stewart has shown as a matter of law that it did not breach its duties to Phleger or
10 Countrywide, the escrow parties, and that it followed the escrow and closing instructions.

11 **1. Breach of Duty**

12 Assuming that Phleger is found to be a party to the escrow, she has shown that there is a
13 genuine issue of material fact as to whether Stewart had “clear evidence of fraud,” and failed to stop
14 the escrow, thus breaching its duty to the parties to the escrow.¹² Phleger notes that it is undisputed
15 that Edison initially instructed Stewart to e-mail the transaction documents, but then instructed
16 Stewart to *instead* overnight them to Las Vegas. Stewart then *overnighted* the documents *on*
17 *September 16, 2005.* Phleger asserts that Stewart thus had clear evidence of fraud when it received
18 the signed mortgage and LOC documents from Edison, ostensibly backdated to *September 16, 2005.*
19 Second Mot. at 2-3, 11. Stewart disagrees, given its agent’s testimony that when she received the
20 documents, she *believed that she might* have e-mailed them to Edison, though *she cannot recall*
21 whether she did.¹³ Docket No. 225 at 6.

22 The Court first notes that it is undisputed that when Stewart’s agent received the transaction
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24 ¹² Phleger also alleges that Stewart negligently supervised the agent who processed the
25 mortgage and LOC documents. Second Mot. at 12. She alleges the agent was inexperienced, poorly
26 trained, and inadequately supervised. *Id.* She provides no evidence, however, regarding what level
27 of experience, training, or supervision meets the standard of care in the escrow industry.

28 ¹³ Phleger also alleges that Stewart’s agent testified that she would have retained such an e-mail
if she had e-mailed the documents. Docket No. 229 at 3. Phleger alleges that the absence of this e-
mail thus shows that the agent did not e-mail the documents. *Id.* The Court notes that the agent
only testified that she *might* have retained such an e-mail, Docket No. 230, Ex. “F” at 66-67, but
observes that there is no evidence in the record that she did.

1 documents, she processed the \$3.85 million transaction based solely on her unsubstantiated belief
2 that she might have e-mailed them, against Hannah's express instructions. Viewing this evidence in
3 a light most favorable to Phleger, see *Anderson*, 477 U.S. at 255, a reasonable jury could find that
4 Stewart's agent failed to dispel the clear evidence of fraud before her, because she relied on her
5 speculation of what she might have done, rather than verify what she did. Moreover, it is undisputed
6 that Stewart produced no evidence during discovery of any e-mail by which its agent sent the
7 documents to Edison. The only "evidence" proffered is the agent's speculation that she might or
8 might not have done so, but she cannot recall. Viewing this evidence in a light most favorable to
9 Phleger, see *id.*, a reasonable jury could find that the agent did not e-mail the documents.
10 A reasonable jury could thus find that had the agent e-mailed documents related to the \$3.85 million
11 transaction, there would be evidence of it, and more importantly, had she made any attempt to verify
12 whether she had e-mailed the documents, she would have realized that she had not, and stopped the
13 escrow. Thus, Phleger has demonstrated the existence of a genuine issue of material fact as to
14 whether Stewart had "clear evidence of fraud," see *id.* at 248, and by failing to stop the escrow,
15 breached its duty to the parties to the escrow, see *Summit*, 27 Cal.4th at 11. The Court thus DENIES
16 Stewart's request for summary adjudication of Phleger's indemnification claim, to the extent it is
17 based on its alleged breach of duty to the parties to the escrow.

