UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICK BROOKS, Plaintiff-Appellant, v. PINNACLE FINANCIAL CORPORATION; et al., Defendants-Appellees.	No. 17-56885 D.C. No. 2:16-cv-07711-JAK-AJW Central District of California, Los Angeles ORDER

Before: LEAVY, M. SMITH, and CHRISTEN, Circuit Judges.

We treat Brooks's motion seeking an extension of time and other relief (Docket Entry No. 14) as a motion for reconsideration, and deny the motion.

No further filings will be entertained in this closed case.

FILED

MAR 22 2018

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

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FOR THE NINTH CIRCUIT

PATRICK BROOKS, Plaintiff-Appellant, v. PINNACLE FINANCIAL CORPORATION; et al., Defendants-Appellees.	No. 17-56885 D.C. No. 2:16-cv-07711-JAK-AJW Central District of California, Los Angeles ORDER

Before: LEAVY, M. SMITH, and CHRISTEN, Circuit Judges.

The district court certified that this appeal is not taken in good faith and revoked appellant's in forma pauperis status. *See* 28 U.S.C. § 1915(a). On January 11, 2018, the court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record and responses to the court's January 11, 2018 order, we conclude this appeal is frivolous. We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. 7) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

DISMISSED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA — WESTERN DIVISION

Patrick Brooks,

Plaintiff,

vs.

Pinnacle Financial Corporation; Mortgage Electronic Registration Systems, Inc.; GMAC Mortgage, LLC; Executive Trustee Services, LLC; Executive Trustee Services, LLC dba ETS Services LLC; ETS Services LLC; Cindy Sandoval; Bank Of New York Mellon Trust Company, National Association; Residential Asset Mortgage Products INC., Series 2006-RS1 Trust; DCB United LLC; Varougan Karapetian and Vincent Karapetian; Nanette Karapetian; and Does 1-12, Inclusive,

Defendants.

Case No. LA CV16-07711 JAK (AJWx)

JUDGMENT

JS-6

The motions of Defendants MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., BANK OF NEW YORK MELLON TRUST COMPANY, NATIONAL ASSOCIATION, RESIDENTIAL ASSET MORTGAGE PRODUCTS INC., SERIES 2006-RS1 TRUST, DCB UNITED LLC, VAROUGAN KARAPETIAN, VINCENT KARAPETIAN, and NANETTE KARAPETIAN (collectively, "Defendants") to dismiss the Complaint of Plaintiff PATRICK BROOKS ("Plaintiff") pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim were granted with prejudice, and defendants GMAC MORTGAGE, LLC, EXECUTIVE TRUSTEE SERVICES, LLC, and ETS SERVICES, LLC were dismissed separately without objection by Plaintiff. Therefore,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff shall recover nothing and that this action this case is dismissed with prejudice as to all defendants.

IT IS SO ORDERED.

Dated: December 1, 2017:

JOHN A. KRONSTADT
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV16-07711JAK (AJW)	Date	November 15, 2017
Title	Patrick Brooks v. Pinnacle Financial Corporation, et al.		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE
Andrea Keifer	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) ORDER RE PLAINTIFF'S MOTION FOR RECONSIDERATION (DKT. 77)**

I. Background

On October 17, 2016, Patrick Brooks ("Plaintiff"), who is self-represented, commenced this action by filing a complaint ("Complaint") that asserts nine causes of action. Dkt. 1. The defendants named in the Complaint are: Pinnacle Financial Corporation ("Pinnacle"); Mortgage Electronic Registration Systems, Inc. ("MERS"); GMAC Mortgage, LLC ("GMAC"); Executive Trustee Services, LLC, Executive Trustee Services, LLC dba ETS Services LLC, and ETS Services LLC (collectively "ETS Defendants"); Cindy Sandoval ("Sandoval"); Bank of New York Mellon Trust Company, National Association ("Bank of New York"); Residential Asset Mortgage Products Inc. ("RAMP"), Series 2006-RS1 Trust; DCB United LLC ("DCB"); Varougan Karapetian ("Varougan") and Vincent Karapetian ("Vincent"); and Nanette Karapetian ("Nanette")[1] (collectively "Defendants"). The causes of action advanced in the Complaint are as follows: (i) Fraud Intentional Misrepresentation and Concealment; (ii) Cancelation of Instruments under Cal. Civ. Code § 3412; (iii) Rescission Pursuant to 15 U.S.C. § 1635; (iv) Wrongful Foreclosure; (v) Violation of 18 U.S.C. §§ 1961, 1962(b) and 1964 ("RICO"); (vi) Violation of California Bus. & Prof. Code §§17200 *et seq.* ("UCL"); (vii) Violation of Cal. Civ. Code §§ 2924, 2923.5; (viii) Violation of Fair Credit Reporting Act, 15 U.S.C. § 1691 ("FCRA"); and (ix) Fraud on the Court.

On November 14, 2016, Defendants Varougan, Vincent and Nanette (collectively "Karapetians") filed a motion to dismiss ("Karapetian Motion" (Dkt. 16)), in which DCB joined. Dkt. 23. Also on November 14, 2016, Bank of New York, MERS and RAMP filed a motion to dismiss ("Bank Motion" (Dkt. 20)). These motions were taken under submission on March 2, 2017. Dkt. 56. On September 11, 2017, the Karapetian Motion and the Bank Motion were granted with prejudice. Dkt. 71 ("September 11 Order").

Since the entry of the September 11 Order, Plaintiff has made several filings through which he has sought to contest it. On September 12, 2017, Plaintiff filed a Notice of Recently Discovered Additional Authority. Dkt. 74. On September 18, 2017, he filed a Motion for Reconsideration ("Reconsideration Motion"). Dkt. 77. On September 20, 2017, Plaintiff filed a document captioned "Supplement to Motion for Reconsideration." Dkt. 81.On September 26, 2017, Bank of New York, MERS, and RAMP filed an

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opposition to the Reconsideration Motion ("Bank Opposition"). Dkt. 82. The Karapetians (Dkt. 84) and DCB (Dkt. 85) each filed a separate opposition. On October 12, 2017, Plaintiff filed a consolidated reply ("Reply"). Dkt. 86. On November 7, 2017, Plaintiff filed a document captioned "Second Supplementary Response to Defendant's Opposition to Plaintiff's Motion for Reconsideration Pursuant to FCCP 60(b)(6) and CR 59(a)(9). Dkt. XX. November 9, 2017, Plaintiff filed a document captioned "Third Supplementary Response to Defendant's Opposition to Plaintiff's Motion for Reconsideration Pursuant to FCCP 60(b)(6) and CR 59(a)(9)." Dkt. 91.

The Reconsideration Motion was taken under submission on October 27, 2017. Dkt. 87. For the reasons stated in this Order, the Reconsideration Motion is **DENIED**.

II. The September 11 Order

This action arises out of a loan made to Plaintiff that was secured by real property ("Property") that he owned, his subsequent default on that loan, and a subsequent foreclosure process with respect to the real property. Dkt. 71 at 5. The September 11 Order includes a detailed description of the allegations made in the Complaint with respect to this process. *Id.* at 5-6. It also details Plaintiff's numerous attempts to advance similar claims for relief in prior civil action. *Id.* at 6-7. That discussion is incorporated here by this reference.

The September 11 Order determined that Plaintiff's claims should be dismissed for several reasons. *First*, the claims were barred by *res judicata* due to the prior judgments entered against Plaintiff. *Id.* at 8-11. Plaintiff argued that *res judicata* did not apply because he first discovered in August 2016 certain of the alleged defects in the various transfers of interest in the underlying note, and that this was after the earlier judgments had been entered. The September 11 Order addressed this argument:

> Plaintiff's claims are neither persuasive nor plausible. Pinnacle[2] was a party in the prior litigation. At the time the prior actions were pending, information about the corporate status of Pinnacle was readily available. There is also no showing that through diligence or discovery, Plaintiff could not have gathered such information as part of an effort to state viable claims. Although Plaintiff has raised certain new causes of action, including under RICO and the FCRA, these claims still arise under the same nucleus of facts—the alleged wrongful foreclosure of the Property. Plaintiff presented arguments about the authority of MERS to substitute the trustee and assign title. They were rejected by the [Los Angeles] Superior Court. Dkt. 21, Ex. 13 and Ex. 17. As noted, the [Superior Court action] was dismissed with prejudice, which was a final adjudication on the merits. Dkt. 21, Ex. 10; Fed. R. Civ. P. 41(b). In [a successive action in state court] the Court of Appeal affirmed the finding of the Superior Court that the second action was barred under principles of *res judicata*, and issued remittitur. Dkt. 21, Ex. 17 and Ex. 18. These holdings prevent the Plaintiff from litigating the matter a third time.

