No. 18A918

In the

Supreme Court of the United States

KIMBERLY COX

Petitioner,

v.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, *et al.*,

Respondents.

APPLICATION FOR AN EXTENSION OF TIME TO FILE PETITION FOR A WRIT OF CERTIORARI

To the Honorable Elena Kagan
Associate Justice of the United States Supreme Court
and Circuit Justice for the Ninth Circuit

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INTRODUCTION

TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT

Pursuant to Supreme Court Rules 13.5, 22, and 30, Kimberly Cox ("Applicant") respectfully requests a 60-day extension of time to file a petition for a writ of *certiorari* to the Supreme Court of the United States to review the Ninth Circuit Court of Appeals' Memorandum decision in *Cox v. Old Republic Nat'l Title Ins. Co. et al.* (2018 U.S. App. LEXIS 32680) 743 Fed. Appx. 104.

For good cause set forth herein, Applicant asks that the current deadline be extended from the current deadline to June 10, 2019.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1), and the time to file a petition for a writ of certiorari will expire without an extension, April 11, 2019. This application is timely because it has been filed more than ten days prior to the date on which the time for filing the petition will expire.

The Honorable Elena Kagan is the Associate Justice of the United States Supreme Court and Circuit Justice for the Ninth Circuit.

PURPOSE AND REASON EXTENSION IS JUSTIFIED

More Time is Needed to Receive a Decision from the Bankruptcy Court on a Motion Filed

The purpose of this extension is to seek more time to obtain a decision from the Northern District of California Bankruptcy Court on Applicant's Rule 60(b) motion to vacate its denial of Applicant's motion

to reopen her case amend her schedules[1] which according to the 9th Cir. Dist. and App. Courts' decisions, was required to provide Applicant "standing" to invoke the 9th Cir. Courts' jurisdiction "over the case."

Granting this extension is justified because the Bankruptcy Court's decision is pivotal to some of the issues currently anticipated to otherwise be presented in Applicant's *certiorari* petition. Applicant's decision whether to seek *certiorari* at this juncture or first pursue further litigation, will depend on whether Applicant's "standing" has been established by the Bankruptcy Court reopening the case and amending the schedules as requested.

In the alternative, should the bankruptcy court further refuse to reopen the case to amend Applicant's schedules, this would mean that all three Federal Courts have deprived Applicant of her rights under the 1st 5th 10th and 14th Amendments of the U.S. Constitution as well as Article 1 Sec. 7 of California's Constitution necessitating *certiorari* by the Supreme Court on these additional important issues and to invoke its supervisory powers over these inferior courts.

> "***All people*** are by nature free and independent and ***have inalienable rights. Among these are*** enjoying and defending life and liberty, ***acquiring, possessing, and protecting property***, and pursuing and obtaining safety, happiness, and privacy." Calif. Constitution Article 1

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[1] See, attached Exhibit "A."

Declaration of Rights, Sec. 1 (*Sec. 1 added Nov. 5, 1974, by Proposition 7. Resolution Chapter 90, 1974*). (Emphasis added)

"***Congress shall make no law*** respecting an establishment of religion, or ***prohibiting*** the free exercise thereof; ***or abridging the freedom of speech***, or of the press; or the right of the people peaceably to assemble, ***and to petition the Government for a redress of grievances.***" USCS Const. Amend. 1 (emphasis added)

"***No person shall*** be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor ***be deprived of*** life, liberty, or ***property, without due process of law***; nor shall private property be taken for public use, without just compensation." USCS Const. Amend. 5 (emphasis added)

"***The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved*** to the States respectively, or ***to the people***." USCS Const. Amend. 10 (emphasis added)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. ***No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of*** life, liberty, or ***property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws***." USCS Const. Amend. 14, § 1 (emphasis added)

Thus far, the Dist. 9th Cir. App. and N. Dist. of Calif. Bankruptcy Courts have denied Applicant these Constitutional rights.

More Time is Needed to Engage Counsel Admitted into the Supreme Court

Applicant is seeking, but has been unable thus far, to timely retain counsel admitted to the Supreme Court or for her current counsel to be admitted due to his medical issues and time constraints with previous commitments, to secure the sponsors he needs to support his request for admission and file his application.

Applicant has had Medical Issues to Deal With

Applicant has had insufficient time to commit to her intended *certiorari* petition due to her husband, her current counsel's paralegal, having been diagnosed with throat cancer in Feb. 2018 and having to deal with the resulting surgeries and debilitating side effects of treatments and follow up appointments with medical professionals.

RELEVANT FACTS RELATED TO THE INSTANT CASE ON WHICH THIS APPLICATION IS BASED

Brief Introduction

The *certiorari* petition Applicant intends to file, will present important questions of federal law that have not been, but should be settled by this Court; and questions of federal law which were decided by the Dist. Court and affirmed by the App. Court that conflict with relevant decision(s) of this Court; particularly in the *Jesinoski v. Countrywide Home Loans, Inc.* (2015) 135 S.Ct. 790 decision. The Dist. and App. Courts decisions were also in conflict with other courts on issues of national importance, needing to invoke this Court's supervisory powers related to Applicant's "standing" or lack thereof, purported to

have deprived the Courts of subject-matter jurisdiction "over [the] case" because of Applicant's unopposed, unchallenged, undenied, timely and lawfully effected Truth in Lending Act and Regulation Z (collectively "TILA") rescission of the consumer transaction ("Rescission"), the subject of this action, was not "scheduled" as a "claim" or "cause of action" in Applicant's Ch. 7 bankruptcy.