18 2. The Escrow Instructions

19 Stewart is not entitled to summary adjudication of Phleger's indemnification claim, to the
20 extent it is based on allegations that Stewart breached its duty to follow the escrow instructions.
21 Phleger asserts that Stewart failed to follow two escrow instructions. The first specifies that "[on] or
22 before September 22, 2005, the undersigned (herein "Borrower(s)"[]) will hand [Stewart] (herein
23 "Escrow Holder"), the funds and/or documents required by Borrower's Lender." Docket No. 209,
24 Ex. "B" at 1. The second specifies that all documents or funds due to "Borrower(s)" are to be
25 "wired to Borrower(s), as per separate wire instructions provided by Borrower(s)." *Id.* Phleger
26 asserts that Stewart violated the first instruction by closing, even though she never personally
27 handed any documents to its agents. Second Mot. at 8. And, she asserts that Stewart violated the
28 second instruction by following Edison's and/or Hannah's instructions, and by wiring funds to the

1 joint account in Las Vegas. *Id.* at 8-9. Stewart counters that it had a copy of Edison’s power of
2 attorney, and when it received the signed and dated mortgage and LOC documents, it received a
3 deposit slip for the Las Vegas joint account and Edison’s instructions to wire funds to it. Docket
4 No. 225 at 7-8. Further, its expert witness testified it is common for escrow agents to only have
5 direct contact with a borrower’s agents.¹⁴ Docket No. 227 ¶ 5.

6 The Court notes that as already discussed there is a genuine issue of material fact as to
7 whether Stewart had “clear evidence of fraud” before it, and should have stopped the escrow, when
8 it received the documents back from Edison, signed and dated on the same day they were
9 overnighted to him. As such, there is a genuine issue of material fact as to whether Stewart, when it
10 received Edison’s wiring instructions along with these documents, reasonably followed the escrow
11 instructions by relying on either his documents or his wiring instructions. Had Stewart investigated
12 and found that it had not e-mailed the documents, it would not have relied on either. As *Summit*
13 holds, only “[a]bsent clear evidence of fraud, [are] an escrow holder’s obligations . . . limited to
14 compliance with the parties’ instructions.” 27 Cal.4th at 711. As Phleger has shown a genuine issue
15 of material fact, *see Anderson*, 477 U.S. at 248, as to whether Stewart reasonably followed the
16 escrow instructions, the Court DENIES Stewart’s request for summary adjudication of Phleger’s
17 indemnification claim, to the extent it is based on Stewart allegedly breaching its duty to follow
18 them.

19 3. The Closing Instructions

20 Stewart is entitled to summary adjudication of three of six closing instructions that Phleger
21 raises in support of her indemnification claim, but it is not entitled to summary adjudication of the
22 other three instructions. Phleger asserts that Stewart breached its duty to follow the closing
23 instructions, by failing to follow six of them. Second Mot. at 10. Stewart notes that the closing
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25 ¹⁴ In her reply, Phleger asserts that Stewart’s agent testified she never relied on Edison’s *role* as
26 an attorney-in-fact. *See* Second Mot. at 9 n.4, 11 n.5. The Court notes that the agent testified that
27 because Phleger signed her own documents, the agent did not rely on seeing Edison’s *signature* on
28 them. Docket No. 209, Ex. “A” at 47:16-17; 131:4-132:12. Phleger also asserts that under section
4121 of the California Probate Code, Stewart may not rely on an un-notarized power of attorney.
Docket No. 229 at 4. The Court notes that while Stewart may not claim *statutory immunity* under
section 4303(a) of the Probate Code, it may still assert that its reliance was *reasonable under the*
circumstances. *Kaneko v. Yager*, 120 Cal.App.4th 970, 977-81, 16 Cal.Rptr.3d 183 (2004).

1 instructions were prepared by Countrywide for Stewart to follow. Docket Nos. 211 at 14, 225 at 12.
2 Stewart asserts that a *borrower* may not claim a breach of duty arising from a *lender's* closing
3 instructions to an *escrow agent*, as they only create a duty running from the *escrow agent* to the
4 *lender*. *See id.* Phleger replies that she is a *third-party beneficiary* of Countrywide's instructions.
5 Docket No. 229 at 9-10.

6 *Summit* provides a six-factor test for determining whether an escrow agent is liable to third-
7 party. 27 Cal.4th at 715. These are:

8 [1] the extent to which the transaction was intended to affect the plaintiff, [2] the
9 foreseeability of harm to him [or her], [3] the degree of certainty that the plaintiff
10 suffered injury, [4] the closeness of the connection between the defendant's conduct
11 and the injury suffered, [5] the moral blame attached to the defendant's conduct, and
12 [6] the policy of preventing future harm.