Id. at 9-10 (internal footnote omitted).

[2] Pinnacle was the original lender on the note. Plaintiff alleged that he did not discover its dissolution until after the prior judgment was entered.

The September 11 Order next explained the basis for the application of *res judicata*:

> All claims against the present and prior parties have been based in the same alleged deficiencies in the substitution of trustee and assignment of deed. All Defendants were either parties to the prior actions, or were in privity with those who were. Further, the claims advanced in the Complaint arise from the same transactional nucleus that was presented in the prior actions. Therefore, the current claims are barred by *res judicata*.

Id. at 10 (internal citations omitted) (emphasis).

Second, the claims advanced lacked substantive merit. This included Plaintiff's contention that MERS lacked authority to substitute the trustee and assign the deed of trust that secured the Property. The loan agreement expressly gave MERS authority to act on behalf of the lender. *Id.* at 11 (citing *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149, 1157 (2011).

Third, Plaintiff lacked standing to challenge the alleged defects in the assignment of the loan, because he was not a party to those transactions. *See* Dkt. 71 at 12-13.

Fourth, Plaintiff's claims were time-barred because they "depend on a substitution and assignment that were recorded in 2007 and 2009," nine and seven years, respectively, prior to the commencement of this action. *Id.* at 13. Given that the prior litigation advanced similar claims, there was no basis for Plaintiff's claim of late discovery. *Id.* at 13-14.

Fifth, Plaintiff's claims for equitable relief—including cancellation, rescission, and quiet title—all failed under the tender rule that applied under California law. *Id.* at 14-15. Thus, because Plaintiff did not tender the amount that was owed under the note, he could not seek equitable relief because the "cloud on [his] title remains until the debt is paid . . . ." *Id.* at 14 (citing *Leuras v. BAC Home Loans Servicing, LP*, 221 Cal. App. 4th 49, 86-87 (2013)).

Finally, the valid sale of the property in question to DCB, and its subsequent conveyance to the Karapetians, all of whom were bona fide purchasers, precludes Plaintiff from seeking rescission of those transactions. *Id.* at 15.

III. Analysis

A. Legal Standards

Pursuant to Local Rule 7-18, A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision.

C.D. Cal. R. 7-18. Further, "[n]o motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion." *Id.*

B. Application

Plaintiff has not met any of the applicable standards under Local Rule 7-18. Plaintiff concedes that he is "reaffirm[ing] his [prior] arguments" based on his disagreement with the application of the law to the facts in the September 11 Order. Dkt. 77 at 2. Doing so is inconsistent with the requirements of Local Rule 7-18. For example, Plaintiff argues that in March 2007 he rescinded the loan pursuant to the Truth in Lending Act ("TILA"), 15 U.S.C. § 1635. This argument was previously presented, analyzed and rejected. Furthermore, the right of rescission under TILA ends upon sale of the encumbered property. *See* 15 U.S.C. § 1635.

Plaintiff also seeks to re-litigate the effect of his claimed discovery in August 2016 of Pinnacle's dissolution. Dkt. 77 at 4. No new basis for this argument, which was previously presented, considered and rejected, has been advanced as required under Local Rule 7-18. Furthermore, even if it did meet those criteria, it would not change the outcome. As stated in the September 11 Order, Plaintiff's argument that he was not aware of Pinnacle's dissolution until 2016 is implausible given the arguments that he made in support of similar claims in the earlier litigation. *See* Dkt. 71 at 9-10.

In the supplement to his Reconsideration Motion, Plaintiff argues that the determination that his claims are barred by *res judicata* was erroneous because it failed to consider the "manifest injustice" doctrine set forth in *Greenfield v. Mather*, 32 Cal. 2d 23, 35 (1948). *Greenfield* recognized that "in rare cases a judgment may not be res judicata, when proper consideration is given to the policy underlying the doctrine, and there are rare instances in which it is not applied. In such cases it will not be applied so rigidly as to defeat the ends of justice or important considerations of policy." *Id.*

Once again, even if it were shown that Plaintiff could not have presented this argument previously—as required by Local Rule 7-18—it would not merit changing the outcome. First, this is not one of the "rare" cases envisioned by *Greenfield*. As noted repeatedly, there are numerous prior judgments pertaining to the same operative transactions, all of which would be upset if a contrary result was reached here. While it is of course unfortunate that Plaintiff lost his property, there is no showing that adhering to the time-tested principles of *res judicata* would "defeat the ends of justice," particularly where, as noted, there are bona fide purchasers who would stand to (unjustly) lose their property if Plaintiff's claims were

vindicated. Furthermore, the continued vitality of the *Greenfield* doctrine has been severely questioned. *See, e.g.*, *Cal Sierra Dev., Inc. v. George Reed, Inc.*, 14 Cal. App. 5th 663, 679 (2017) ("While *Greenfield* has not been overruled, our Supreme Court has considered it of 'doubtful validity' and has noted 'it has been severely criticized.'") (quoting *Slater v. Blackwood*, 15 Cal. 3d 791, 796 (1975)).

Plaintiff has not advanced any new or otherwise meritorious arguments to warrant reconsideration of the September 11 Order. The Reconsideration Motion is **DENIED**.

IV. Conclusion

For the foregoing reasons, the Reconsideration Motion is **DENIED**. Pursuant to the September 11 Order, Defendants lodged a proposed judgment consistent with that order. Dkt. 76. Plaintiff shall timely file any objections to the form of the proposed judgment pursuant to the Local Rules no later than November 22, 2017.

IT IS SO ORDERED.

_____ : _____

Initials of Preparer ak

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV16-07711 JAK (AJW)	Date	September 11, 2017
Title	Patrick Brooks v. Pinnacle Financial Corporation, et al.		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Andrea Keifer	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) ORDER RE DEFENDANT VAROUGAN KARAPETIAN'S MOTION TO DISMISS (DKT. 16);**

DEFENDANT MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC'S MOTION TO DISMISS (DKT. 20);

DEFENDANT DCB UNITED LLC'S JOINDER IN MOTION (DKT. 23);

PLAINTIFF'S REQUEST FOR A HEARING DATE FOR AN EVIDENTIARY HEARING (DKT. 39);

PLAINTIFF'S REQUEST FOR SUBSTITUTED SERVICE ON DEFENDANT PINNACLE FINANCIAL CORPORATION (DKT. 38);

ORDER TO SHOW CAUSE AS TO WHY DEFENDANTS GMAC MORTGAGE, LLC, EXECUTIVE TRUSTEE SERVICES, LLC, AND ETS SERVICES, LLC SHOULD NOT BE DISMISSED (DKT. 44);

PLAINTIFF'S REQUEST FOR LEAVE TO AMEND COMPLAINT (DKT. 51);

PLAINTIFF'S MOTION FOR EVIDENTIARY HEARING (DKT. 65)

I. Introduction

On October 17, 2016, Patrick Brooks ("Plaintiff"), who is self-represented, commenced this action through a complaint ("Complaint") that asserts nine causes of action. Dkt. 1. The defendants named in the Complaint are: Pinnacle Financial Corporation ("Pinnacle"); Mortgage Electronic Registration Systems, Inc. ("MERS"); GMAC Mortgage, LLC ("GMAC"); Executive Trustee Services, LLC, Executive Trustee Services, LLC dba ETS Services LLC, and ETS Services LLC (collectively "ETS Defendants"); Cindy Sandoval ("Sandoval"); Bank of New York Mellon Trust Company, National Association ("Bank of New York"); Residential Asset Mortgage Products Inc. ("RAMP"), Series 2006-RS1 Trust; DCB United LLC ("DCB"); Varougan Karapetian ("Verougan") and Vincent Karapetian ("Vincent"); and Nanette

Karapetian ("Nanette")[1] (collectively "Defendants"). The following causes of action are advanced in the Complaint: (i) Fraud Intentional Misrepresentation and Concealment; (ii) Cancelation of Instruments under Cal. Civ. Code § 3412; (iii) Rescission Pursuant to 15 U.S.C. § 1635; (iv) Wrongful Foreclosure; (v) Violation of 18 U.S.C. §§ 1961, 1962(b) and 1964 ("RICO"); (vi) Violation of California Bus. & Prof. Code §§17200 *et seq.* ("UCL"); (vii) Violation of Cal. Civ. Code §§ 2924, 2923.5; (viii) Violation of Fair Credit Reporting Act, 15 U.S.C. § 1691 ("FCRA"); and (ix) Fraud on the Court.