The problem is:

1. **Both the Dist. and App. Courts erred in their determination that Appellant's TILA Rescission was a "claim" (or "cause of action") which was: (a) never stated as a claim upon which relief can be granted in the operative complaint; and (b) was shown by Applicant to both Courts with applicable supporting authority provided, that a rescission is a REMEDY, not a "CLAIM." The term was obfuscated by the Courts in each of their' decisions**;[2] and

2. **Despite determining that they failed to have subject-matter jurisdiction "over the case;" each Court selectively and subjectively invoked jurisdiction over, *other* portions of the case, but not the *actual* claims upon which relief can be granted, stated in the operative complaint.**

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[2] The claims upon which relief can be granted were stated as Counts 1-6 in the operative complaint and completely ignored by the Courts. Appellant did not seek relief for her TILA Rescission but from the unlawful actions of the Defendants and Non-Defendants.

Abbreviated Chronological History of Facts

The refinance transaction the subject of this action was undeniably subject to TILA and consummated in December 2004.

Appellant noticed the "creditor" (as defined under 15 U.S.C. § 1602(g)) of her Rescission in July 2007 as codified under TILA, and as subsequently determined by a unanimous Supreme Court decision in *Jesinoski v. Countrywide Home Loans, Inc.* (2015) 135 S.Ct. 790. However; despite being properly and timely served, the "creditor" completely ignored Appellant's Rescission of the transaction, failed to respond whatsoever, and more importantly, the "creditor" failed to comply with the mandatory statutory duties 15 U.S.C. § 1635(b).

Applicant failed to file a lawsuit to assert or enforce her Rescission within the three-year TILA statue of repose which terminated in December 2007, or to seek damages under 15 U.S.C. § 1640 *et seq.* within its one-year statute of limitations which terminated in July 2008.

Applicant's bankruptcy petition was filed November 12, 2010,[3] well over two years after she was barred from filing a lawsuit as required in the 9th Circuit at that time. It was not until the *Jesinoski* decision by this Court in 2015 that the 9th Circuit's holding at that until then, was reversed.

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[3] See, N. Dist. of Calif. BK Court case No. 10-61716 CN 7.

Applicant scheduled the subject real Property in the bankruptcy along with multiple "claims" (as the term is used exclusively in the bankruptcy context) by multiple purported "creditors" (again, as the term is used exclusively in bankruptcy) for the same purported debt which were scheduled as "contingent, unliquidated and disputed[4] and further described in the schedules as "unsecured and subject to discharge. Subject to Setoff."

Applicant initiated an adversary proceeding by filing a complaint in the Bankruptcy Court. However, the judge declined jurisdiction over ruling on the secured status of the subject purported "debt." There were no proofs of claim(s) filed, no objection or opposition to Applicant scheduling the Property and related "debt" as unsecured and the bankruptcy trustee refused to pursue the unsecured status of the purported debt any further as he declared during the meeting of creditors.

The Court granted the discharge and the case closed on January 27, 2012.

The *Jesinoski* decision was handed down in January 2015.

The litigation the subject of this action commenced by the filing of the initial complaint in the N. Dist. of California on May 20, 2015.[5]

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[4] See *e.g.*, Schedules A, C, D and F and Statement of Intention as applicable, in the relevant bankruptcy case, *Id.*

[5] See, N. Dist. of Calif. Case no. 5:15-cv-o2253.

The decision by the Dist. Court was filed on August 8, 2016 as Document 148, the associated Judgment filed the same day as Document 149.[6]

Applicant filed her notice of appeal on Sept. 4, 2016 (DktEntry: 150) for case # 16-16566 in the 9th Cir. App. Ct.

The 9th Cir. App. Ct. returned its Memorandum decision affirming the Dist. Court's decision on November 19, 2018.[7]

Applicant filed her Petition for Panel Rehearing or Rehearing *en banc* as DktEntry: 102 on December 14, 2018 along with a Request for Judicial Notice in support ("RJN"). Applicant's Petition and RJN were each denied by the Court's Order filed as DktEntry: 104, on January 11, 2019, setting the deadline to file her *certiorari* petition as April 11, 2019.[8]

The App. Ct. denied Applicant's Motion to Recall and Stay Reissuance of the Mandate on Jan. 28, 2019.[9]

Applicant filed her motion to reopen and amend her bankruptcy schedules on Feb. 15, 2019 which was denied by the Bankruptcy Court on February 25, 2019;[10] filed her Rule 60 Motion to Vacate the Order, Reopen the Case and Amend the schedules as Doc# 38 on February 27,

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6 See, attached APPENDIX A and B.

7 See, DktEntry: 98-1 and attached APPENDIX C.

8 See, DktEntry: 104 and attached APPENDIX D.

9 See, DktEntry: 107 and attached APPENDIX E.

10 See, Doc# 37 in N. Dist. of Calif. Bankr. Case: 10-61716 Doc#37 and attached APPENDIX F.

2019 and filed her Request for Judicial Notice in support on March 4, 2019 as Doc# 39.

CURRENT DECISIONS AT ISSUE AND ARGUMENT

The decisions by the Dist. and App. Courts were primarily based upon what Applicant contends were their erroneous presumptions that her 2007 timely, undenied and unchallenged rescission of her 2004 attempted refinance transaction under TILA was a pre-petition "claim" that was required to be "scheduled" in her 2010 Chapter 7 bankruptcy which she had not done. Accordingly, the Ninth Cir. Courts each decided that Applicant "lacked standing" depriving them of subject-matter jurisdiction "over the case."

Applicant's argument that because the 9th Circuit at that time required a lawsuit be filed in order to assert a TILA rescission which Applicant failed to do; Applicant's right to state a claim upon which relief can be granted (or state a "cause of action") as stated herein above, terminated years before her bankruptcy petition was filed.