13 *Id.* (quoting *Biakanja v. Irving*, 49 Cal.2d 647, 650, 320 P.2d 16 (1958)).

14 In *Summit*, an escrow agent issued funds at closing to a non-party to the escrow, per the
15 escrow instructions. *Summit*, 27 Cal.4th at 709. The non-party then refused to honor an assignment
16 it had made. *Id.* The assignee, also a non-party to the escrow, sued the agent, asserting that it had
17 breached a duty to the assignee by issuing funds to the assignor, rather than the assignee. *Id.* The
18 California Supreme Court, analyzing the matter under the factors just stated, disagreed, noting the
19 general rule is that "an escrow holder incurs no liability . . . for a loss caused by following the
20 escrow instructions." *Id.* at 709, 715.

21 **a. Intent to affect Phleger**

22 Examining the first factor, in *Summit*, the court found that the escrow transaction was neither
23 intended to benefit nor affect the plaintiff, who was not a party to the escrow. *Id.* at 715. Here, the
24 escrow transaction was intended to benefit and affect the borrower. If a factfinder finds that Phleger
25 is the borrower, then the first *Summit* factor favors finding her a third-party beneficiary.

26 **b. Foreseeability**

27 Turning to the second factor, in *Summit*, the court found that the plaintiff had suffered an
28 injury by not receiving funds under the assignment. *Id.* Nonetheless, the court held that while the

1 escrow agent knew of the assignment, it could not have foreseen that the assignor would breach the
2 assignment. *Id.* Here, if Phleger is found liable to Countrywide, then she will be injured. Whether
3 such injury was foreseeable to Stewart, depends on the nature of the instruction allegedly not
4 followed. Phleger asserts that Stewart failed to follow six of them.

5 **i. The Assigned Notary**

6 The first instruction states, “PLEASE INSIST THAT YOUR ASSIGNED NOTARY
7 REVIEW THE ‘WARNING REGARDING [NORTC]’ PAGE (2C3451US).” Docket No. 209,
8 Ex. “C” (“Closn’g Inst.”) at 1. Stewart did not do this. Its expert witness testified, however, that
9 unless a lender prohibits an outside signing or mandates that the notary be an escrow company
10 employee, outside signings are commonplace, and were the norm during September 2005. Docket
11 No. 227 ¶ 10. Stewart also notes that Phleger never explains how this review at signing would have
12 benefitted her, where she asserts that she did not sign the documents, and her attorney-in-fact chose
13 an outside notary. Docket No. 234 at 7.

14 The Court notes that Stewart fails to provide support for its ostensible conclusion that an
15 outside signing insulates it from its obligation to comply with the instructions. The instructions
16 imposed a duty upon Stewart to insist that the notary assigned to its closing review the warning with
17 Phleger. Stewart failed to do so. Assuming that a fact-finder found Phleger were a party to the
18 escrow and had signed the mortgage and LOC documents in notary Hilario’s presence, then had
19 Stewart had Hilario review this warning with Phleger, she would have had the opportunity to rescind
20 under the NORTCs. Stewart should have foreseen that by failing to have Hilario do this, Phleger
21 could be harmed by losing this opportunity to stop the transaction.

22 **ii. The Rescission Contact**

23 The second instruction states that “[a]t the end of the 3-day rescission period, [Stewart] must
24 contact each person who signed a NORTC to confirm that no person has rescinded the loan.”
25 Closn’g Inst. at 3 ¶ 14(v). Stewart did not do this. Stewart asserts that its failure is of no moment,
26 as Phleger has not declared that she rescinded the transactions during this period or that she would
27 have, had she been contacted. Docket No. 234 at 7. Focusing on foreseeability, the Court disagrees.
28 The Court notes that absent clear evidence of fraud, had Stewart followed this instruction, it would

1 have contacted Edison. As the Court has already noted, however, a factfinder could find that the
2 dates on the documents Edison returned to Stewart were clear evidence of fraud. If a factfinder so
3 found, he or she could also find that, rather than rely on Edison’s instructions, that Stewart should
4 have contacted Phleger directly, as instructed. A factfinder could also find that Stewart should have
5 reasonably foreseen that its failure to do so, could financially harm Phleger, due to possible
6 inappropriate conduct by Edison.