On November 14, 2016, Defendants Varougan, Vincent and Nanette (collectively "Karapetians") filed a motion to dismiss ("Karapetian Motion" (Dkt. 16)). DCB joined in this motion. Dkt. 23. Plaintiff filed an opposition, erroneously titled "sur-reply," on February 13, 2017. Dkt. 48. The Karapetians replied. Dkt. 49. Plaintiff subsequently filed an additional response to certain arguments advanced by DCB in its joinder. Dkt. 52.

Also on November 14, 2016, Bank of New York, MERS and RAMP filed a motion to dismiss ("Bank Motion" (Dkt. 20)). Plaintiff opposed. Dkt. 28. Defendants Bank of New York, MERS, and RAMP replied. Dkt. 31.

On January 23, 2017, Plaintiff filed a request to permit substituted service on Defendant Pinnacle Financial Corp. Dkt. 38.

On January 26, 2017, Plaintiff filed a request for a hearing date for an evidentiary hearing. Dkt. 39. An opposition was filed by Defendants Bank of New York, MERS, and RAMP. Dkt. 40. The Karapetians joined in this opposition (Dkt. 41), as did DCB (Dkt. 43). Plaintiff replied. Dkt. 47.

On February 16, 2017, Plaintiff filed a request for leave to amend the Complaint to add additional causes of action against Defendants DCB United, LLC, Varougan and Vincent. Dkt. 51. The Karapetians opposed (Dkt. 54), and DCB joined the opposition (Dkt. 55).

On March 2, 2017, the matter was taken under submission. Dkt. 56.

On June 15, 2017, Plaintiff filed an additional motion for evidentiary hearing. Dkt. 65. The issues raised in this request were the same of those previously raised. On June 19, 2017, that motion was taken under submission. Dkt. 67.

For the reasons stated in this order, the Motions to Dismiss are **GRANTED** with prejudice. The various requests by Plaintiff are **DENIED**.

II. Factual Background

A. Bankruptcy Proceedings

On February 2, 2017, a Notice of Bankruptcy ("Notice") was filed on the docket in this action. Dkt. 42. It

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states that, on May 14, 2012, Residential Capital LLC and certain of its subsidiaries, including Defendants GMAC and ETS, filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. *Id.* ¶ 1. It also states that, on December 11, 2013, the Bankruptcy Court in the Southern District of New York entered an "Order Confirming Second Amended Joint Chapter 11 Plan," ("Bankruptcy Order"), which included an injunction barring all parties from "commencing or continuing in any manner or action or other proceeding of any kind relating to claims that are released under the Plan." *Id.* ¶ 3 (internal quotations marks omitted). The Bankruptcy Order also stated that the Bankruptcy Court retained jurisdiction to hear and determine any dispute that might arise under the aforementioned Plan. *Id.* ¶ 5. The Notice asserts that Plaintiff did not file a proof of claim in the Bankruptcy proceedings, and that he is, therefore, barred from asserting any claim against GMAC and ETS. *Id.* ¶ 9.

In response to the Notice, the Court issued an Order to Show Cause ("OSC") why Defendants GMAC and ETS should not be dismissed. Dkt. 44. Plaintiff was directed to respond by February 21, 2017. A Declaration was filed in response by attorney Karry Franich, on behalf of Bank of New York, ETS Defendants, GMAC, MERS, and RAMP. Dkt. 45. He declares that Plaintiff had been notified of the OSC by email and voicemail. Plaintiff did not respond to the OSC. Because no objection to dismissal of these defendants has been entered, GMAC and ETS were dismissed. Dkt. 60.

B. Request for Judicial Notice

In connection with the Bank Motion, Bank of New York, MERS and RAMP have requested judicial notice of the following:

- A Deed of Trust dated October 7, 2005, and recorded in the Official Records of the Los Angeles County Recorder's Office on October 14, 2005, as Instrument Number 05 2479219 ("Deed of Trust" (Dkt. 21, Ex. 1));
- A Substitution of Trustee dated November 5, 2007, and recorded in the Official Records of the Los Angeles County Recorder's Office on November 6, 2007, as Instrument Number 20072491063 ("Substitution of Trustee" (Dkt 21, Ex. 2));
- An Assignment of Deed of Trust dated December 10, 2009, and recorded in the Official Records of the Los Angeles County Recorder's Office on December 21, 2009, as Instrument Number 20091939116 ("Assignment" (Dkt 21, Ex. 3));
- A Notice of Default and Election to Sell Under Deed of Trust dated July 17, 2010, and recorded in the Official Records of the Los Angeles County Recorder's Office on July 21, 2010, as Instrument Number 20100996441 ("Notice of Default" (Dkt. 21, Ex. 4));
- A Notice of Trustee's Sale dated January 9, 2012, and recorded in the Official Records of the Los Angeles County Recorder's Office on January 19, 2012, as Instrument Number 20120088688 ("Notice of Trustee's Sale" (Dkt. 21, Ex. 5));
- A Trustee's Deed Upon Sale dated October 23, 2012, and recorded in the Official Records of the Los Angeles County Recorder's Office on November 8, 2012, as Instrument Number 20121704224 ("Trustee's Deed Upon Sale (Dkt. 21, Ex. 6));
- A Grant Deed dated October 23, 2012, and recorded in the Official Records of the Los Angeles County Recorder's Office on November 8, 2012, as Instrument Number 20121704225. ("Grant Deed" (Dkt. 21, Ex. 7));

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV16-07711 JAK (AJW) Date September 11, 2017

Title Patrick Brooks v. Pinnacle Financial Corporation, et al.

