



**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN FRANCISCO**

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**MOTIONS IN LIMINE**

VICTOR TUNG VS. AMI QI et al

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6 SUPERIOR COURT OF CALIFORNIA, LTD. JURIDS.  
7 COUNTY OF SAN FRANCISCO  
8

9 VICTOR TUNG,

10 Plaintiff,

11 vs.

12 AMI QI, also known as AMI Y A NAN QI,  
also known as AMY Y. CHIK, also known  
13 as  
AMY Y ANAN CHIK; MARK. MINH DAI,  
14 also known as TAI DE CAI, also known as  
CAI TI DE; and WENDY LI, also known as  
15 WENDY LO, also known as WENDY  
16 HUYNH, also known as CHONA C. SUI,  
also known as C. CHONG SUI, also  
17 known as CHONA LO; JRT ASSOCIATES  
18 COMPANY, a California Corporation  
(suspended), doing business as NEW  
19 HORIZNON REALTY and doing business  
as 415 ASSOCIATES; CHICAGO TITLE  
20 COMPANY, a corporation doing business  
in California; Maureen Dullea (also known  
21 as MAUREEN DULLEA-TEJADA; and  
22 DOES

23 1-20, Defendant  
24  
25  
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29

)  
)No. CGC 13 531599  
)MOTION *IN LIMINE* #11 OF  
)DEFENDANT WENDY LO:  
)TO PRECLUDE ADMISSABILITY AT  
)TRIAL OF ALL EVIDENCE OF UNPLED  
)AND/OR RESOLVED CLAIMS FOR  
)DAMAGES AND/OR, IN THE  
)ALTERNATIVE, DEFENDANTS'  
)NONSTATUTORY MOTION FOR  
)JUDGMENT ON THE PLEADINGS

Judge: Hon Cynthia Lee  
Date of Trail: August 29, 2016  
Time: 9:30 a.m.  
Dept.: 606

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3 Defendant WENDY LO, also known as Chung Shong Lo, hereby moves the  
4 court *in limine* for an order to preclude admissibility at trial of all evidence of un-  
5 pled and/or resolved claims for damages and/or, in the alternative, to grant her  
6 non-statutory motion for judgment on the pleadings. Given the press of time,  
7 Wendy Lo has incorporated substantially all of the arguments and authority used  
8 by defendant Chicago title and Maureen Dullea in their recently granted motion  
9 for judgment on the pleadings. This Court has granted Chicago Title and Maureen  
10 Dullea's motion for judgment on the pleadings and **it is Wendy Lo's contention**  
11 **that this current motion for judgment on the pleadings as to her should be**  
12 **granted on essentially the same grounds.**

### 13 I. INTRODUCTION

14 In January of 2013, Plaintiff VICTOR TUNG opened an escrow with Defendant  
15 CHICAGO TITLE COMPANY and escrow officer, MAUREEN DULLEA, to  
16 process his sale of property located at 714-716 Monterey Boulevard, San  
17 Francisco, California. Wendy Lo, a long-time friend of Victor Tung and a friend  
18 of defendant Ami Qi, having experience with real property transactions, and  
19 formerly having been a licensed California Real Estate Broker, For this case,  
20 Wendy Lo has been assisted **the parties and Victor Tung in handling the paper**  
21 **work between him, the real estate broker for the transaction Mark Dai, of**  
22 **Broker of JRT Associates, Inc., and Ami Qi as the buyer. Regarding this real**  
23 **estate transactions Wendy Lo with the parties and to assist with instructions**  
24 **from defendant Mark Dai, JRT's qualifying broker, to messenger paper**  
25 **work for the transaction. Wendy Lo received no compensation for her**  
26 **assistance of the parties in connection with this transaction.**

27 Victor Tung was formerly a licensed real estate sales person who had prior  
28 dealings with JRT Associates, Inc. and had worked with JRT Associates, Inc., in  
29 other transactions in the past.

1 Wendy Lo was involved in prior real estate transactions with Victor Tung  
2 over 15 years Ago. Victor Tung were aware of Wendy Lo does not hold a valid  
3 California Real Estate Broker's license since that time.

4 Wendy Lo was acting as long time Friend, Help him, share Real Estate  
5 knowledge without paid, and refereed to other licensed Real Estate Broker to  
6 handle Victor Tung's Properties. so **Victor Tung was accustomed to dealing**  
7 **with Windy Lo in such-transactions.**

8 Although Plaintiff VICTOR TUNG was the sole owner of the property, it  
9 was encumbered by a deed of trust that secured a loan that MR. TUNG and his ex-  
10 wife, Michelle Shen had received from an institutional lender. When MR. TUNG  
11 decided to sell the property for money to pay off his debts, there was discussion  
12 about whether Ms. Shen's consent was needed for his carry back financing  
13 arrangement with the buyer. Since Ms. Shen was not on title, it was determined  
14 that her consent was unnecessary and escrow closed as MR. TUNG and the buyer  
15 instructed.