7 **iii. The Closing Dates**

8 The closing instructions require that the mortgage close the earlier of September 21, 2005,
9 when the dates in the loan documents are no longer valid, or September 22, 2005, when the interest-
10 rate lock expires. Clo’s Instr. at 1 ¶ A. The mortgage was funded on September 23, 2005.
11 Docket No. 209, Ex. “A” at 114:1-19. Stewart notes that Phleger fails to explain how this delay is
12 causally related to her harm: Edison’s illegal activities. Docket No. 234 at 7. Phleger provides no
13 reply. The Court agrees that Phleger presents insufficient information for the Court to find that
14 Stewart should have reasonably foreseen that this delay would result in an injury to Phleger due to
15 Edison’s possible illegal activities.

16 **iv. The Other Sales Clause**

17 The closing instructions require Stewart to contact Countrywide’s chief credit officer, prior
18 to closing or funding, if the transaction involves (1) any other sale, transfer, or financing, except a
19 junior loan approved by Countrywide; (2) if the Source of Title shows a property transfer in the six
20 months preceding the closing; or (3) if any transfers have occurred or will occur after the date and
21 time of the Source of Title, other than the contemplated escrow transaction. Clo’s Instr. at 2 ¶ C.2.
22 Stewart notes that Phleger fails to provide a predicate which triggers this instruction, such that
23 Stewart allegedly failed to follow it. Docket No. 234 at 7. The Court agrees and notes that Phleger
24 attempts to rely on the first clause of this instruction, which requires Stewart to contact
25 Countrywide’s CCO, but she makes *no mention of*, much less analyzes, *any* of the three predicates
26 which comprise the remainder of the instruction. Phleger has shown no breach of duty.

27 **v. Cash Back to Borrower**

28 The closing instructions require that if the transaction provides for “cash back” to the

1 borrower, then the funds must be delivered to only the borrower. Closn'g Inst. ¶ 16. Here, after the
2 Wells Fargo credit line was paid off, funds were wired to the Las Vegas account. Stewart asserts
3 that this instruction is no different than the escrow instruction directing it to follow the borrower's
4 wiring instructions. Docket No. 234 at 8. Stewart asserts it was thus proper to follow Edison's
5 instructions to deliver funds to the joint account. Docket No. 234 at 8. As the Court already noted,
6 however, in ruling on the escrow instructions, there is a genuine issue of material fact as to whether
7 it was reasonable for Stewart to wire funds to this account, on Edison's instructions, given the date
8 on which the transaction documents were purportedly signed. As such, a factfinder could find that
9 Stewart should have reasonably foreseen that if it complied with the "cash back" closing instruction,
10 based on Edison's instructions, it could financially harm Phleger, due to his possibly inappropriate
11 conduct.

12 **vi. Disbursement Date**

13 The closing instructions require disbursement no "earlier than the fourth business day" after
14 the borrower has signed the NORTC and other transaction documents. Closn'g Inst. ¶ 14(v).
15 Phleger lists this instruction as one which Stewart failed to follow, but never actually addresses it.
16 See Docket No. 207 at 10-11; Docket No. 223 at 15. Nor is it clear from the evidence when any
17 funds were "disbursed." Phleger has not demonstrated how Stewart breached its duty to follow this
18 instruction.

19 **c. Moral Blame**

20 In *Summit*, the court held that "[w]ith regard to the moral blame factor, compliance by [the
21 escrow company] with its fiduciary duty to follow the instructions of the parties to the escrow was
22 not blameworthy and is, instead, a policy consideration that militates against concluding the
23 company had a tort duty in this case." *Summit*, 27 Cal.4th at 716. The escrow company in *Summit*,
24 however, did not have clear evidence of fraud before it. Here, a factfinder could find that Stewart
25 had clear evidence of fraud before it, in the form of the transaction documents returned by Edison.
26 Further, unlike the plaintiff in *Summit*, who was not a party to the transaction, if a factfinder finds
27 that Phleger is the borrower here, then she will be party to the transaction. If so, then a factfinder
28 could find that Stewart's conduct was morally blameworthy, which would support finding a tort

1 duty.