Contrary to the Dist. And Appellate Courts' presumptive, and Applicant contends, erroneous decisions, Applicant never actually stated a claim upon which relief can be granted (or a "cause of action") for her TILA Rescission in the operative complaint and did not need to,[11] because the Rescission was a non-judicial *remedy* and event, asserted by

[11] See *e.g., Hinrichsen v. Bank of Am., N.A.* (S.D. Cal. May 9, 2017) 2017 U.S. Dist. LEXIS 70943, at *9

Applicant that pursuant to the plain language of TILA and the *Jesinoski* Court, was effected by operation of law and completed because of the statutorily defined "creditor's" acquiescence and its failure to comply with the mandatory provisions of 15 U.S.C. 1635(b). Applicant's actual claims for relief related to Defendants' actions that commenced in 2014 stated with specificity in Counts 1-6 which were never addressed by either the Dist. or App. Courts.

Notwithstanding all the important issues that could be presented; it was in the interest of judicial economy and to seek all remedies she could before resorting to a *certiorari* petition, Applicant decided to move to reopen the bankruptcy case to amend her schedules first, in deference to, and to satisfy, the Dist. and App. Courts' decisions pursuant to their determinations on the "standing" issue as a pre-petition "claim." Unfortunately, the Bankruptcy Court denied the motion to reopen and to amend the schedules, causing Applicant to file her R. 60 motion and RJN in support, each of which are still pending a decision that will affect whether to seek *certiorari* or on what issues will need to be presented.

Copies of the Courts' decisions addressed herein are attached.

CONCLUSION

There can be no prejudice to any of the Defendants/Appellees or Non-Defendants/Non-Appellees because none of them have the authority they claim. The security instrument purported to provide such authority, was undeniably rescinded by operation of law pursuant to TILA in 2007 and the *Jesinoski* Court decision in January 2015; whereas, the unlawful acts Applicant sought relief from, did not commence until November 2014.

Accordingly, for the foregoing reasons and good cause shown, Applicant respectfully requests that an order be granted extending the time to file Applicant's *certiorari* petition for 60 days, up to and including June 10, 2019.

Dated: March 6, 2019

/s/Kimberly Cox
Kimberly Cox
in propria persona

APPENDIX A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

KIMBERLY COX,

Plaintiff,

v.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, et al.,

Defendants.

Case No. 15-cv-02253-BLF

ORDER RE MOTIONS TO DISMISS AND DENYING MOTIONS FOR DEFAULT JUDGMENT

[Re: ECF 95, 99, 117, 135, 137, 138]

Plaintiff brings this action to rid herself of a purported mortgage refinancing loan. The Court previously dismissed her complaint for seeking to bring claims that she had failed to properly schedule in her Chapter 7 bankruptcy, but granted leave to amend. *See* ECF 91. Plaintiff has now filed a prolix 91 page, 218 paragraph amended complaint. In four separate motions pled by Old Republic Default Management Services, Old Republic National Title Insurance Company, Shellpoint and Bank of New York, and MERS, Defendants[1] argue that she again exclusively asserts claims that she failed to schedule in her bankruptcy. Defendants therefore ask the Court to dismiss the complaint with prejudice. For the reasons stated below, the Court GRANTS Defendants' motions to dismiss, docketed at ECF 99, 117, and 135, without leave to amend.[2]

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[1] Defendants are New Penn Financial, LLC, d/b/a Shellpoint Mortgage Servicing ("Shellpoint"), Mortgage Electronic Registration Systems, Inc. ("MERS"), Old Republic National Title Insurance Company ("ORNTIC"), and The Bank of New York Mellon fka The Bank of New York as Trustee for The Certificateholders of CWMBS, Inc., CHL Mortgage Pass-Through Trust 2005-02 Mortgage Pass-Through Certificates, Series 2005-02 ("BONY").

[2] The Court DENIES the motion to dismiss filed by Old Republic Default Management Services, a Division of Old Republic National Title Company ("ORDMS") at ECF 95. As discussed further below, ORNTIC, and not ORDMS, is the proper party defendant and the Court therefore considers only ORNTIC's motion at ECF 135. Though Plaintiff objects to ORNTIC's motion as late-filed, the Court OVERRULES the objection, finding no prejudice to Plaintiff because she filed a full opposition to ORNTIC's motion. *See* ECF 139. The Court also OVERRULES Plaintiff's objection

I. BACKGROUND

Having detailed Plaintiff's allegations in its first Order Granting Motions to Dismiss ("First Dismissal Order"), *see* ECF 91, the Court briefly summarizes Plaintiff's amended allegations below. Plaintiff alleges that she acquired the property located at 131 Sutphen Street in Santa Cruz, CA ("Property") and recorded the deed on September 1, 1998. Second Amended Compl. ("SAC") ¶ 11, ECF 93. Though Plaintiff is now a citizen of Nevada, she alleges that, at all relevant times, the Property was her principal residence. *Id.* ¶ 41.

On December 14, 2004, Plaintiff secured a $544,000 refinancing loan with a deed of trust ("DOT") on the Property. *Id.* ¶¶ 12-13, 18. The DOT was recorded on December 21, 2004 and named non-party America's Wholesale Lender as the lender. *Id.* ¶¶ 12-13. Plaintiff alleges that, though $544,000 was credited primarily to refinance a previous loan, neither AWL nor any of the Defendants provided that funding. *Id.* ¶ 18. Rather, Plaintiff alleges, AWL did not exist as named (i.e., as a New York corporation) and the actual lender was never disclosed. *Id.* ¶¶ 12, 19.