16 After completing the sales transaction, MR. TUNG decided to back out of  
17 the sale for reasons that have never been made clear. However, by that point, it  
18 was too late because the escrow for the transaction had already closed.

19 Since Plaintiff VICTOR TUNG refused to leave the premises after the sale,  
20 he brought this lawsuit against the buyer, Defendant AMI QI for rescission of the  
21 sales and purchase contract and against the real estate professionals and the  
22 escrow holders and against Wendy Lo for alleged fraud and other claims.

23 After a long litigation, the claims against all Defendants, including Mark  
24 Dai, except for Defendants CHICAGO TITLE COMPANY, MAUREEN  
25 DULLEA and WENDY LO, have been settled for a judgment that cancels all  
26 pertinent sales, financing and escrow documents and restores full ownership of the  
27 property to Plaintiff VICTOR TUNG. Since the settlement has restored Plaintiff  
28 VICTOR TUNG to the same position he was in before the close of escrow, all  
29 claims for damages alleged in Plaintiffs complaint have been fully resolved.

1 Therefore, with the recent settlement, his Second Amended Complaint fails to  
2 state facts sufficient to support any on-going claims for damages against  
3 Defendants WENDY LO, CHICAGO TITLE COMPANY and MAUREEN  
4 DULLEA. As a result, exclusion of evidence of un-pled and/or resolved claims for  
5 damages and/or a judgment on the pleadings is warranted.

6 **II. PLAINTIFF'S CLAIMS AGAINST THE REMAINING DEFENDANTS**

7 In paragraphs 83 through 86 and Paragraphs 88 through 101 of the Plaintiffs  
8 Second Amended Complaint, Plaintiff VICTOR TUNG claims that Wendy Lo  
9 owed plaintiff a fiduciary duty included a duty to disclose all material facts  
10 concerning the transaction to plaintiff and to provide a written agency disclosure  
11 to plaintiff and to provide plaintiff with copies of all transaction documents as and  
12 when signed and to follow the instructions of Plaintiff as principal. The Plaintiff  
13 claims that Wendy Lo failed to fulfil this duty by instructing the escrow holder to  
14 close the transaction without the signature of Michelle Shen over plaintiff's  
15 objection, that Wendy Lo revealed confidential personal and financial information  
16 about plaintiff to defendant Ami Qi, that Wendy Lo failed to disclose prior  
17 relations with the buyer Ami Qi to plaintiff, that Wendy Lo informed plaintiff that  
18 his property was worth less than its then fair market value, that Wendy Lo provided  
19 plaintiff inaccurate information about Ami Qi's ability to pay a seller carry back  
20 loan, that Wendy Lo received a secret profit of \$35,000.00 from the transaction,  
21 that Wendy Lo was a qualified real estate professional when in fact she was not  
22 licensed, that Lo failed to provide copies to transactional documents to plaintiff.  
23 MR. TUNG goes on to claim that Ms. Lo's failure to make these disclosures and  
24 representations to plaintiff resulted in damages to plaintiff and plaintiff prays for  
25 damages against Wendy Lo for \$25,000.00 plus compensatory damages plus  
26 punitive damages and attorneys' fees.

27 In paragraphs 96 through 101 of the Plaintiff's Second Amended Complaint,  
28 the Plaintiff alleged that Wendy Lo committed fraud on plaintiff by the failing to  
29



1 comply strictly with the parties' written instructions and concealed facts from  
2 plaintiff in connection with the complained of transaction.

3 Since Victor Tung has settled with Mark Dai, the real estate broker in this  
4 transaction, he cannot complain about the actions of Mr Dai's assistant Wendy Lo.  
5 **Effectively, Wendy Lo, acting on behalf of Mark Dai and defendant JRT**  
6 **Associates, Inc. cannot be held accountable for alleged failures of Plaintiff's**  
7 **brokerage firm given the fact that Plaintiff has completely settled with the**  
8 **brokers. Plaintiff's settlement with Mark Dai effectively eliminated damages**  
9 **Plaintiff alleges were caused by actions of Wendy Lo.**

10 In paragraph 122, the Plaintiff alleged that "as a result of said Defendants  
11 fraud and deceit, Plaintiff sustained general and special damages in an amount in  
12 excess of the jurisdictional minimum of this Court to be established according to  
13 proof at trial." Since all pertinent sales, financing and escrow documents have  
14 been cancelled and Plaintiff VICTOR TUNG has been restored to full ownership  
15 of the property, all documents referenced in the allegations against the escrow  
16 holders and Wendy Lo are now null and void. Therefore, it is of no consequence  
17 to anyone how the escrow closed in the first place. Since the documents are no  
18 longer effective legal instruments, they no longer give rise to any damages as  
19 originally alleged in the Second Amended Complaint. Therefore, Plaintiff  
20 VICTOR TUNG's Second Amended Complaint fails to allege facts sufficient to  
21 state any cause of action or **claim for recoverable damages against Defendants**  
22 **WENDY LO as a matter of law.**