2 **d. Closeness of the Connection**

3 In *Summit*, the injury was caused by a non-party to the escrow breaching an assignment to
4 another non-party, which assignment had no connection to the escrow transaction. *Id.* Here, if
5 Phleger is injured, it will be because she is forced to repay the funds which Edison siphoned from
6 the escrow transaction, which a factfinder could find was due to Stewart's failure to follow three of
7 the closing instructions. Thus, unlike *Summit*, there is a close connection between Stewart's conduct
8 and Phleger's injury.

9 **e. Future Harm**

10 The *Summit* court did not consider this factor. If a factfinder finds that Stewart caused
11 Phleger injury by failing to follow the first, second, or fifth closing instructions, then tort liability
12 would be an appropriate means of discouraging Stewart or another escrow agent from proceeding
13 with escrow in the future, in the face of clear evidence of fraud. See *Biakanja*, 49 Cal.2d at 651.

14 **f. Summary**

15 Based on the evidence before the Court, a factfinder could find that Phleger is Countrywide's
16 borrower, and could find that Stewart had clear evidence of fraud before it, and by closing, breached
17 its duty to follow the first, second, and fifth closing instructions. If a factfinder so found, then all six
18 *Summit* factors would favor finding Phleger to be their third-party beneficiary, and Stewart would be
19 liable to her for breaching its duty to follow them. Thus, the Court DENIES Stewart's request for
20 summary adjudication of Phleger's indemnity claim, to the extent it is premised on Stewart allegedly
21 breaching its duty to follow these three closing instructions. The Court, however, GRANTS
22 Stewart's request for summary adjudication of Phleger's indemnity claim, to the extent it is
23 premised on Stewart allegedly breaching its duty to follow the third, fourth, and sixth closing
24 instructions.

25 **B. Phleger's claims for negligence and breach of fiduciary duty.**

26 Stewart seeks summary adjudication of Phleger's claims for negligence and breach of
27 fiduciary duty, as does Phleger, but only regarding the issue of liability. The parties premise their
28 requests on the same alleged breaches analyzed by the Court in part II.A *supra*, discussing Phleger's

1 indemnity claim. That is, Phleger claims that Stewart had clear evidence of fraud, and thus by
2 closing escrow, breached its duty to the parties to the escrow. Second Mot. at 2-3, 11. And she
3 claims that Stewart breached its duty to follow the escrow and closing instructions analyzed in
4 part II.A. Second Mot. at 8-10. She further claims that these breaches constitute negligence and
5 breaches of fiduciary duty. *Id.* at 6-12. In defense, Stewart raises the same defenses considered by
6 the Court in part II.A. That is, that it cannot be held liable for Phleger’s claims because its only duty
7 was to follow the escrow parties’ instructions, which it alleges it did. Third-Party Mot. at 16-17.
8 And, that it did not breach its duty to follow the escrow instructions, nor did it breach its duty to
9 follow the closing instructions as they did not create a duty running to a non-party to the escrow. *Id.*

10 The Court first turns to Stewart’s request for summary adjudication of Phleger’s claims for
11 negligence and breach of fiduciary duty. Given the symmetry in the parties’ arguments between
12 these requests and Stewart’s request for summary adjudication of Phleger’s claim for indemnity, the
13 Court relies on its analysis of the latter to dispose of the former. As previously noted, Stewart’s duty
14 was limited to following the parties’ escrow instructions, “[a]bsent clear evidence of fraud[.]”
15 *Summit*, 27 Cal.4th at 711. As already noted, however, there is a genuine issue of material fact as to
16 whether Stewart had clear evidence of fraud and failed to stop the escrow, thereby breaching its duty
17 to the parties to the escrow. Further, there is a genuine issue of material fact as to whether Stewart
18 reasonably followed the escrow instructions or the first, second, or fifth closing instructions. Thus,
19 the Court DENIES Stewart’s request for summary adjudication of Phleger’s negligence and breach
20 of fiduciary duty claims, to the extent they are premised on Stewart allegedly breaching its duty to
21 the escrow parties, duty to follow the escrow instructions, or duty to follow the first, second, and
22 fifth closing instructions. The Court, however, GRANTS Stewart’s request for summary
23 adjudication of Phleger’s negligence and breach of fiduciary duty claims, to the extent they are
24 premised on Stewart allegedly breaching its duty to follow the third, fourth, and sixth closing
25 instructions.