Nevertheless, for the purposes of her Truth in Lending Act ("TILA") claim, Plaintiff alleges that AWL was the creditor and that AWL violated TILA by failing to provide her with the required disclosures. *Id.* ¶¶ 2, 20. Plaintiff alleges that she therefore properly rescinded the refinancing loan by mailing a notice of rescission to AWL on July 13, 2007. *Id.* ¶ 16. AWL then "failed to comply with its duties under 15 U.S.C. § 1635(b)" or to challenge the rescission within 20 days of receiving the rescission. *Id.* ¶ 20.

On December 7, 2009, non-party Reconstruct Company requested that a Substitution of Trustee and Assignment of Deed of Trust ("SOT and Assignment")[3] be recorded. *Id.* ¶ 31. Plaintiff alleges that the SOT and Assignment was invalid and void because the Defendants and AWL were not what they purported to be (i.e., the lender, assignee, trustee, or beneficiary of the loan) and because Plaintiff had previously rescinded the DOT. *Id.* ¶ 32. In March 2010,

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to Shellpoint and BONY's motion as late-filed, instead finding that Shellpoint and BONY timely filed their motion on March 21, 2016, *see* ECF 97, and then filed a motion to correct a typographical error the following day.

[3] Plaintiff refers to the Substitutions of Trustee as "SOTs" and the Notices of Default as "NODs." The Court follows Plaintiff's naming convention.

Reconstruct Company recorded a Notice of Trustee's Sale of the Property. *Id.* ¶ 29.[4]

On November 12, 2010, Plaintiff filed for Chapter 7 bankruptcy. *Id.* ¶ 22; *see also* Case No. 5:10-bk-61716. Plaintiff scheduled the Property and the loan at issue as unsecured, nonpriority, contingent, unliquidated, and disputed. SAC ¶ 22.

Plaintiff also filed an adversary proceeding in bankruptcy court against MERS and other entities who are not parties to this action to determine whether or not the purported refinancing debt was secured. *Id.* ¶ 22; *see also* Case No. 5:11-ap-05106. Plaintiff did not mention the alleged rescission. SAC ¶¶ 22-23. The bankruptcy court dismissed the adversary proceeding for lack of subject matter jurisdiction because only the Chapter 7 trustee had standing to pursue Plaintiff's claims at that time. *Id.* ¶ 22.

In January 2012, Plaintiff's bankruptcy case was closed. Plaintiff alleges that, at that point, the Property was abandoned back to Plaintiff and the purported refinancing debt was deemed unsecured and void by operation of law. *Id.* ¶ 25.

In May 2012, Plaintiff filed a lawsuit in Santa Cruz Superior Court, Case No. CV 174201. *Id.* ¶ 29. Plaintiff alleges that, with trial looming, Reconstruct Company recorded a Notice of Rescission and Declaration of Default and Demand for Sale and of Notice of Default and Election to Sell on January 23, 2014. *Id.* ¶ 29. Plaintiff alleges that, because this effectively ended the attempts to foreclose on the Property, Plaintiff dismissed her state case without prejudice and her appeal of the bankruptcy adversary ruling. *Id.* ¶ 29.

But Plaintiff alleges that Defendants' wrongful activities did not end there. Instead, Plaintiff alleges that Defendants collectively recorded or "caused to be recorded" the following: a Notice of Default and Election to Sell Under Deed of Trust ("NOD 1") and second Substitution of Trustee ("SOT 2") on October 28, 2014, *id.* ¶¶ 33-34; a second Notice of Default ("NOD 2") and third Substitution of Trustee ("SOT 3") on December 19, 2014, *id.* ¶¶ 35-36, and a second Notice

[4] Plaintiff alleges that this 2010 notice was wrongfully recorded because it ignored Plaintiff's bankruptcy discharge. SAC ¶ 29. However, this appears to be inconsistent with Plaintiff's allegation that the bankruptcy discharge did not occur until 2012. *Id.* ¶ 25.

of Trustee's Sale on April 30, 2015, *id.* ¶ 37.[5] Plaintiff alleges that the documents wrongfully identified Shellpoint and MERS as the beneficiary, MERS as the nominee, ORNTIC as the trustee, and BONYMCorp as the assignee of the DOT. *Id.* ¶¶ 32, 84. Plaintiff alleges that each of these documents was invalid and void because Plaintiff had rescinded the DOT on which they were based. *Id.* ¶¶ 33-37.

Based on the above allegations, Plaintiff asserts: (1) cancellation of invalid instruments; (2) slander and disparagement of the title to Plaintiff's property against all Defendants; (3) fraud against ORNTIC and Shellpoint; (4) violation of the Federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq*, and the Rosenthal Debt Collection Practices Act ("RFDCPA" or "Rosenthal Act"), Cal. Civil Code § 1788 *et seq*, against ORNTIC and Shellpoint; (5) violation of California's Unfair Practices Act ("UPA"), Cal. Bus. & Prof. Code § 17000 *et seq.*, against ORNTIC, Shellpoint, and MERS; and (6) a new 42 U.S.C. § 1983 claim against all Defendants.

II. MOTIONS TO DISMISS

A. Legal Standard

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When considering a motion to dismiss, the Court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). The Court "need not, however, accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

[5] Plaintiff's allegations regarding these events are written exclusively in the passive voice and therefore fail to specify who did any of the challenged acts. Read in combination, the clearest theory that emerges is that ORNTIC and Shellpoint conspired to have an allegedly non-existent entity, ORDMS, request the recording of each NOD and the second Notice of Trustee's Sale; Shellpoint recorded each SOT; and MERS "caused the other [Defendants] to record" the purportedly invalid documents." SAC ¶¶ 90, 110, 112, 123, 173, 186.