23  
24 **III. LEGAL ARGUMENT**

25 **A. THIS COURT MAY ENTER JUDGMENT FOR THE DEFENDANTS**  
26 **AT THE START OF TRIAL EITHER ON MOTION IN LIMINE OR**  
27 **ON A NONSTATUTORY MOTION FOR JUDGMENT ON THE**  
28 **PLEADINGS**

29 A court's inherent powers to control litigation and conserve judicial  
resources authorize it to conduct hearings and formulate rules of procedure as

1 justice may require. *Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687,  
2 701, 34 Cal.Rptr.3d 19, citing *Walker v. Superior Court* (1991) 53 Cal.3d  
3 257,267-268,279 Cal.Rptr. 576, 807 P.2d 418. Exercising these powers, the court  
4 may enter judgment for a defendant when motions in limine show that "even if the  
5 plaintiff's allegations were proved, they would not establish a cause of action."  
6 *Coshow*, supra at 701.

7 In *Coshow*, supra, the motions in limine, although directed at particular  
8 items of *Coshow's* evidence, had the cumulative effect of an objection to all  
9 evidence on the ground *Coshow* failed to state any cause of action, thereby  
10 entitling City and Department to judgment as a matter of law. *Coshow*, supra at  
11 701. Even though the court had previously overruled the City's and the  
12 Department's demurrers and denied their motions for summary adjudication of  
13 claims and summary judgment, those rulings did not deprive the court of its  
14 inherent power to grant judgment on the pleadings if it believed that *Coshow's*  
15 allegations, even if proved, would not establish a cause of action. *Coshow*, supra  
16 at 701.

17 The court noted that "it is not uncommon that as a case proceeds to trial and  
18 additional discovery is conducted, evidence is revealed which will either  
19 substantiate or disprove a cause of action." Therefore, once the court sustained  
20 various objections to *Coshow's* evidence, no viable cause of action remained.  
21 Thus, the court properly exercised its inherent powers over the proceedings by  
22 construing the motions in limine as a motion for judgment on the pleadings.  
23 *Coshow*, supra at 702.

24 As stated in *Coshow*, supra, Code of Civil Procedure § 1008 does not  
25 prevent the court from revisiting issues of law previously raised or from  
26 considering motions in limine as a basis to grant judgment on the pleadings. So,  
27 any prior demurrer or motion for summary judgment by the Defendants is of no  
28 consequence to this current motion.  
29

1 Even apart from the in limine motions, "a motion for judgment on the  
2 pleadings may be made at any time either prior to the trial or at the trial itself."  
3 *Stoops v. Abbassi* (2002) 100 Cal.App.4th 644, 122 Cal.Rptr.2d 747, citing *Ion*  
4 *Equipment Corp. v. Nelson* (1980) 110 Cal.Rptr.3d 868,877, 168 Cal.Rptr. 361  
5 and *Smiley v. Citibank* (1995) 11 Cal. 4th 138, 145. Such a motion may be made  
6 on the same ground as those supporting a general demurrer, i.e., that the pleading  
7 at issue fails to state facts sufficient to constitute a legally cognizable claim or  
8 defense. *Stoops*, supra.

9 Since no notice is required for a non-statutory motion for judgment on the  
10 pleadings, the motion may even be made orally at the outset of trial. *Kortmeyer v.*  
11 *California Ins. Guarantee Assn.* (1992) 9 Cal.AppAth 1285, 1293. As a result, the  
12 court can enter judgment for the Defendants either on a motion in limine or on this  
13 no statutory motion for judgment on the pleadings. *Coshow*, supra at 701-702.

14 A motion for judgment on the pleadings must be based on grounds  
15 appearing on the face of the complaint and its attachments, and any matter, such as  
16 the settlement documents, of which the court may take judicial notice. See, e.g.  
17 *Blank v. Kirwan* (1985) 39 Cal. 3d 311, 318; and *Saltarelli & Stepnovich v.*  
18 *Douglas* (1995) 40 Cal. App. 4th 1,5. Granting a motion for judgment on the  
19 pleadings without leave to amend is proper where the facts alleged in the  
20 complaint are not in dispute, and the nature of plaintiffs' claims is clear, but under  
21 substantive law, no liability exists on the part of the defendant. See *Routh v. Quinn*  
22 (1942) 20 Cal. 2d 488, 493; and *Berkeley Police Association v. Berkeley* (1977) 76  
23 Cal. App. 3d 931, 942.

24 Now that Plaintiff VICTOR TUNG'S ownership of the property has been  
25 restored and all associated escrow documents are null and void, the Defendants'  
26 motion in limine and/or their motion for judgment on the pleadings should be  
27 granted because Plaintiff VICTOR TUNG's Second Amended Complaint fails to  
28 state facts sufficient to constitute any valid claims or causes of action for damages  
29 against Defendant Wendy Lo.