- A Complaint filed by Patrick Brooks in the Los Angeles Superior Court on February 25, 2001 as Case No. EC055033 (Dkt. 21, Ex. 8);
- The Civil Minutes Re: Order on Motion to Dismiss dated May 12, 2011 filed in USDC Central Case No. 11-3135 GAF (SSx) (Dkt. 21, Ex. 9);
- The Civil Minutes Re: Order Dismissing Case dated June 8, 2011 filed in USDC Central Case No. 11-3135 GAF (SSx) (Dkt. 21, Ex. 10);
- The Complaint filed by Patrick Brooks in the Los Angeles Superior Court on February 5, 2013 as Case No. BC500541 (Dkt. 21, Ex. 11);
- Bank of New York's Demurrer to Complaint filed on March 26, 2013 in Los Angeles Superior Court Case BC500541 (Dkt. 21, Ex. 12);
- A Notice of Ruling on Bank of New York's Demurrer to the Complaint filed on May 22, 2016 in Los Angeles Superior Court Case BC500541 (Dkt. 21, Ex. 13);
- A First Amended Complaint filed on June 3, 2013 in the Los Angeles Superior Court, Case No. BC500541 (Dkt. 21, Ex. 14);
- Demurrer by the Bank of New York to First Amended Complaint, filed on August 30, 2013 in the Los Angeles Superior Court, Case No. BC500541 (Dkt. 21, Ex. 15);
- A Notice of Entry of Order Sustaining Demurrer to First Amended Complaint filed on December 2, 2013 in the Los Angeles Superior Court, Case No. BC500541 (Dkt. 21, Ex. 16);
- Opinion filed September 25, 2015 in Second Division of the Court of Appeal in Case No. B252060 (Dkt. 21, Ex. 17);
- A Remittitur filed November 25, 2015 in Second Division of the Court of Appeal in Case No. B252060 (Dkt. 21 Ex. 18);
- Bankruptcy court dockets from the following cases in the U.S. Bankruptcy Court for the Central District of California: 09-bk-36236; 08-bk-16529; 08-bk-18429; 10-bk-59099; 11- bk-56891; 12-bk-14267 (Dkt. 21, Ex. 19);
- Order Granting Motion for Relief from the Automatic Stay filed on July 20, 2012, in United States Bankruptcy Court Case No. 12-bk-14267 WB (Dkt. 21, Ex. 20);
- Discharge of Debtor filed on August 11, 2010, in United States Bankruptcy Court Case No. 09-bk-36236 VZ (Dkt. 21 Ex. 21);
- Complaint for Unlawful Detainer filed on March 4, 2013, in the Los Angeles Superior Court, Case No. 13U00440 (Dkt. 21 Ex. 22);
- Opinion filed on October 21, 2014 in the Appellate Division of the Los Angeles Superior Court, Case No. BV030606 (Dkt. 21, Ex. 23).

Certain of these documents concern the loan and deed of trust that are at issue in this action based on the allegations in the complaint. Dkt. 21, Exs. 1-7. Others concern prior litigation among certain parties to this action. Dkt. 21, Exs. 8-23. All of these documents are public records that have been sufficiently authenticated, or are self-authenticating pursuant to Fed. R. Evid. 902. The Ninth Circuit has addressed the propriety of judicial notice in connection with a motion to dismiss:

> There are [] two exceptions to the requirement that consideration of extrinsic evidence converts a 12(b)(6) motion to a summary judgment motion. First, a court may consider material which is properly submitted as part of the complaint on a motion to dismiss without converting the motion to dismiss into a motion for summary judgment. If the documents are not physically attached to the complaint, they may be considered if the

> documents' authenticity . . . is not contested and the plaintiff's complaint necessarily relies on them. Second, under Fed. R. Evid. 201, a court may take judicial notice of matters of public record.

Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001) (internal citations and quotation marks omitted); *see also Williams v. TouchTunes Music Corp.*, No. CV 13-4752-BRO, 2014 WL 12626340, at *3 (C.D. Cal. June 13, 2014). Because these standards have been met, the request for judicial notice is **GRANTED.**

C. The Allegations in the Complaint

1. Ownership of the Property

Plaintiff is the former owner of certain real property in Glendale, California (the "Property"). Dkt. 1 ¶¶ 4.1, 4.4. In 2005, Plaintiff borrowed $768,000 from defendant Pinnacle, a loan that was memorialized in a promissory note ("Note") that was secured by a deed of trust ("Deed" or "Deed of Trust") on the Property. *Id.* ¶ 4.5. MERS was identified as the nominee of Pinnacle, and its successors and assigns, as well as a beneficiary of the Deed of Trust. Dkt. 21, Exs. 1, 2.

In November 2007, MERS recorded a Substitution of Trustee, under which ETS replaced First American Title Insurance Company as trustee on the Deed of Trust. Dkt. 1 ¶ 4.12.

On December 10, 2009, MERS assigned the Deed of Trust to Bank of New York, as Trustee for RAMP. Dkt. 21, Ex. 3.

In July 2008, Plaintiff stopped making the required monthly payments on the Note. Dkt. 21, Ex. 11 at 4:12-13. A notice of default was recorded in July 2010. Dkt. 21, Ex. 4. The default was not cured, and a notice of trustee's sale was recorded in January 2012. Dkt. 21, Ex. 5. DCB purchased the Property at a trustee's sale held during October 2012. Dkt. 21, Ex. 6. DCB then conveyed the Property to Varougan and Vincent, who are father and son. Dkt 21, Ex. 7. Subsequently, Varougan and Vincent gifted the property to Nanette through a quitclaim deed. Dkt. 16, Ex. C. She currently holds title to and resides in the Property. Dkt. 16, at 7-8.

2. Claimed Improper Actions

The underlying theory of the Complaint is that the Substitution of Trustee recorded in 2007 and assignment of the Deed of Trust to Bank of New York in 2009 were fraudulent and invalid. Based on these allegations, the Complaint avers that the subsequent acts by Bank of New York and its successors are also without force. Dkt. 1 ¶ 3.3. Plaintiff seeks to challenge the validity of the 2007 Substitution of Trustee and the 2009 assignment of the Deed of Trust on the basis of numerous factual allegations. In support of this theory, the Complaint presents several linked allegations.

First, it alleges that, on or before June 30, 2007, Pinnacle went out of business and was dissolved, with its assets purchased by Impac Funding Corporation ("IFC"). Dkt. 1 ¶¶ 5.19-5.21. It is also alleged that, prior to its dissolution, Pinnacle did not grant any interest in the Deed of Trust to any other individual or entity. *Id.* ¶ 5.22. Because Pinnacle was no longer in existence after June 2007, the Complaint alleges that it

could not assign the Deed after that time. *Id.* ¶ 5.26. Therefore, MERS allegedly lacked authority to substitute Bank of New York as trustee to the Deed in 2007, because the authority of MERS was limited to that it could exercise on behalf of Pinnacle. *Id.* On the same basis, it is alleged that MERS lacked authority to assign the Deed of Trust to Bank of New York in 2009. *Id.* ¶ 5.53.

Second, it is alleged that in 2008, the State of California found that Pinnacle had violated certain statutes. As a result, it is alleged that the state barred Pinnacle from doing business in California. *Id.* ¶¶ 4.16, 5.70-5.71. It is alleged that, because MERS was an agent of Pinnacle, it was subject to this same limitation. *Id.* This is offered as an alternative basis to find that the 2009 assignment is without force.

Third, various procedural flaws are alleged as to the substitution and assignment. For example, Plaintiff claims that Sandoval, who signed the Substitution of Trustee on behalf of MERS, lacked the authority to do so because she was not an authorized officer of MERS appointed by the Board of Directors. *Id.* ¶ 5.27. Plaintiff also alleges that Sandoval's signature failed to comply with statutory requirements. *Id.* ¶¶ 5.27-5.30. The Complaint makes similar allegations regarding the assignment. *Id.* ¶¶ 5.56-5.63.

Finally, Plaintiff alleges that a notice of default was issued by ETS without authorization by Pinnacle, and without complying with certain procedural requirements. *Id.* ¶ 5.95. ETS then foreclosed on the Property and conducted a foreclosure sale, again allegedly without authorization. *Id.* ¶¶ 6.28, 6.35.

D. Prior Litigation

1. February 2011 Action

In February 2011, Plaintiff filed a complaint in the Los Angeles Superior Court against Bank of New York, and GMAC (the "2011 Action"). The complaint there alleged that, when the loan was made, these defendants knew that Plaintiff could not afford the monthly payments. It also alleged that they misrepresented their claimed ownership of the Deed of Trust and Note to the Property. Dkt. 21, Ex. 8. After being removed to federal court, the 2011 Action was dismissed without prejudice by Judge Feess. Case No. CV11-3135-GAF(SSx), Dkt. 21, Ex.9. That order found that Plaintiff had failed adequately to plead the facts of the alleged fraud, and that the complaint had other shortcomings. Dkt. 21, Ex. 9. Although permitted to file an amended complaint, Plaintiff did not do so. The action was then dismissed. Dkt. 21, Ex. 10. The Karapetians were not involved in that litigation because they held no interest in the Property throughout the time that it was pending.