When a party pleads a cause of action for fraud or mistake, as here, it is subject to the heightened pleading requirements of Rule 9(b). Rule 9(b) demands that the circumstances constituting any alleged fraud be pled "specific[ally] enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Kearns v. Ford Motor Co.*, 567 F.3d 1120 (9th Cir. 2009) (citing *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)). "Rule 9(b) does not allow a complaint to merely lump multiple defendants together but 'require[s] plaintiffs to differentiate their allegations when suing more than one defendant . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.'" *Swartz v. KPMG LLP*, 476 F.3d 756, 764-765 (9th Cir. 2007). Claims of fraud must be "accompanied by the who, what, when, where, and how of the misconduct alleged." *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997).

B. Discussion

Shellpoint, BONY, and MERS argue that Plaintiff lacks standing to bring this case.[6] Because the Court previously dismissed Plaintiff's complaint for lack of standing and because the argument extends to each of Plaintiff's claims, including those alleged against ORNTIC as discussed further below, the Court begins there.

In the First Dismissal Order, the Court determined that Plaintiff lacked standing to bring claims related to her alleged rescission because any such claims accrued pre-petition and therefore now belong to the Chapter 7 trustee. *See* First Dismissal Order at 11-12. Because Plaintiff asserted that she could plead around this deficiency, the Court granted leave to amend all claims.

Shellpoint, BONY, and MERS contend that Plaintiff has failed to cure this deficiency, instead squarely predicating each claim in the SAC on the alleged rescission. MERS argues that,

[6] Each Defendant has filed a RJN, *see* ECF 98, 118, 136, seeking judicial notice of the same exhibits offered in the first round of motions to dismiss. Plaintiff again objects to these requests on the same bases as she asserted in the first round. As before, the Court finds that these exhibits are documents "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," *see* Fed. R. Evid. 201(b), and finds that judicially noticing them does not convert Defendants' motions into motions for summary judgment. *See* First Dismissal Order at 7-9. Therefore, as before, the Court GRANTS judicial notice of the claims and disclosures made in Shellpoint and BONY's Exhibits A-L, MERS' Exhibits A-L (which are identical), and ORNTIC Exhibits A-E, but does not grant judicial notice as to the underlying facts.

Plaintiff has amended her allegations only to offer legal argument to challenge the Court's findings in the First Dismissal Order. MERS Mot. at 1, ECF 117. Therefore, as in the first round of motions to dismiss, Defendants argue that, because Plaintiff failed to properly schedule these claims in her 2010 bankruptcy, they now belong to the Chapter 7 trustee. *Id.* at 6; *see also* Shellpoint Mot. at 5, ECF 99.

As the Court explained in the First Dismissal Order, "when [an individual] declare[s] bankruptcy, all the 'legal or equitable interests,' he had in his property became the property of the bankruptcy estate and are represented by the bankruptcy trustee." *Turner v. Cook*, 362 F.3d 1219, 1225-26 (9th Cir. 2004) (quoting 11 U.S.C. § 541(a)(1)). "Causes of action are among such legal or equitable interests." *Id.* at 1226 (citing *Sierra Switchboard Co. v. Westinghouse Elec. Corp.*, 789 F.2d 705, 707 (9th Cir.1986)); *see also In re Polis*, 217 F.3d 899, 901 (7th Cir. 2000) (finding that estate property includes TILA claim). Thus, any pre-petition claims that Plaintiff had regarding the Property were property of the estate. Pursuant to 11 U.S.C. § 554(d), claims remain property of the estate unless the bankruptcy court orders otherwise or the claims are abandoned or administered. In order to have been abandoned or administered, Plaintiff's claims must have been properly scheduled. 11 U.S.C. §§ 554(c), 521(1); *see also Vreugdenhill v. Navistar Int'l Transp. Corp.*, 950 F.2d 524, 526 (8th Cir. 1991).

Plaintiff does not contest the fact that each of the claims in the SAC arises from the purported rescission,[7] but she argues that Defendants' argument nevertheless fails because she could not have listed the rescission in her bankruptcy schedules as the rescission was a remedy (for AWL's alleged TILA violation), and not itself a claim. *See, e.g.,* Pl.'s Opp. to MERS Mot. at

[7] The Court notes that the First Dismissal Order suggested that Plaintiff's allegations in the FAC could also have been read to challenge the SOTs, NODs, and other documents as invalid because they ignored the discharge of Plaintiff's debt in 2012. This theory appears less central to the SAC, as Plaintiff now consistently challenges the documents because "the purported DOT relied on for . . . authority . . . was absolutely void by operation of law pursuant to the Rescission," without mention of the discharge. *See, e.g.,* SAC ¶¶ 32-37. Moreover, the Court notes that any allegations of wrongdoing based on the discharge would have failed to state a claim because "discharge in a Chapter 7 liquidation only extinguishes the 'personal liability of the debtor' and the creditor's right to foreclose on the mortgage survives or passes through the bankruptcy." *U.S. Bank N.A. v. Friedrichs*, 924 F. Supp. 2d 1179, 1187 (S.D. Cal. 2013) (quoting *Johnson v. Home State Bank*, 501 U.S. 78, 82-83 (1991)).