1 B. PLAINTIFF CANNOT PROVE HE IS ENTITLED TO DAMAGES

2 As noted above, Plaintiff VICTOR TUNG has alleged claims against  
3 Defendants Wendy Lo for breach of fiduciary duty and for fraud and deceit.  
4 However, now that the entire sales transaction and all associated escrow  
5 documents have been set aside, Plaintiff VICTOR TUNG cannot prove the  
6 Defendant Wendy Lo's involvement in the transaction caused him any damage.  
7 *Tribeca Companies, LLC v. First American Title Insurance Company* (2015) 239  
8 Cal.App.4th 1088, 192 Cal.Rptr.3d 354.

9 As stated in *Tribeca Companies*, supra, an essential element of each claim is  
10 that a defendant's alleged misconduct was the cause in fact of the Plaintiffs  
11 damage. See Civil Code §§ 1709,3300,333, Rest.2d Contracts §347, Rest.2d Torts  
12 §§ 546, 766, *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surlus Lines*  
13 *Ins. Co.* (2002) 101 Cal.App.4th 1038, 1060, 124 Cal.Rptr.2d 818 (breach of  
14 contract, *Charnay v. Cobert* (2006) 145 Cal.App.4th 170 182,51 Cal. Rptr.3d 471  
15 [breach of fiduciary duty], *Leslie G. v Perry & Associates* (1996) 43 Cal.App.4th  
16 472,480, 50 Cal.Rptr.2d 785 [negligence], *Goehring v. Chapman University*  
17 (2004) 121 Cal.App.4th 353,364, 17 Cal.Rptr.3d 39 [fraud], *Home Budget Loans,*  
18 *Inc. v. Jacoby & Meyers Law Offices* (1989) 207 Cal.App.3d 1277, 1285,255  
19 Cal.Rptr. 483 (negligent misrepresentation).

20 As the *Tribeca Companies*, supra court explained, the causation analysis  
21 involves two elements. "'One is cause in/act. An act is a cause in fact if it is a  
22 necessary antecedent of an event.' [Citation.]" *Ferguson v. Lieff, Cabraser,*  
23 *Heimann & Bernstein LLP* (2003) 30 Cal.4<sup>th</sup> 1037, 1045, 135 Cal.Rptr.2d 46, 69  
24 P.3d 965, original italics. The second element is proximate cause. "' [p]roximate  
25 cause 'is ordinarily concerned, not with the fact of causation, but with the various  
26 considerations of policy that limit an actor's responsibility for the consequences of  
27 his conduct. "' *Ferguson, supra.*

28 Determining whether a defendant's misconduct was the cause in fact of a  
29 plaintiffs injury involves the same inquiry in both tort and contract cases. *U.S.*

1 *Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 909, 28  
2 Cal.Rptr.3d 894, *Vu v. California Commerce Club, Inc.* (1997) 58 Cal.App.4th  
3 229, 233, 68 Cal.Rptr.2d 31. "The test for causation in a breach of contract  
4 ... action is whether the breach was a substantial factor in causing the damages."  
5 *US Ecology*, supra at 909. Similarly, in tort cases, "California has definitively  
6 adopted the substantial factor test ... for cause-in-fact determinations. Under that  
7 standard, a cause in fact is something that is a substantial factor in bringing about  
8 the injury." *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 968-969, 67  
9 Cal.Rptr.2d 16,941 P.2d 1203, see *Strebel v. Brenlar Investments, Inc.*  
10 (2006) 135 Cal.App.4th 740, 752, 37 Cal.Rptr.3d 699 [approving substantial  
11 factor instruction in fraud action] and *Stanley v. Richmond* (1995) 35 Cal.App.4th  
12 1070, 1095, 41 Cal.Rptr.2d 768 [applying substantial factor test in breach of  
13 fiduciary duty action].

14 Plaintiff VICTOR TUNG'S claim of damages is based entirely on his  
15 contention that the transaction's escrow closed contrary to his instructions without  
16 clarifying certain alleged "inconsistencies" in the parties' escrow instructions. As a  
17 corollary to this contention, he claims that because of these "inconsistencies,"  
18 certain of the escrow and loan documents were erroneous. However, since these  
19 documents have been rendered null and void by the settlement, the closing of the  
20 escrow and alleged "errors" in voided documents no longer give rise to a claim for  
21 damages as a matter of law.