2. February 2013 Action

In February 2013, Plaintiff brought a successive action in the Los Angeles Superior Court (the "2013 Action"). It named Pinnacle, Bank of New York, Verougan and Vincent as defendants. The complaint challenged the validity of the mortgage loan and foreclosure of the Property. Dkt. 21, Ex. 11. The complaint there alleged that the Substitution of Trustee was invalid both because MERS lacked authority to do so on behalf of Pinnacle, and because Sandoval was not authorized to execute the substitution. *Id.* ¶¶ 16-23. It also alleged that the assignment of the Deed of Trust in 2009 was invalid because MERS did not hold an ownership interest in the Note, and MERS failed to meet certain deadlines and procedural requirements. *Id.* ¶¶ 24-33.

Bank of New York and DCB demurred to the complaint, and the Karapetians joined in the demurrer. Dkt. 21, Ex. 12. The tentative ruling on the demurrer found that Plaintiff's claims against Bank of New York were barred by res judicata. Dkt. 21, Ex. 13. It also posited that Plaintiff's claim that MERS lacked authority to act on behalf of Pinnacle was based on a misinterpretation of law, and was meritless. *Id.* The order stated that Plaintiff had failed to allege that he had made tender of payment of his debt, as required under California law when a plaintiff seeks to set aside a foreclosure. *Id.* The trial court adopted these tentative holdings and sustained the demurrer without leave to amend. *Id.* However, the trial court granted Plaintiff leave to assert new causes of action for negligence and to void the foreclosure sale. *Id.*

Plaintiff filed a First Amended Complaint. However, it largely repeated the allegations from the original complaint. Dkt. 21, Ex. 14. Bank of New York again demurred (Dkt. 21, Ex. 15), and DCB and the Karapetians joined. The trial court ultimately sustained the demurrer without leave to amend. Dkt. 21, Ex. 16. Plaintiff appealed, and the Second District Court of Appeal affirmed. Dkt. 21, Ex. 17. It did so on the basis of res judicata as to Bank of New York, and for failure to tender as to the claims against DCB and the Karapetians. *Id.* A remittitur was filed in connection with that decision. Dkt. 21, Ex. 18.

3. Unlawful Detainer Action

In March 2013, Varougan brought an unlawful detainer action against Plaintiff in the Los Angeles Superior Court. Dkt. 21, Ex. 22. Plaintiff answered the complaint, arguing that the foreclosure sale was invalid. Dkt. 21, Ex. 23. The Superior Court entered judgment for possession in favor of Varougan and Vincent. *Id.* Plaintiff appealed this judgment, and the Los Angeles Superior Court Appellate Division affirmed. *Id.*

4. Related Bankruptcy Petitions

Plaintiff has filed six bankruptcy petitions between 2008 and 2012. Dkt. 21, Ex. 19. In 2012, the Bankruptcy Court issued an order finding that Plaintiff was engaged in "a scheme to delay, hinder, and defraud creditors." Dkt. 21, Ex. 20. All but one of these bankruptcy cases were dismissed. The one brought in 2009, resulted in a discharge under Chapter 7. Dkt. 21, Ex. 21.

III. Motions to Dismiss

A. Overview

In support of the motions to dismiss, defendants argue that they should be granted on the following grounds: (i) the claims are precluded by the prior litigation in which the same or similar claims were made; (ii) Plaintiff has failed sufficiently to allege that the assignment or substitution were invalid; (iii) Plaintiff lacks standing to challenge the assignment of note and substitution of trustee; (iv) certain claims are time barred; (v) Plaintiff has not tendered payment of amounts due under the loan; and (vi) there is a conclusive presumption of the validity of the sale arising from a statute, which bars the claims as to DCB and the Karapetians. *See* Dkts. 16, 20.

B. Legal Standards

Fed. R. Civ. P. 8(a) provides that a "pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." The complaint must state

facts sufficient to show that a claim for relief is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint need not include detailed factual allegations, but must provide more than a "formulaic recitation of the elements of a cause of action." *Id.* at 555. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations and quotations omitted).

A party may move to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Dismissal is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support one. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In considering a motion to dismiss, the allegations in the challenged complaint are deemed true and must be construed in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-338 (9th Cir. 1996). However, a court need not "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Sciences Sec. Litig.* 536 F.3d 1049, 1055 (9th Cir. 2008) (citing *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

C. Analysis

1. Whether Plaintiff's Claims are Precluded by the Prior Judgments

Defendants argue that Plaintiff's claims are precluded by the two earlier actions that Plaintiff brought as to the mortgage loan and foreclosure. "Res judicata, also known as claim preclusion, bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (citing *Western Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997)). "The doctrine is applicable whenever there is "(1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between parties." *Id.* (internal quotation marks omitted). "The central criterion in determining whether there is an identity of claims between the first and second adjudications is 'whether the two suits arise out of the same transactional nucleus of facts.'" *Frank v. United Airlines, Inc.*, 216 F.3d 845, 851 (9th Cir.2000) (citation omitted). Under California law, res judicata applies so long as the party to be affected "has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. . . ." *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n*, 60 Cal. App. 4th 1053, 1065 (1998).

Defendants argue that the present action is based on the same transactional nucleus of facts that was at issue in the 2011 Action, the 2013 Action and the unlawful detainer action. This nucleus is Plaintiff's loss of his property in foreclosure. As the Court of Appeal concluded in its affirmance of the Superior Court's dismissal of the 2013 Action:

> The First and Second Actions involved the same property, the same mortgage loan, the same default on that loan, and the same alleged misconduct by [Bank of New York].
>
> Most critical for res judicata purposes, the First and Second Actions allege the same fundamental harm to Brooks—the loss of his Glendale house through foreclosure. In

> short, although Brooks advanced a number of different legal theories and sought a variety of different remedies in the First and Second Actions, he alleged in both the violation of a single primary right: the right to own the Glendale property.

Dkt. 21 Ex. 17 (Dkt. 21-3 at 44-45).

The Complaint in this action is the same. It challenges the validity of the assignment and substitution of the trustee. These arguments were made and rejected in the 2013 Action. Dkt. 21, Ex. 11 at 5, 7. Thus, the complaint there alleged that MERS was not the beneficiary of the Deed of Trust, and lacked authority to substitute ETS as a trustee. Dkt. 21, Ex. 11 ¶¶ 17-18. That complaint also alleged that the assignment of the deed was invalid, because no valid ownership interest was in place when MERS was designated. *Id.* ¶ 26. The first amended complaint filed in the 2013 Action made the same or very similar allegations. Dkt. 21, Ex. 14 at 14, 17. Although these filings did not allege—as the present Complaint does—that Pinnacle was dissolved in 2007, they did allege that MERS lacked authority to effect a substitution or assignment of claims.

Plaintiff argues that res judicata is not a bar to this action here because he only discovered certain of the alleged defects in the substitution of trustee and assignment of Deed of Trust in August 2016. This was after the prior matters had concluded. Therefore, he contends that he did not have an opportunity to litigate them. Dkt. 1 ¶¶ 3.4-3.6. Plaintiff contends that he learned about the dissolution of Pinnacle in the course of conducting background research for a book that he planned to write about his foreclosure experience. Dkt. 28 at 15-16. Plaintiff states that he identified the financial records reflecting the dissolution of Pinnacle only by chance, and he could not have discovered these facts through the exercise of reasonable diligence when the earlier actions were pending. *Id.* These allegations involving substitution of trustee and assignment of the Deed of Trust were not expressly addressed in the prior actions. MERS was not a party. Therefore, insofar as the present Complaint includes allegations that Pinnacle lacked the capacity to assign the Deed of Trust, Plaintiff argues that res judicata cannot apply. Plaintiff also argues that all other causes of action asserted here arise from that alleged fraud by MERS, and could not have been alleged in the prior actions.