8, ECF 125. This argument misreads Defendants' challenge. Defendants correctly assert—as the Court previously determined—that Plaintiff had to schedule any claims "related to" her alleged rescission, not the rescission itself, in order to retain standing to assert them. *See Cusano v. Klein*, 264 F.3d 936, 948-49 (9th Cir. 2001).[8]

Plaintiff next argues that, even though the rescission was effective by operation of law in 2007, the claims she now brings did not accrue until 2015, when the Supreme Court decided *Jesinoski v. Countrywide Home Loans*, --- U.S. --- , 135 S.Ct. 790 (2015), and that she therefore could not have scheduled them in her bankruptcy. *See, e.g.,* Pl.'s Opp. to MERS Mot. at 2, 5. Shellpoint and BONY disagree with this reading of *Jesinoski*, instead arguing that, as alleged throughout the SAC, Plaintiff's claims accrued in 2007. While the Court's First Dismissal Order was premised on implicit agreement with Defendants' reading of *Jesinoski*, the issue was not explicitly raised by the parties in the prior round of motions and so the Court addresses it explicitly below.

In *Jesinoski,* two borrowers mailed their creditors a letter of rescission within three years of taking out their loan, but did not file suit for a declaration of rescission until more than four years had passed from the loan's consummation. 135 U.S. at 791. The creditor defendants argued that the litigation was barred by TILA's three year statute of limitations. The Supreme Court disagreed, holding that TILA's language "leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. It follows that, so long as the borrower notifies within three years after the transaction is consummated, his rescission is timely." *Id.* at 792. In other words, under *Jesinoski*, as long as a borrower sends a notice of rescission within three years, s/he is safely within the statute of limitations for filing suit at any point after.

Applying that holding here, the Court agrees with Defendants: *Jesinoski* makes clear that Plaintiff could have asserted the claims at issue as early as 2007 and retained the ability to do so in 2010, when she filed for bankruptcy. Therefore, as before, the Court finds that Plaintiff must have

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[8] Plaintiff also argues that Defendants lack standing to challenge her rescission. *See* Pl.'s Opp. to MERS Mot. at 22. The Court does not reach the merit of this argument as it, too, misconstrues Defendants' position, which does not challenge the validity of the purported rescission.

properly scheduled the claims at issue in order to now have standing to bring this case.

Plaintiff additionally argues that she could not have raised her claims in the bankruptcy because she knew that, given the state of Ninth Circuit law at that time, claims brought in 2010 concerning a loan that was consummated in 2004 would have been considered time-barred. This argument ignores a debtor's obligation to disclose all assets to the bankruptcy court. *See* 11 U.S.C. § 521(a)(1). This requirement exists to enable the trustee to determine whether claims should be pursued. In other words, once a debtor enters the bankruptcy process, it is no longer up to the debtor to unilaterally determine what claims the trustee should and should not pursue. *See In re Yonikus*, 996 F.2d 866, 869 (7th Cir. 1993) (explaining how under the definition of the bankruptcy estate, virtually all property of the debtor becomes property of the bankruptcy estate and holding that "every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of [that definition]") (citing *In re Neuton*, 922 F.2d 1379, 1382-83 (9th Cir. 1990)).

The Court previously determined that Plaintiff improperly scheduled her claims after reviewing her bankruptcy schedules. *See* First Dismissal Order at 11-12. Though Plaintiff has not altered her factual allegations on this issue, Plaintiff nevertheless argues that she properly scheduled her claims by listing the purported debt as unsecured. *See* Pl.'s Opp. to MERS Mot. at 11. As the Court explained in the First Dismissal Order, however, "[c]auses of action are separate assets which must be formally listed." *Cusano v. Klein*, 264 F.3d 936, 947 (9th Cir. 2001) (citing *Vreugdenhill*, 950 F.2d at 526). "Simply listing the underlying asset [or liability] out of which the cause of action arises is not sufficient." *Id.* Thus, regardless of whether or not Plaintiff scheduled her debt properly, she failed to schedule any related claims as assets.

As a result, to the extent that Plaintiff's claims are viable, they now belong to the bankruptcy estate and Plaintiff lacks standing to pursue them. *Id.* at 947-48 ("If [debtor] failed properly to schedule an asset, including a cause of action, that asset continues to belong to the bankruptcy estate and did not revert to [debtor]."); *see also Stein v. United Artists Corp.*, 691 F.2d at 891 (9th Cir.1982) ("It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee all knowledge of certain property, can, after his estate in bankruptcy has been finally

closed up, immediately thereafter assert title to the property on the ground that the trustee had never taken any action in respect to it."). Accordingly, the Court GRANTS Defendants' Motions to Dismiss.[9] In addition, because the Court highlighted Plaintiff's lack of standing as the main defect in her FAC but, as MERS points out, Plaintiff has amended the relevant allegations only to offer legal argument, the Court does not grant leave to amend.

III. MOTIONS FOR DEFAULT

After Defendants filed their motions to dismiss, Plaintiff moved for default against The Bank of New York Mellon Corporation as Trustee for the Certificateholders of CWMBS, Inc., – CHL Mortgage Pass-Through Trust 2005-02 Mortgage Pass-Through Certificates, Series 2005-02 ("BONYMCorp"), *see* ECF 137, and ORNTIC, *see* ECF 138. In considering whether to enter a default judgment, a district court first must determine whether it has jurisdiction over the case. *See In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999). Here, the Court finds that it lacks subject matter jurisdiction because, as discussed at length above, Plaintiff lacks standing. *See Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) ("Standing is a threshold matter central to our subject matter jurisdiction.") (citing *United States v. Hays*, 515 U.S. 737, 742 (1995)). Accordingly, the Court DENIES Plaintiff's motions for default.