22 In other words, even though Plaintiff VICTOR TUNG alleges that Wendy  
23 Lo failed to fulfil her duty in several respects, each alleged breach concerns a  
24 transaction and related escrow and financing documents that are now null and  
25 void. Therefore, the Plaintiff cannot prove that he suffers on-going injuries from  
26 any alleged failure on the part of Wendy Lo as alleged in his second amended  
27 complaint. The documents facts he claims fraudulently represented or concealed  
28 and the processes that he claims were improperly performed are now null and  
29 void. As a result, Plaintiff VICTOR TUNG can no longer allege the essential

1 element of damages caused by a breach of duty as required to state a valid claim  
2 against the Defendant Wendy Lo.

3 Since there is no liability without proof of causally related damages, the  
4 Defendants' motion for judgment on the pleadings should be granted as a matter of  
5 law.

6  
7 **C. THE SECOND AMENDED COMPLAINT FAILS TO STATE FACTS**  
8 **SUFFICIENT TO CONSTITUTE VALID CAUSES OF ACTION FOR BREACH**  
9 **OF FIDUCIARY DUTY AND FRAUD AND DECEIT AGAINST WENDY LO**  
10 **OR THE ESCROW HOLDERS.**

11 The elements of fraud that give rise to a tort action for deceit are: (a)  
12 misrepresentation (false representation, concealment, or nondisclosure), (b)  
13 knowledge of falsity (or "scienter"), (c) intent to defraud, i.e. to induce reliance,  
14 (d) justifiable reliance, and (e) resulting damage." *Engalla v. Permanente Medical*  
15 *Group, Inc.* (1997) 15 Cal.4th 951, 938 P.2d 903.

16 The elements of a cause of action for negligence are (1) a legal duty to use  
17 reasonable care, (2) breach of that duty, and (3) proximate cause between the  
18 breach and (4) the plaintiff's injury. *Mendoza v. City of Los Angeles* (1998) 66  
19 Cal.App.4th 1333, 1339, 78 Cal.Rptr.2d 525. The elements of a cause of action for  
20 breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the  
21 fiduciary duty; and (3) damage proximately caused by the breach." *Gutierrez v.*  
22 *Girardi* (2011) 194 Cal.App.4th 925, 932, 125 CalRptr.3d 210. The breach of  
23 fiduciary duty can be based upon either negligence or fraud, depending on the  
24 circumstances. See *Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th  
25 555, 563, 29 Cal.Rptr.2d 463.

26 More importantly, an "agency created by (an) escrow is limited-limited to  
27 the obligation of the escrow holder to carry out the instructions of each of the  
28 parties to the escrow." *Summit Financial Holdings, Ltd v. Continental Lawyers*  
29 *Title Co.* (2002) 27 Cal. 4<sup>th</sup> 705, 711, 117 Cal.Rptr. 2d 541, 41 P.3d 548. "[N]o  
liability attaches to the escrow holder for [its] failure to do something not required

1 by the terms of the escrow or for a loss incurred while obediently following [the]  
2 escrow instructions." *Lee v. Title Ins. & Trust Co.* (1968) 264 Cal.App.2d 160,  
3 163, 70 Cal.Rptr. 378. "[A]n escrow holder 'has no general duty to police the  
4 affairs of its depositors'; rather, an escrow holder's obligations are 'limited to  
5 faithful compliance with [the depositors'] instructions.' [Citations.] Absent clear  
6 evidence of fraud, an escrow holder's obligations are limited to compliance with  
7 the parties' instructions." *Summit, supra* at p. 711.

8 Since the escrow instructions in this case were limited to accomplishing a  
9 sale, the contract for which is now void *ab initio*, any failure to follow the escrow  
10 instructions is of no consequence to Plaintiff VICTOR TUNG. His title to the  
11 property has been restored and all financing arrangements for the sale are null and  
12 void. Therefore, he is actually in a much better position now than he was before he  
13 opened the escrow. Assuming that she was the owner, Defendant AMI QI spent a  
14 considerable amount of money on MR. TUNG's property, all without  
15 compensation by MR. TUNG. Therefore, rather than being harmed and damaged,  
16 MR. TUNG has been advantaged by the closing of escrow.

17 Additionally, there is no evidence that Wendy Lo owed any fiduciary duty  
18 to Plaintiff Victor Tung since she was merely acting as a friend in this transaction  
19 at his request.

20 So, while the Second Amended Complaint alleges several alleged breaches  
21 of the parties' escrow instructions, all alleged breaches concern a voided sales  
22 transaction and nullified documents which are of no on-going legal significance.  
23 Thus, the terms of the escrow instructions, which take precedence over the  
24 allegations themselves, do not support the Plaintiff's claim for damages for a  
25 breach by Wendy Lo. *Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal. App.  
26 3d 1624, 1627. [Facts appearing in exhibits attached to the complaint will also be  
27 accepted as true and, if contrary to the allegations in the pleading, will be given  
28 precedence.].