Plaintiff's claims are neither persuasive nor plausible. Pinnacle was a party in the prior litigation. At the time the prior actions were pending, information about the corporate status of Pinnacle was readily available.[2] There is also no showing that through diligence or discovery, Plaintiff could not have gathered

[2] The new facts asserted by Plaintiff were publicly available, and could reasonably have been identified by Plaintiff during the pendency of his prior lawsuit against Pinnacle. The acquisition of Pinnacle by Impac Funding Corporation was announced in public Form 8-K and 10-K filings with the Securities and Exchange Commission ("SEC") that were filed contemporaneously with that transaction. *See* Impac Mortg. Holdings, Inc., Current Report (Form 8-K) (May 21, 2007), *available at* https://www.sec.gov/Archives/edgar/data/1000298/000110465907042780/a07-15144_18k.htm (announcing entry into asset purchase agreement with Pinnacle); Impac Mortg. Holdings, Inc., Annual Report (Form 10-K) at F-10 (May 21, 2008), *available at* https://www.sec.gov/Archives/edgar/data/1000298/000104746908006846/a2185881z10-k.htm.

Similarly, the 2008 Order to Discontinue Residential Mortgage Lending and/or Servicing Activities by the California Department of Corporations, on which Plaintiff now relies, was publicly available. *See* Dep't of Corp. of the State of Cal., File No. 413-0484, Order to Discontinue Residential Mortgage Lending And/Or Servicing Activities Pursuant to

such information as part of an effort to state viable claims. Although Plaintiff has raised certain new causes of action, including under RICO and the FCRA, these claims still arise under the same nucleus of facts—the alleged wrongful foreclosure of the Property. Plaintiff presented arguments about the authority of MERS to substitute the trustee and assign title. They were rejected by the Superior Court. Dkt. 21, Ex. 13 and Ex. 17. As noted, the 2011 Action was dismissed with prejudice, which was a final adjudication on the merits. Dkt. 21, Ex. 10; Fed. R. Civ. P. 41(b). In the 2013 Action, the Court of Appeal affirmed the finding of the Superior Court that the second action was barred under principles of *res judicata*, and issued remittitur. Dkt. 21, Ex. 17 and Ex.18. These holdings prevent the Plaintiff from litigating the matter a third time.

Furthermore, the Complaint is precluded by the prior unlawful detainer judgment. In that proceeding, the Superior Court addressed Plaintiff's argument that the foreclosure sale of the Property was unlawful. Dkt. 21, Ex. 23. The Superior Court concluded that the Karapetians had received title to the Property from DCB, which purchased the Property at a legitimate foreclosure sale. *Id.* The Court of Appeal affirmed. *Id.* Such findings in an unlawful detainer action have res judicata effect. *See Rucker v. Wells Fargo Bank, N.A.*, 605 Fed. Appx. 670, 671 (9th Cir. 2015) (*citing City of Martinez v. Texaco Trading & Transp., Inc.*, 353 F.3d 758, 762 (9th Cir. 2003); *Malkoskie v. Option One Mortg. Corp.*, 188 Cal. App. 4th 968, 976 (2010)).

The Karapetians and DCB were parties to the unlawful detainer action and the 2013 Action. Bank of New York was a party to the 2011 Action and 2013 Action. Dkt. 21, Ex. 8 and Ex. 11. MERS and RAMP were not parties in the prior litigation, but Defendants argue that they are also entitled to the benefits of res judicata because they were in privity with Bank of New York. *See Triano v. F.E. Booth & Co.*, 120 Cal. App. 345, 347 (1932) ("If the party who actually causes the injury is free from liability by reason of his acts, it must follow that his principal is entitled to a like immunity. In other words, a judgment in favor of the immediate actor is a bar to an action against one whose liability is derivative from or dependent upon the culpability of the immediate actor."). Plaintiff alleges that MERS was "acting as an alleged 'nominee'" for mortgage lenders, including Pinnacle, and that Bank of New York was trustee to RAMP. Dkt. 1 ¶¶ 2.3, 2.5. Agency relationships of this kind are evidence of privity. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1082 (9th Cir. 2003); *see also Pearson v. Nationstar Mortg., LLC,* 16-cv-01079, 2016 WL 5496268, at *4 (C.D. Cal. Sept. 26, 2016) (privity of relationship is basis for res judicata in challenge to foreclosure (citing cases)). Additionally, although Sandoval and Pinnacle have not responded to the Complaint in any fashion—and Pinnacle allegedly no longer exists—the same analysis applies to them. Sandoval was allegedly an employee and agent of MERS. Pinnacle was a party to the to the 2013 Action. Dkt. 21, Ex. 11.

All claims against the present and prior parties have been based in the same alleged deficiencies in the substitution of trustee and assignment of deed. All Defendants were either parties to the prior actions, or were in privity with those who were. Further, the claims advanced in the Complaint arise from the same transactional nucleus that was presented in the prior actions. Therefore, the current claims are barred by res judicata. *See generally Stephenson v. United Air Lines, Inc.*, 02-cv-2922, 2002 WL 31738793, at *4 (N.D. Cal. Dec. 2, 2002) ("[T]he addition of new facts, new allegations, or new legal theories does not avoid the bar of res judicata; rather, the critical question is whether the cause of action in the second suit

Section 50319, California Financial Code (Dec. 2008), *available at* http://www.dbo.ca.gov/FSD/08pdf/4130484.pdf. Because these public filings are not subject to reasonable dispute, judicial notice of them is appropriate.

is the same as in the first." (citing *Constantini v. Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir. 1982)).

2. Whether MERS Had Authority to Substitute the Trustee and Assign the Deed of Trust

Alleged deficiencies with the substitution of trustee and the subsequent assignments of interests in the Deed of Trust are the principal bases for the challenges to the propriety of the foreclosure of the Property. The premise for this claim, which was not expressly addressed in the prior actions, is the allegation that Pinnacle ceased doing business in 2007, and in 2008 was enjoined from engaging in mortgage lending activities in California. As noted, Pinnacle originated the Loan. Dkt. 1 ¶ 4.5. Because Pinnacle allegedly lacked the capacity to do business on or before June 2007, Plaintiff argues that MERS did not have authority to substitute a new trustee or assign the Deed of Trust in November 2007.

This theory fails as a matter of law. The terms of the Deed of Trust allowed MERS to act on behalf of Pinnacle and to exercise its rights, which included assigning the Deed of Trust and substituting trustees. Thus, the Deed of Trust provides that "MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument." Dkt. 21 Ex. 1. This language authorized MERS to act for the benefit of Pinnacle or its successors in interest. *See Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149, 1157 (2011) (once a plaintiff enters a binding deed of trust that authorizes a lender's nominee to conduct foreclosure, the plaintiff cannot subsequently challenge that nominee's authority to foreclose). On this basis, courts that have considered the scope of the rights of MERS under agreements that have substantially similar language have determined that "MERS has standing to foreclose as the nominee for the lender and beneficiary of the Deed of Trust and may assign its beneficial interest to another party." *Lane v. Vitek Real Estate Industries Group*, 713 F. Supp. 2d 1092, 1099 (E.D. Cal. 2010) (citing cases).

The dissolution of Pinnacle did not affect the authority of MERS under the Deed of Trust. *Herrera v. Federal National Mortgage Ass'n.*, 205 Cal.App.4th 1495 (2012), *overruled on other grounds by Yvanova v. New Century Mortg. Corp.*, 62 Cal. 4th 919 (2016) In *Herrera*, the defendant lender was placed into a conservatorship by the Federal Deposit Insurance Corporation ("FDIC") in July 2008, and into receivership in March 2009. *Id.* at 1499. The lender's assets, which included a note and deed of trust concerning the property owned by the plaintiffs, were allegedly sold to a third party. *Id.* Thereafter, in June 2009, MERS executed an assignment of the deed of trust on behalf of the lender. *Id.* This assignment transferred all interest in this note and deed of trust to the third party. *Id.* A foreclosure of the property was then conducted for the benefit of the third party. The plaintiffs then filed a complaint that challenged this process by alleging that MERS lacked the authority to assign the deed of trust to the third party on behalf of the lender. *Id. Herrera* rejected this argument:

> Plaintiffs argue MERS lacked authority to assign the DOT [Deed of Trust] to [the third party] because . . . the successors and assigns of the original lender[] did not have an agency agreement with MERS. But this does not necessarily defeat the foreclosure sale because plaintiffs agreed in the DOT that MERS had the right to exercise all rights of the lender, including foreclosing on and selling plaintiffs' property.