26 With regards to Phleger’s request for summary adjudication of her negligence and breach of
27 fiduciary duty claims, the Court GRANTS it to the extent her claims are premised on Stewart
28 allegedly breaching its duty to the parties to the escrow, duty to follow the escrow instructions, and

1 duty to follow the first, second, and fifth closing instructions. Except for its failure to follow the
2 first closing instruction, Stewart’s alleged breaches turn on whether it had “clear evidence of fraud.”
3 Assuming that Phleger is found to be a party to the escrow, Stewart *cannot* show that there is a
4 genuine issue of material fact as to whether it had “clear evidence of fraud,” and failed to stop the
5 escrow. The undisputed evidence shows that when Stewart’s agent received the transaction
6 documents, she *processed the \$3.85 million transaction based solely on her belief that she might*
7 *have e-mailed them, against Hannah’s express instructions.* Viewing this evidence in a light most
8 favorable to Stewart, *see Anderson, 477 U.S. at 255, no reasonable jury* could find that Stewart’s
9 agent dispelled the clear evidence of fraud before her, based in part on the likelihood that *no*
10 *reasonable jury* could find that she e-mailed the documents.

11 With regards to Stewart’s alleged failure to follow the first closing instruction, it is
12 undisputed that Stewart failed to ensure that the notary assigned to the transaction advised Phleger
13 how and when she could rescind the transaction. Assuming that Phleger were found to be a party to
14 the escrow and present for the transaction, no reasonable jury could find that Stewart should not
15 have foreseen that its failure could harm Phleger by depriving her of an opportunity to rescind the
16 transaction.

17 The Court, however, DENIES Phleger’s request for summary adjudication of her negligence
18 and breach of fiduciary duty claims, to the extent these claims are premised on Stewart allegedly
19 breaching its duty to follow the third, fourth, and sixth closing instructions, given the Court’s ruling
20 in favor of Stewart with regards to these instructions.

21 **C. Phleger’s and Stewart’s Evidentiary Objections**

22 Phleger filed evidentiary objections [Docket No. 231] to 11 paragraphs in a declaration filed
23 by Stewart’s expert witness, Warren D. Vaughn [Docket No. 227]. The Court OVERRULES as
24 moot the objections to the expert’s 11th, 12th, 14th, and 16th paragraphs, as the Court did not rely
25 on them to resolve the Second or Third-Party Motions. The Court OVERRULES as moot the
26 objections to the expert’s 4th, 10th, 13th, and 18th paragraphs as contradicting his deposition
27 testimony, as his deposition testimony was not provided to the Court for use in resolving the Second
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1 or Third-Party Motions.¹⁵ The Court OVERRULES the objections to the expert’s 4th and 7th
2 paragraphs as referring to documents which speak for themselves, as Phleger provides no supporting
3 legal analysis and the basis for resolving them is not readily apparent on their face. And the Court
4 OVERRULES the objections to the expert’s 15 and 17th paragraphs as misstating testimony,
5 because they do not.

6 Stewart filed evidentiary objections [Docket No. 237] to Phleger’s use of two pages from a
7 deposition transcript for Countrywide employee Brent Mochel, *see* Docket No. 224, Ex. “E.” The
8 Court OVERRULES these objections as moot, because the Court did not rely on this exhibit in
9 resolving the Second and Third-Party Motions.