1 More explicitly, the Plaintiff alleges that Wendy Lo failed to provide the  
2 Plaintiff with signed documents at the time they were signed and failed to provide  
3 certain real property transaction disclosures to plaintiff . However, since the sales  
4 contract is void *ab initio* and the implementing documents are null and void, it  
5 does not matter whether the Plaintiff received signed copies or the broker was  
6 unlicensed. The transaction is void and the documents are of no consequence to  
7 MR. TUNG'S current situation. As a result, since MR. TUNG suffers no on-going  
8 damages, he has failed to allege facts sufficient to state a cause of action for  
9 damages against Wendy Lo.

10 It is important to note that while this might not have been the case before  
11 the settlement, this is the situation that exists now. It does not matter whether the  
12 Deed of Trust "did not contain the required amount of Seven Hundred Ninety  
13 Thousand Dollars (\$790,000)" or whether it was "sent to someone other than the  
14 secured lender after recordation." Since the Deed of Trust is null and void, the  
15 stated balance is of no consequence to anyone. Furthermore, since there is no  
16 Grant Deed or loan, it does not matter that the "Plaintiff would not sign a Grant  
17 Deed describing AMI Qi as an unmarried woman" or that "plaintiff was relying on  
18 her husband's income and assets to repay the loan." It also does not matter what  
19 representations may or may not have been made by Wendy Lo or Plaintiff's broker  
20 JRT Associates, Inc. and Mark Dai. **This is particularly true given the fact that**  
21 **Plaintiff has settled with Mark Dai.**

22 **So, given the current state of affairs, Plaintiff VICTOR TUNG has**  
23 **failed to allege facts sufficient to constitute any valid claim or cause of action**  
24 **against WENDY LO. Absent an actionable breach of some contract between**  
25 **Plaintiff Victor Tung and defendant Wendy Lo, which has not been pled, the**  
26 **Plaintiff has failed to state facts sufficient to state a cause of action for breach**  
27 **of fiduciary duty (Sixth cause of action) or fraud and deceit (Seventh cause of**  
28 **action) against WENDY LO. In settling the case with MS. QI and Mark Dai in**  
29



1 the way he did, the Plaintiff effectively settled the case against Defendant Wendy  
2 Lo as well.

3 **Given the current situation, the Plaintiff has failed to allege any facts to**  
4 **show that any wrong was committed by defendant Wendy Lo in any way that**  
5 **has caused, or is causing, the Plaintiff any damages. Since MR. TUNG has**  
6 **been restored to the position he was in before escrow commenced, the**  
7 **Plaintiff no longer has any valid causes of action to pursue at trial.**

8  
9 **D. PLAINTIFF PLED NO CAUSE OF ACTION FOR "TORT OF ANOTHER" ATTORNEY**  
10 **FEES AGAINST THESE DEFENDANTS**

11 It is anticipated that the Plaintiff may argue that while there are no other  
12 damages associated with the Plaintiffs claims, the Plaintiff is entitled to recover  
13 "tort of another" or Prentice attorney's fees from Wendy Lo. However, as in  
14 *Prentice vs. North American Title Guaranty Corporation* (1963) 59 Cal.2d  
15 618,621-622,381 P.2d 645,30 Cal.Rptr. 821, the pleadings contain no allegation  
16 that attorney's fees had been, or would be, incurred in the clearing of title. While  
17 there is a mention of attorney's fees, these are attorney's fees pursuant to contract  
18 and not a "tort of another" damage claim.

19 In *Prentice*, supra, the California Supreme Court overlooked the lack of  
20 proper pleading because "the issue was thoroughly tried and understood by  
21 counsel and by the court, and no prejudice has resulted to defendant from a failure  
22 to allege the damage more specifically in the complaint." *Prentice*, supra at 622-  
23 623. While that might have been true in that case, it is certainly not true here.  
24 Discovery has been cut off in this case since December 31, 2015 and the Plaintiff  
25 has allowed no newly initiated discovery since that cut-off date. Therefore, even if  
26 the Defendants knew that the Plaintiff was secretly harbouring a plan to seek  
27 *Prentice*, supra type damages, which they did not, the Defendants have had no  
28 opportunity to obtain copies of billings, conduct depositions of pertinent witnesses  
29 as to causation and damages or otherwise prepare this issue for trial. Therefore, the  
lack of proper pleading is a due process issue that cannot be ignored.

1 **E. PLAINTIFF CANNOT STATE A CLAIM FOR PRENTICE DAMAGES**  
2 **ON THESE FACTS**

3 Even if the court were to allow the Plaintiff to amend his complaint to state  
4 a claim for Prentice-type damages, the Plaintiff cannot state such a claim on these  
5 facts. As stated by the California Supreme Court in *Prentice*, supra, the general  
6 rule is that "in the absence of some special agreement, statutory provision, or  
7 exceptional circumstances, attorney's fees are to be paid by the party employing  
8 the attorney. Therefore, it is only in the rarest of cases that parties such as the  
9 Defendants are compelled to pay attorney's fees as damages to a Plaintiff.  
10 *Prentice*, supra at 622-623. This is why the pleading rules on this subject are so  
11 stringent.