Plaintiff's motions additionally seek Rule 11 sanctions against the attorneys representing ORNTIC and BONY on the grounds that their submissions have been fraudulent and/or frivolous because they misrepresented the existence of BONY and ORDMS and because the attorneys have no legal services agreements with BONYMCorp or ORNTIC. BONY's counsel maintains that BONY is the proper defendant in this case and argues that Plaintiff has failed to prove otherwise. In support, BONY notes that the Clerk of the Court has declined to grant default against BONY on two occasions. *See* ECF 64, 123. Having reviewed the record, the Court agrees with BONY's counsel that Plaintiff has failed to establish that BONY is the improper party. *See* BONY's RJN Exh. C (SOT listing BONY as the assignee of Plaintiff's DOT). Accordingly, the Court DENIES

[9] Having dismissed the case for lack of standing, the Court does not reach Defendants' other grounds for dismissal.

Plaintiff's motion for sanctions against BONY's counsel.

As for ORNTIC, its counsel explains that, after receiving Plaintiff's Safe Harbor Notice for her Rule 11 motion, counsel contacted ORDMS who then researched the issue and concluded that ORNTIC is in fact the proper party defendant in this case. Upon learning this, counsel immediately filed a Notice of Errata to advise the Court of the error and filed a "corrective" Motion to Dismiss the SAC. ORNTIC's counsel argues that this remedied any offensive pleading within the time allotted in Plaintiff's Safe Harbor Notice and the Court agrees. Accordingly, Plaintiff's motion for sanctions against ORNTIC's counsel is DENIED.

IT IS SO ORDERED.

Dated: August 8, 2016

BETH LABSON FREEMAN
United States District Judge

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

KIMBERLY COX,

Plaintiff,

v.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, et al.,

Defendants.

Case No. 15-cv-02253-BLF

JUDGMENT

Having granted Defendants' Motions to Dismiss Plaintiff's Second Amended Complaint without leave to amend, the Court hereby ENTERS judgment in favor of Defendants and against Plaintiff. The Clerk of Court shall close the file in this matter.

IT IS SO ORDERED.

Dated: August 8, 2016

BETH LABSON FREEMAN
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 19 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KIMBERLY COX,

Plaintiff-Appellant,

v.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY; NEW PENN FINANCIAL, LLC DBA SHELLPOINT MORTGAGE SERVICING; THE BANK OF NEW YORK MELLON CORPORATION AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWMBS INC - CHL MORTGAGE PASS-THROUGH TRUST 2005-02; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Defendants-Appellees.

No. 16-16566

D.C. No. 5:15-cv-02253-BLF

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Beth Labson Freeman, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Submitted November 13, 2018**
San Francisco, California

Before: SCHROEDER and WATFORD, Circuit Judges, and KORMAN,*** District Judge.

Kimberly Cox defaulted on a loan that was secured by a deed on her home in Santa Cruz. She filed for bankruptcy in 2010, and her debts were discharged in 2012. Defendant creditors and lenders later recorded default notices against Cox's home and a notice of trustee sale. Cox filed this lawsuit claiming the underlying home loan upon which she defaulted was either invalid or had been rescinded in 2007.

The district court concluded that Cox's unscheduled property-related claims became part of her bankruptcy estate, and dismissed Cox's complaint for lack of standing. The district court also denied Cox's motion for default and her motion for sanctions. Cox appeals. We affirm.

When a debtor declares bankruptcy, the debtor's "legal or equitable interests" in his or her property becomes part of the bankruptcy estate, to be represented by the bankruptcy trustee. *See* 11 U.S.C. § 541(a)(1); *see also Turner*

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

v. Cook, 362 F.3d 1219, 1225-26 (9th Cir. 2004). Legal and equitable interests include "[c]auses of action." *Turner*, 362 F.3d at 1226 (citing *Sierra Switchboard Co. v. Westinghouse Elec. Corp.*, 789 F.2d 705, 707 (9th Cir. 1986)).

Each of Cox's causes of action relates to her legal or equitable interest in her real property. When Cox's bankruptcy petition was granted, her interest and all claims that derive from it became part of the bankruptcy estate. *See Stein v. United Artists Corp.*, 691 F.2d 885, 891 (9th Cir. 1982) (undisclosed property becomes part of the bankruptcy estate and a debtor cannot "withhold[] from his trustee all knowledge of certain property") (quoting *First Nat'l Bank v. Lasater*, 196 U.S. 115, 119 (1905)). Only the bankruptcy trustee has standing to bring these claims. The district court correctly dismissed plaintiff's complaint with prejudice and granted judgment for defendants.

Because Cox lacked standing to sue, the district court lacked subject-matter jurisdiction over this lawsuit. *See Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004). Accordingly, the district court correctly denied Cox's motion for default.

Cox sought sanctions because two corporate defendants' names were spelled differently on certain filings ("Old Republic Default Management Services" instead of "Old Republic National Title Insurance"; and "BONY" instead of

"BONYMCorp"). This is not the abusive misconduct that Rule 11 was designed to prevent. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990). The district court did not abuse its discretion when it denied Cox's motion for Rule 11 sanctions.

On appeal, Cox moves for additional sanctions. Cox has not identified any sanctionable misconduct. We therefore deny her motions for sanctions.

Cox also filed two requests for judicial notice. Because neither request, if granted, would change our conclusions above, both requests are denied as moot.