Id. at 1505.

This analysis applies here. Plaintiff voluntarily entered the Deed of Trust, which granted MERS the authority to pursue the rights of Pinnacle, and those of its successors and assigns. This language was not ambiguous. This permitted MERS to act on behalf of those who had succeeded to the rights of Pinnacle at the time of the foreclosure. The contention that MERS lacked the authority to assign the Note and Deed of Trust because Pinnacle had been dissolved at that time fails for this reason. Moreover, in *Herrera* the lender was in a conservatorship and then a receivership prior to the assignment that was found valid. There are no allegations that support any different outcome here. *See also, e.g.*, *Bryer v. U.S. Bank Nat'l Ass'n*, No. 15-CV-00378-PSG, 2015 WL 9304054, at *2 (N.D. Cal. Dec. 22, 2015) ("[I]n fact, California law allowed MERS to assign the deed of trust even after [the lender] went out of business." (citing *Herrera*)).

3. Whether Plaintiff has Standing to Assert the Alleged Defects in the Assignment and Transfer

Defendants argue that Plaintiff lacks standing to assert certain alleged defects in the assignment of the Deed of Trust. They contend that a borrower only has standing to raise alleged defects in assignments that would make them void, not those that would make them voidable. The California Supreme Court has addressed the distinction between these terms:

> A void contract is without legal effect. [] "It binds no one and is a mere nullity." [] "Such a contract has no existence whatever. It has no legal entity for any purpose and neither action nor inaction of a party to it can validate it...." []As we said of a fraudulent real property transfer in *First Nat. Bank of L.A. v. Maxwell* (1899) 123 Cal. 360, 371, 55 P. 980, " 'A void thing is as no thing.' "
>
> A voidable transaction, in contrast, "is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance." [] It may be declared void but is not void in itself. [] Despite its defects, a voidable transaction, unlike a void one, is subject to ratification by the parties.

Yvanova, 62 Cal. 4th at 929–30 (internal citations omitted). "Unlike a voidable transaction, a void one cannot be ratified or validated by the parties to it even if they so desire." *Id.* at 936.

Plaintiff was not a party to the transaction that he now challenges, *i.e.*, the transfer of the Note and Deed of Trust. Nor was he a third party beneficiary to that transaction. Defendants argue that under these circumstances, even if the allegations in the Complaint regarding the assignment had force, they would not be sufficient to show that it is void. "[A] borrower can generally raise no objection to assignment of the note and deed of trust. A promissory note is a negotiable instrument the lender may sell without notice to the borrower." *Id.* at 927. Furthermore, "numerous courts have found that where a plaintiff alleges that a document is void due to robo-signing, yet does not contest the validity of the underlying debt, and is not a party to the assignment, the plaintiff does not have standing to contest the alleged fraudulent transfer." *Pratap v. Wells Fargo Bank, N.A.*, 63 F. Supp. 3d 1101, 1109 (N.D. Cal. 2014) (internal citations omitted).

Plaintiff argues that the analysis presented in *Yvanova* shows that he has standing. There, the California

Supreme Court held that "a borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly void assignment merely because he or she was in default on the loan and was not a party to the challenged assignment." *Yvanova*, 62 Cal. 4th at 924. The opinion explained that,

> only the entity holding the beneficial interest under the deed of trust—the original lender, its assignee, or an agent of one of these—may instruct the trustee to commence and complete a nonjudicial foreclosure. . . . If a purported assignment necessary to the chain by which the foreclosing entity claims that power is absolutely void, meaning of no legal force or effect whatsoever . . . the foreclosing entity has acted without legal authority by pursuing a trustee's sale, and such an unauthorized sale constitutes a wrongful foreclosure.

Id. at 935

But, for the reasons stated above, the Complaint fails to allege a basis upon which the challenged assignment could be deemed void. Nor could it have done so. MERS had the authority to assign the rights at issue. Further, even if Plaintiff were to identify some procedural failure in the assignment process, *e.g.*, a failure to make an express assignment or to make one that using a proper method of signature, MERS could ratify or validate the assignment. Such a challenge would be that the agreements were voidable, not void. Plaintiff lacks standing to assert these claims under California law.

4. Statutes of Limitations

The claims advanced here depend on a substitution and assignment that were recorded in 2007 and 2009, respectively. The Complaint was filed in October 2016, which was approximately nine years after the first assignment and seven years after the second one. Defendants identify the following statutes of limitations that apply to Plaintiff's claims: (i) fraud, three years (Cal. Code Civ. Proc. § 338(d)); (ii) UCL, four years (Cal. Bus. & Prof. Code, § 17208); (iii) FCRA, two years (15 U.S.C. § 1681p(1)); and (iv) RICO, four years (18 U.S.C. § 1961).

Plaintiff does not contest that these are the correct statutes of limitations. Nor has Plaintiff alleged any viable grounds on which these limitations periods could be tolled. Although Plaintiff claims that he only recently discovered the information about Pinnacle, for the reasons stated earlier, there is no reasonable basis for a claim that he could not have done so during the course of the prior litigation. To be sure, California law recognizes the "discovery rule," which "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." *Norgart v. Upjohn Co.*, 21 Cal.4th 383, 389 (1999). Normally, whether a plaintiff had prior notice of facts that should have triggered an investigation for purposes of the discovery rule is a factual question that is inappropriate for disposition on a motion to dismiss. *See In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 860 F. Supp. 2d 1062, 1076 (C.D. Cal. 2012) (declining to dismiss as time-barred a fraud claim because a factual question was presented as to when plaintiff had "actual notice of facts that should have triggered an investigation.").

The circumstances here warrant a different result. Plaintiff previously challenged the assignment and substitution of trustee through the allegations in the 2013 Action. The prior actions, which were initiated

four and six years ago, respectively, reflect that Plaintiff had "discovered" the basis for this cause of action as early as 2011. Further, "[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery, and (2) the inability to have made earlier discovery despite reasonable diligence." *E-Fab, Inc. v. Accountants, Inc. Services*, 153 Cal. App. 4th 1308, 1319 (2007) (internal citations omitted). The Complaint does not meet these standards. Once again, there is also no plausible basis on which Plaintiff could do so through an amended complaint.

5. Tender Rule

Defendants argue that under California law, Plaintiff cannot seek to cancel the written instruments or quiet title to the Property unless he tenders the amount owed on the Note. Under California law,

> [a] borrower may not . . . quiet title against a secured lender without first paying the outstanding debt on which the mortgage or deed of trust is based . . . . The cloud on title remains until the debt is paid . . . . Full tender of the indebtedness is not required if the borrower attacks the validity of the underlying debt.

Lueras v. BAC Home Loans Servicing, LP, 221 Cal. App. 4th 49, 86-87 (2013); s*ee also Shimpones v. Stickney*, 219 Cal. 637, 649 (1934) ("It is settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured."); *Segura v. Wells Fargo Bank, N.A.*, No. CV-14-04195-MWF, 2014 WL 4798890, at *16 (C.D. Cal. Sept. 26, 2014) ("To the extent that Plaintiffs seek to set aside the trustee's deed upon sale, or quiet title through their various claims for relief, their claims fail because Plaintiffs do not sufficiently allege an offer of tender.") (citing *Arnolds Mgmt. Corp. v. Eischen,* 158 Cal. App. 3d 575, 578 (1984) ("It is settled that an action to set aside a trustee's sale for irregularities in sale notice or procedure should be accompanied by an offer to pay the full amount of the debt for which the property was security.").