12 Generally speaking, a Plaintiff is entitled to attorney's fees as damages only  
13 if he is reasonably compelled to employ counsel to prosecute or defend an action  
14 against a third party as a result o/the tort of the defendant. *Gray v. Don Miller &*  
15 *Associates, Inc.* (1984) 35 Cal.3d 348,505. Thus, the attorney's fees claimed must  
16 be premised upon the conclusion that the "natural and proximate consequence of  
17 defendant's negligence was to require the Plaintiff to file an action ... " *Gray*, supra  
18 at 505.

19 For these reasons, when the action against the third party is not clearly a  
20 proximate cause of the Defendant's conduct, the tort feasor will not be liable for  
21 the fees incurred by the Plaintiff in prosecuting the action. *Miller & Starr,*  
22 *California Real Estate 3d, § 34.65, Flyer's Body Shop Profit Sharing Plan v. Tigor*  
23 *Title Ins. Co.* (1986) 185Cal.App.3d 1149, 1156-1157.

24 As the court in *Watson v. Department o/Transportation* (1998) 68 Cal.App.  
25 4th 885, articulates:

26  
27 "The claim was summarily rejected in *Davis v. Air Technical*  
28 *Industries, Inc.* (1978) 22 Cal.3d 1, 7, fn. 9, 148 Cal. Rptr. 419,  
29 582 P.2d 1010: "[T]he Prentice language cited by respondent ...  
could be read to entitle exonerated defendants in commonplace,

1 multiparty tort actions to recover their attorney's fees from  
2 unrelated co-defendants who were held liable. Such a rule was not  
3 intended by this court. .. The extension of the Prentice rule to the  
4 commonplace case of an exonerated alleged tort feisor would go  
5 a long way toward abrogation of the American rule that each  
6 party to a lawsuit must ordinarily pay his or her own attorney's  
7 fees. It would substantially expand the notion of duty under the  
8 law of tort to compensation of the litigation expenses incurred by  
9 all persons, however connected to any tortious event, whom the  
10 injured plaintiff elects to sue who succeed in establishing lack of  
11 liability. Watson makes no policy argument justifying such an  
12 extension of duty. There is no warrant for such a wholesale  
13 extension in the general language of Prentice." *Watson*, supra at  
14 894.

15 As a result, Prentice-type damages are not available against joint tort feisors, such  
16 as "aiders and abetter" in fraud actions, as alleged in Plaintiff's ninth cause of  
17 action. In other words, in order to recover Prentice-type damages, there must be a  
18 true third party litigation that was necessitated by the "tort of another." *Miller &*  
19 *Starr*, California Real Estate 3d, § 34.65 and *Flyer's Body Shop*, supra at 1156-  
20 1157. Otherwise, a Prentice claim would merely be a clever ruse to obtain  
21 indemnity at the expense of the American rule regarding attorney's fees.

22 There is no true third party litigation in this case because Plaintiff VICTOR  
23 TUNG sued all of the Defendants over the same transactional events and damages  
24 that he is pursuing against Defendant WENDY L0. His "aiding and abetting"  
25 claim makes that point clear. So, since this is the commonplace, multiparty tort  
26 action that was addressed in :the *Watson*, supra and the *Davis*, supra cases, there is  
27 no warrant for a wholesale extension of the general language of Prentice to this  
28 case.

29 To make a claim for Prentice, supra damages here, the Plaintiff would have  
to show that his claims against the real estate principals arose out of a breach of  
duty by the escrow holders. However, the Plaintiff sued the real estate principals,  
wrong party, it should be Broker Mark Dai, based on a breach of the duties that

1 they owed to him or to rescind the contract that they had with him. So, clearly, any  
2 fees expended to pursue the real estate principals could not have arisen out of a  
3 breach of duty by the escrow holders.

4 The same is true for the litigation with MS. QI. The Plaintiff successfully  
5 sued MS. QI to prove that his contract with MS. QI was void ab initio, so that he  
6 pursue MS. QI or to defend against MS. QI's claims could not have arisen out of a  
7 breach of duty by the escrow holders. The suit was founded on issues that had  
8 nothing whatsoever to do with the escrow instructions and nothing to do with  
9 representations made or not made by Wendy Lo, (Wendy Lo is under the  
10 instruction by Victor Tung and Mark Dai, ) and the other defendants .

11 A closer examination of the fifth cause of action of MR. TUNG'S Second  
12 Amended Complaint helps to highlight the point. MR. TUNG sued Defendant  
13 AMI QI for Rescission of the Purchase Agreement for the following grounds:  
14 fraud by Defendant WENDY LO, as ratified by Defendant AMI QI, unappreciated  
15 illegality of the contract, his own mistaken consent, failure of consideration, and  
16 prejudice of the public interest. Those were the bases of the judgment he sought  
17 and achieved through settlement with MS. QI and none of bases had anything to  
18 do with any breaches of duty by the other defendants.