Conclusion

The judgment of the district court is AFFIRMED. The district court's orders denying Cox's motions for default and sanctions are AFFIRMED. Cox's pending motions for sanctions and for judicial notice are DENIED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- The proceeding involves a question of exceptional importance; or
- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or ans[redacted] must be accompanied by a Certi[redacted]te of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs ..... *(Rev. 12-1-09)*

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, [ ], swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature [ ]

("s/" plus attorney's name if submitted electronically)

Date [ ]

Name of Counsel: [ ]

Attorney for: [ ]

(To Be Completed by the Clerk)

Date [ ] Costs are taxed in the amount of $ [ ]

Clerk of Court

By: [ ], Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KIMBERLY COX, Plaintiff-Appellant, v. OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY; NEW PENN FINANCIAL, LLC DBA SHELLPOINT MORTGAGE SERVICING; THE BANK OF NEW YORK MELLON CORPORATION AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWMBS INC - CHL MORTGAGE PASS-THROUGH TRUST 2005-02; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Defendants-Appellees.	No. 16-16566 D.C. No. 5:15-cv-02253-BLF Northern District of California, San Jose ORDER

Before: SCHROEDER and WATFORD, Circuit Judges, and KORMAN,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judge Watford has voted to deny the petition for rehearing en banc, and Judges Schroeder and Korman have so recommended.

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* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and petition for rehearing en banc, Docket No. 102, are **DENIED.**

The Appellant's Request for Judicial Notice, Docket No. 103, is **DENIED.**

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 28 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KIMBERLY COX,

Plaintiff-Appellant,

v.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY; NEW PENN FINANCIAL, LLC DBA SHELLPOINT MORTGAGE SERVICING; THE BANK OF NEW YORK MELLON CORPORATION AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWMBS INC - CHL MORTGAGE PASS-THROUGH TRUST 2005-02; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Defendants-Appellees.

No. 16-16566

D.C. No. 5:15-cv-02253-BLF
Northern District of California,
San Jose

ORDER

Before: SCHROEDER and WATFORD, Circuit Judges, and KORMAN,* District Judge.

The Appellant's Motion to Recall and Stay Reissuance of the Mandate, Docket No. 106, is **DENIED.**

* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

APPENDIX F

The following constitutes the order of the Court.
Signed: February 22, 2019

M. Elaine Hammond

M. Elaine Hammond
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re	Case No. 10-61716 MEH
	Chapter 7
Kimberly Cox,	
Debtor(s).	

ORDER DENYING MOTION TO REOPEN

On February 15, 2019, Kimberly Cox ("Debtor") filed a Motion to Reopen (the "Motion") (Dkt# 36) her Chapter 7 bankruptcy case in order to amend Schedule B and list a claim regarding the Truth in Lending Act. Debtor states that the Northern District of California and Ninth Circuit ruled she currently lacks standing to pursue said claim due to the failure of scheduling it in the bankruptcy case. As a result, reopening her case and allowing her to add the claim would give her standing to pursue the lawsuit in the District Court.

However, upon examining the prior decisions from these two courts, Debtor does not correctly present their conclusions.[1] In the District Court decision, Judge Freeman initially granted defendants' motion to dismiss due to standing issues with leave for Debtor to amend. However, Debtor brought the same exact argument in the amended complaint and Judge Freeman again found Debtor asserted claims

[1] Case No. 5:15-cv-02253-BLF (N.D. California) and Case No. 16-16566 (Ninth Circuit).

she failed to schedule in her bankruptcy case. As a result, the claims were property of the bankruptcy estate and Judge Freeman dismissed the complaint with prejudice due to lack of standing.[2]

Debtor then appealed the decision to the Ninth Circuit. The Ninth Circuit agreed with the District Court's decision and found that only the bankruptcy trustee had standing to bring the claims. Therefore, the decision from the District Court to dismiss with prejudice was affirmed.[3]

Due to the above cited decisions from the Northern District of California and the Ninth Circuit, reopening the case to add a claim to the schedules would not confer standing to pursue any Truth In Lending Act claim as Debtor's complaint was already dismissed with prejudice. *In re Marino*, 181 F.3d 1142, 1144 (9th Cir. 1999)(stating a dismissal with prejudice bars any further action between the parties on the same causes of action).

Accordingly, it is ORDERED the Motion (Dkt# 36) is

DENIED and Debtor may not amend any schedules.

END OF ORDER

UNITED STATES BANKRUPTCY COURT
for the Northern District of California

[2] Case No. 5:15-cv-02253-BLF (N.D. California) at Dkt# 148.
[3] Case No. 16-16566 (Ninth Circuit).

UNITED STATES BANKRUPTCY COURT
for the Northern District of California

COURT SERVICE LIST

Via ECF:

All ECF Recipients

PROOF OF SERVICE

Pursuant to S.Ct. R. 22, 29 and 30.3, I, Charles Wayne Cox, am not a party to this action and I am over 18 years old and hereby certify that on March 6, 2019, I personally caused three copies of the APPLICATION FOR AN EXTENSION OF TIME TO FILE PETITION FOR A WRIT OF CERTIORARI to which this Proof of Service is attached, to be served, by placing them in an envelope addressed to each person listed below, first-class postage prepaid, and mailed them by U.S. Mail.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, C/O Zieve, Brodnax & Steele, LLP, 30 Corporate Park, Suite 450, Irvine, CA 92606;

NEW PENN FINANCIAL, LLC d/b/a SHELLPOINT MORTGAGE SERVICING, C/O Yu Mohandesi LLP, 633 West Fifth St., Suite 2800, Los Angeles, CA 90071;

THE BANK OF NEW YORK MELLON CORPORATION f/k/a THE BANK OF NEW YORK COMPANY, INC., AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF CWMBS INC - CHL MORTGAGE PASSTHROUGH TRUST 2005-02, C/O CT Corporation System 818 W Seventh St., 2nd FL, Los Angeles, CA 90017; and

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. C/O Severson & Werson APC, One Embarcadero Center, San Francisco, CA 94111.

I declare under the penalty of perjury under the laws of the United States, that the information above is true and correct.

Date: March 6, 2019

/s/Charles Wayne Cox
Charles Wayne Cox