The tender of the amount claimed by the holder of a note is also a condition to seeking to set aside a foreclosure sale. *Stebley v. Litton Loan Servicing, LLP*, 202 Cal. App. 4th 522, 526 (2011). However, the Complaint only alleges that Plaintiff "stands ready to tender and satisfy the debt obligations in full to the lawful owner of the Loan." Dkt. 1 ¶ 17.9. An offer to tender must be both credible and unconditional. *See Cohen v. Capital One, N.A.*, No. CV-14-6139-PSG, 2015 WL 12746217, at *12 (C.D. Cal. June 1, 2015) (internal citations omitted). These standards are not satisfied by Plaintiff's assertion that he "stands ready to tender." As noted, in the 2013 Action it was previously determined that the tender rule barred Plaintiff's claims against DCB and the Karapetians through which he sought to set aside the trustee's sale. As the California Court of Appeal stated in that case, "[w]e are mindful that foreclosures are a far too frequent occurrence in today's difficult financial times. But the hardship must not become a haven for those who, as here, do not appear to make any good faith effort to resolve the issue but, instead, seek shelter in [meritless legal theories concerning] acts that neither misled nor prejudiced them." Dkt. 21, Ex. 17 (quoting *Shuster v. BAC Home Loans Servicing,* LP, 211 Cal. App. 4th 505, 513 (2012). Nevertheless, the Complaint again presents several claims seeking equitable relief in the form of cancelling the foreclosure sale or declaring that Defendants have no interest in the Property. These include the causes of action for cancellation, wrongful foreclosure, quiet title and declaratory relief.

Plaintiff argues that "[t]ender is not required where the foreclosure sale is void, rather than voidable, such

as when a plaintiff proves that the entity lacked the authority to foreclose on the property." *Glaski v. Bank of Am., Nat'l Ass'n,* 218 Cal. App. 4th 1079, 1100 (2013). However, for the reasons stated above, the Complaint does not sufficiently allege that the foreclosure sale was void due to the allegedly unauthorized substitution of trustee and assignment of the Note. Nor has Plaintiff either identified any other exception to the tender rule that applies, or suggested that he could do so in an amended complaint.[3]

For these reasons, Plaintiff's claims for equitable relief, including cancellation, rescission, and quiet title, all fail under the tender rule.

6. Presumption of Validity of Sale

The Karapetians argue that, even if Plaintiff could seek monetary relief from the lenders or their assignees in connection with the terms of the Note and Deed of Trust, he is barred from rescinding the sale of the property to DCB and its subsequent conveyance. The basis for this position is that Plaintiff failed to obtain an injunction prior to the sale of the Property. Instead, the Complaint only alleges that Plaintiff made an oral announcement at the foreclosure sale that the sale was unlawful, and that "Defendant DCB heard his announcements." Dkt. 1 ¶ 4.27.

Under California law, sale of a property to a bona fide purchaser is subject to a conclusive presumption of validity. Cal. Civ. Code § 2924(c) provides:

> A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof shall constitute prima facie evidence of compliance with these requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.

See also Biancalana v. T.D. Serv. Co., 56 Cal. 4th 807, 814 (2013) ("The purchaser at a foreclosure sale takes title by a trustee's deed. If the trustee's deed recites that all statutory notice requirements and procedures required by law for the conduct of the foreclosure have been satisfied, a rebuttable presumption arises that the sale has been conducted regularly and properly; this presumption is conclusive as to a bona fide purchaser." (citations omitted)).

Plaintiff argues that DCB was not a bona fide purchaser because Plaintiff appeared at the auction and stated that the foreclosure sale was unlawful, and that anyone purchasing the Property would be subject to litigation. Dkt. 28 at 17. There is no authority that supports this position.

The foregoing reasons provide an additional ground to dismiss the claims against DCB and the

[3] California courts have held that tender is not required when that would be inequitable. *See, e.g., Lona v. Citibank, N.A.*, 202 Cal. App. 4th 89, 113 (2011); *Cohen* 2015 WL 12746217, at *12. However, this exception applies in circumstances involving a loan modification agreement. In that situation, it would be illogical to require borrowers to tender the original amount of indebtedness, despite having allegedly agreed with the lender to reduce that amount. *See Cohen*, 2015 WL 12746217, at *12; *Singh v. Wells Fargo Bank,* No. 10-CV-1659-AWI, 2012 WL 691705, at *8 (E.D. Cal. Mar. 2, 2012). No such loan modification agreement is alleged here.

Karapetians.

* * *

For the foregoing reasons, the Motions to Dismiss are **GRANTED**.

IV. Request for Evidentiary Hearing

The Request for Evidentiary Hearing (Dkt. 39) repeats certain allegations made in the Complaint, including that Pinnacle was subject to cease and desist orders, and that Cindy Sandoval, who allegedly executed the substitution of trustee, was not an authorized agent of MERS. Plaintiff requests an evidentiary hearing so that witnesses may be called to testify as to these matters. For the reasons stated above as to the deficiencies of the claims advanced in the Complaint, no such evidence is needed to address the Motions.[4]

For these reasons, the Request for Evidentiary Hearing is **DENIED**.

V. Request for Leave to Amend

On February 16, 2017, Plaintiff filed a request for leave to amend the Complaint to bring additional causes of action against DCB, Varougan and Vincent. Dkt. 51. The request is based on the language of the deed by which title to the Property was transferred from DCB to Varougan and Vincent. A copy of that deed was in support of the Karapetian Motion to Dismiss. Dkt. 16-1 at 7. The text on that deed states that the Property was transferred from DCB to Varougan and Vincent as a "bona fide gift." *Id.* Plaintiff argues that this statement was false, and that the sale was mischaracterized as a gift to avoid paying recording fees. Dkt. 51, at 2. As a result, Plaintiff argues that DCB and the Karapetians have "knowingly perpetrated a fraud on the Court by submitting into evidence a fraudulent document." *Id.*

Rule 15(a)(1) provides that a party "may amend its pleading once as a matter of course within (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Rule 15(a)(2) provides that, "[i]n all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Although Rule 15(a)(2) is "to be applied with extreme liberality," *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001), a request for leave to amend may be denied on the basis of bad faith, undue delay, prejudice to the opposing party, or futility of amendment. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (internal citations omitted).

Plaintiff's proposed amendment is futile and would impose undue burdens on the Defendants. Even assuming the assertions by Plaintiff are taken as true, he has no standing to pursue any appropriate remedy due to the claimed effort to evade the payment of recording fees. Nor has he shown or suggested

[4] Plaintiff's Reply in support of the Request for an Evidentiary Hearing argues that a hearing is necessary to show that Defendants are not "real parties in interest", because they lacked "standing" to foreclose on the Property. Dkt. 47. This position confuses two doctrines. Defendants are real parties in interest because they have been named in the Complaint. No evidence on this issue is needed.

any basis on which he could seek a remedy based on the filing of the deed in the docket of this action.

Because the proposed amendment would be futile and impose unwarranted burdens on party and judicial resources, the Request for Leave to Amend is **DENIED**.

VI. Request for Substituted Service

On January 23, 2017, Plaintiff filed a Request for Substituted Service ("Request" (Dkt. 38)). It states that, despite "extraordinary efforts," Plaintiff had been unable to serve Pinnacle with the Complaint. The Request, like the Complaint, stated that Pinnacle was "an administratively dissolved Florida corporation with no known address or[] agent of service." *Id.* The request seeks an order allowing service by publication in a newspaper of general circulation.

Because the claims advanced lack merit, and the Complaint and the Request contend that Pinnacle has been dissolved, the request to serve it is both moot and unnecessary. Therefore, the Request is **DENIED**.

VII. Conclusion

For the foregoing reasons, the Motions to Dismiss are **GRANTED**, with prejudice. The claims against Defendants GMAC and ETS, have been addressed in a separate Order. Dkt. 60. Plaintiff's Requests for Evidentiary Hearing, Request for Leave to Amend, and Request for Substituted Service are **DENIED**.

On or before September 18, 2017, Defendants shall lodge a proposed judgment consistent with its terms and those of the prior Order as to GMAC and ETS. Plaintiff may file objections to the form of the proposed judgment pursuant to the Local Rules no later than September 25, 2017.

IT IS SO ORDERED.

_____ : _____

Initials of Preparer ak

Additional material from this filing is available in the Clerk's Office.