19 Clearly, none of the reasons for recovery against the real estate  
20 professionals or rescission of the sales contract continue after Victor Tung's  
21 ownership of the property has been restored to him.

22 The Plaintiff contends that Defendant WENDY LO took inappropriate  
23 actions in connection with this voided transaction. But, incorrect paperwork and  
24 failure to make disclosures was not the reason why the transaction was void.

25 Put another way, even if Defendant WENDY LO committed major errors or  
26 failed to make appropriate disclosures, her errors could not have served as a basis  
27 for rescission of valid and enforceable contracts with MS. QI. It would make for a  
28 truly difficult and unfair real estate market if real estate assistants had the ability to  
29 void an owner's' valid sales contracts on the grounds of their errors or omissions.

1 MS. QI could not possibly lose her valuable, arms-length contract because of  
2 errors committed by Wendy Lo, nor could plaintiff Victor Tung. As a result, MR.  
3 TUNG'S suit against MS. QI and her agents could not possibly be occasioned by  
4 or caused by errors on the **part of the Wendy Lo as an assistant to Mark Dai,**  
5 **Broker and JRT Associates Company.** Therefore, attorney's fees expended to  
6 pursue claims against MS. QI and the professionals cannot be recovered as  
7 damages as a matter of law. Additionally, **Plaintiff's settlement with Mark Dai,**  
8 **the real estate broker for this transaction, effectively settled all claims against**  
9 **Mark Dai's assistant Wendy Lo. Wendy Lo received no commission from this**  
10 **transaction and he name appears nowhere in any of the transaction**  
11 **documentation.**

12 Since Defendant Wendy Lo's conduct and actions could not have been a  
13 basis for Plaintiff VICTOR TUNG'S legal actions against MS. QI and the real  
14 estate professionals and Plaintiff has settled against the real estate professionals  
15 and Ami Qi, all evidence of un-pled and/or resolved claims for damages should be  
16 excluded. Or, **in the alternative, the court should grant a judgment on the**  
17 **pleadings in favor of the Defendant Wendy Lo and against the Plaintiff as a**  
18 **matter of law.**

#### 19 CONCLUSION

20 **Defendant WENDY LO'S duty to Plaintiff VICTOR TUNG was very**  
21 **limited since she did not act as his agent or real estate professional. Her only**  
22 **duty was to strictly follow his instructions.** Since the object of those instructions  
23 was the **sales contract that has now been found to be void *ab initio*,** the Plaintiff  
24 cannot allege facts sufficient to state any valid claim or cause of action against the  
25 Defendant WENDY LO. Additionally, **Plaintiff's settlement with his broker**  
26 **Mark Dai, effectively settled any claims he might have had against Wendy Lo.**  
27 **As a result, the court should grant Defendant WENDY LO'S motion *in limine***  
28 **and exclude the admissibility of evidence of un-pled and/or resolved claims of**  
29 **damages and/or, in the alternative, grant the Defendant a judgment on the**

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**pleadings because of the Plaintiff's inability to state a cause of action against her.**

Dated: September 6, 2016

  
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WENDY LO

Defendant

1 PROOF OF SERVICE *Tung v. Qi, et al.*  
2 San Francisco County Superior Court Case No. CGC 13 531599

3 I reside in the County of San Francisco, State of California. I am over the age of 18  
4 years and not a party to the within action. My residence address is 347-10<sup>th</sup> Street.  
5 San Francisco CA 94103

6 On September 6, 2016 I served the within: • MOTION IN LIMINE #11 OF DEFENDANT  
7 WENDY LO: TO PRECLUDE Admissibility AT TRIAL OF ALL EVIDENCE OF UNPLED  
8 AND/OR RESOLVED CLAIMS FOR DAMAGES AND/OR, IN THE ALTERNATIVE,  
9 DEFENDANTS' NONSTATUTORY MOTION FOR JUDGMENT ON THE PLEADINGS  
on the parties in said action by placing a true copy thereof as indicated below, addressed as  
follows:

10 Michele L McGill E-mail: Michele@mcgillattorney.com ( Hand  
11 deliver)

12 Stephen C. Seto Email: sseto@wcjuris.com

13 Scot D. Peebles Email: scott@wcjuris.com

14 Mark Dai: Email : bjtc@att.net

15 John Lo: Email : jlo@dincellaw.com

16 Thomas Trapani : thomas.trapani@fnf.com

17 Ti De Cai: Email: tide\_chi@yahoo.com

18 I declare under penalty of perjury under the laws of the State of  
19 California that the foregoing is true ad correct.

20  
21 I declare under penalty of perjury under the laws of the State of California that the foregoing  
is true and correct.

22 DATED: Monday, September 6, 2016

Kai Yi Liu  
Kai Yi Liu