10 **III. Stewart’s Administrative Motion**

11 After Phleger filed her reply, Stewart filed an Administrative Motion Pursuant to Civil Local
12 Rule 7-11 for Leave to File [1] Objections to Evidence Proffered by Plaintiff, and [2] Motion to
13 Strike Such Evidence [Docket No. 245] and a Motion to Strike [Docket No. 245, Attach. “1”].
14 Stewart asserts that with her reply, Phleger filed exhibits “E” through “L,” and a chart based on
15 Vaughn’s deposition, taken after Stewart filed its opposition. Stewart also takes issue with a
16 statement by Phleger’s counsel in a declaration filed with her reply. Stewart asserts that this
17 evidence is new, and not “reply” evidence, and is disallowed under *Zamani v. Carnes*, 491 F.3d 990,
18 997 (9th Cir. 2007) (A “court need not consider arguments raised for the first time in a reply brief.”).

19 The Court GRANTS Stewart’s administrative motion, but DENIES its motion to strike. Two
20 of the exhibits were not “new” to Stewart. Exhibit “G,” Phleger’s trustee certificate, was attached
21 by Stewart to its opposition to the Second Motion. *See* Docket No. 226, Ex. “C.” Likewise,
22 Exhibit “K,” a portion of Hannah’s deposition transcript, was attached by Phleger to her *opposition*
23 to the Third-Party Motion. *See* Docket No. 224, Ex. “I.” As for the chart, counsel’s statement, and
24 Exhibits “E,” “I,” “J,” and “L,” the Court did not rely on them to dispose of the Second and Third-
25 Party Motions. As for Exhibit “F,” a deposition transcript for Stewart’s agent, the Court considered

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27 ¹⁵ Phleger attached as Exhibit “E” to her counsel’s declaration in connection with her reply for
28 her Second Motion, a rough *uncertified* copy of Vaughn’s deposition transcript, which is
inadmissible. *See* Federal Rule of Civil Procedure 80; *Orr v. Bank of Am., NT & SA*, 285 F.3d 764,
776-77 (9th Cir. 2002).

1 portions of it, but Stewart advances *no argument* as to why it is “new” evidence, not responsive to
2 its opposition, and the Court does not find as such.

3 **CONCLUSION**

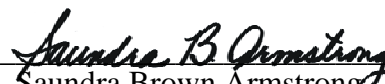
4 ACCORDINGLY, the Court DENIES plaintiff/counter-defendant Jean Phleger’s Motion for
5 Partial Summary Judgment [Docket No. 200]; GRANTS third-party defendant Stewart Title of
6 California, Inc.’s Administrative Motion Pursuant to Civil Local Rule 7-11 for Leave to File
7 [1] Objections to Evidence Proffered by Plaintiff, and [2] Motion to Strike Such Evidence [Docket
8 No. 245]; and DENIES Stewart’s Motion to Strike Evidence [Docket No. 211, Attach. “1”].

9 In addition, the Court GRANTS in part and DENIES in part Phleger’s Motion for Summary
10 Judgment on the Issue of Liability on Her Second and Third Causes of Action against Stewart Title
11 of California, Inc. [Docket No. 207] as follows. The Court GRANTS the motion to the extent
12 Phleger’s claims for negligence and breach of fiduciary duty are based on Stewart’s alleged breach
13 of duty to the parties to the escrow, duty to follow the escrow instructions, and duty to follow the
14 first, second, and fifth closing instructions. The Court DENIES the motion, however, to the extent
15 these two claims are based on Stewart’s alleged breaches of its duty to follow the third, fourth, or
16 sixth closing instructions.

17 Finally, the Court GRANTS in part and DENIES in part Stewart’s Motion for Summary
18 Judgment, or in the alternative, Partial Summary Judgment [Docket No. 211] as follows. The Court
19 DENIES the motion to the extent Phleger’s claims for indemnity, negligence, and breach of
20 fiduciary duty are based on Stewart’s alleged breach of duty to the parties to the escrow, duty to
21 follow the escrow instructions, or duty to follow the first, second, and fifth closing instructions. The
22 Court GRANTS the motion, however, to the extent these claims are based on alleged breaches of its
23 duty to follow the third, fourth, or sixth closing instructions.

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25 IT IS SO ORDERED.

26
27 January 28, 2009

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Saundra Brown Armstrong
United States District Judge

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