APPENDICES

APPENDIX A — ORDER OF THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT,

DATED NOVEMBER 1, 2023

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 22-13279

PETER OTOH,

Plaintiff-Appellant,

versus

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

NATIONSTAR MORTGAGE, LLC, d.b.a. Mr. Cooper,

NEWREZ LLC, d.b.a. Shellpoint Mortgage Servicing,

US BANK TRUST NATIONAL ASSOCIATION,
not in its individual capacity but solely as owner
trustee for VRMTG Asset Trust,

Defendants- Appellees.

Appeal from the United States District Court

for the Northern District of Georgia

D.C. Docket No. 1:22-cv-02488-TCB

Before WILSON, JORDAN, and BRANCH, Circuit Judges. BY THE COURT:

Plaintiff-Appellant Peter Otoh's motion to recall the mandate is DENIED. Insofar as the motion seeks to vacate this Court's opinion in this case or stay the mandate, those requests are also

DENIED

APPENDIX B — ORDER OF THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT,

DATED AUGUST 9, 2023

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 22-13279

PETER OTOH,

Plaintiff-Appellant,

versus

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

NATIONSTAR MORTGAGE, LLC, d.b.a. Mr. Cooper,

NEWREZ LLC, d.b.a. Shellpoint Mortgage Servicing,

US BANK TRUST NATIONAL ASSOCIATION, not in its individual capacity but solely as owner trustee for VRMTG Asset Trust,

Defendants- Appellees.

Appeal from the United States District Court

for the Northern District of Georgia

D.C. Docket No. 1:22-cv-02488-TCB

Before WILSON, JORDAN, and BRANCH, Circuit Judges. BY THE COURT:

The Petition for Panel Rehearing filed by the Appellant is

DENIED.

APPENDIX C — OPINION OF THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT,

DATED AUGUST 9, 2023

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 22-13279

PETER OTOH,

Plaintiff-Appellant,

versus

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

NATIONSTAR MORTGAGE, LLC, d.b.a. Mr. Cooper,

NEWREZ LLC, d.b.a. Shellpoint Mortgage Servicing,

US BANK TRUST NATIONAL ASSOCIATION, not in its individual capacity but solely as owner trustee for VRMTG Asset Trust,

Defendants- Appellees.

Appeal from the United States District Court

for the Northern District of Georgia

D.C. Docket No. 1:22-cv-02488-TCB

Before WILSON, JORDAN, and BRANCH, Circuit Judges. PER CURIAM:

Peter Otoh, pro se, appeals from the district court's denial of his motion to remand to state court for lack of subject matter jurisdiction and the district court's grant of motions to dismiss for Federal National Mortgage Association (Fannie Mae); Nationstar Mortgage, LLC, doing business as Mr. Cooper (Nationstar); Newrez, LLC, doing business as Shellpoint Mortgage Servicing (Shellpoint); and US Bank Trust National Association, as owner trustee for VRMTG Asset Trust (US Bank) (collectively the Appellees).

Otoh argues on appeal that the district court lacked jurisdiction because there was not complete diversity of the parties and because the amount in controversy did not exceed $75,000. He also argues that his claims were not barred by res judicata because the bankruptcy court, in proceedings separate from the proceedings the district court relied upon for res judicata purposes, abstained from determining the validity of a security deed from 2013.

I.

We employ a two-tiered standard of review for the district court's determination of subject-matter jurisdiction. The ultimate question of jurisdiction is considered de novo, but "[t]he district court's factual findings with respect to jurisdiction, however, are reviewed for clear error." *United States v. Tinoco,* 304 F.3d 1088, 1114 (11th Cir. 2002). Factual findings may only be overturned under the clear error standard if we are "left with the definite and firm conviction that a mistake has been committed." *Eggers v. Alabama,* 876 F.3d 1086, 1094 (11th Cir. 2017).

District courts have subject matter jurisdiction over civil actions where the amount in controversy exceeds $75,000, and the action is between citizens of different states. 28 U.S.C. § 1332(a). Defendants may remove such actions filed in a state court to the district court for the district and division where the state court action is pending. 28 U.S.C. §1441(a). "[A]ll defendants who have been properly joined and served must join in or consent to the removal of the action." 28 U.S.C. § 1446(b)(2)(A).

In determining whether there is subject matter jurisdiction, the district court can consider facts beyond the plaintiff's pleadings when the plaintiff fails to specify the total amount of damages demanded. *Leonard v. Enter. Rent a Car,* 279 F.3d 967, 972 (11th Cir. 2002). In that case, the defendant seeking removal must prove the amount in controversy by a preponderance of the evidence. Id. In doing so, the removing defendant may direct the court to additional evidence beyond the complaint. *Pretka v. Kolter City Plaza II, Inc.,* 608 F.3d 744, 751 (11th Cir. 2010).

"[W]hen the validity of a contract or a right to property is called into question in its entirety, the value of the property controls the amount in controversy." *Waller v. Pro. Ins. Co.,* 296 F.2d 545, 547–48 (5th Cir. 1961).[1] For diversity purposes, "when a trustee files a lawsuit or is sued in her own name, her citizenship is all that matters for diversity purposes." *Americold Realty Tr. v. Conagra Foods, Inc.,* 577 U.S. 378, 383 (2016). Therefore, for a traditional trust, there is no need to determine its membership to determine diversity jurisdiction. Id.

[1] Decisions of the former Fifth Circuit issued before October 1, 1981, consti- tute binding precedent in the Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

Under Federal Rule of Evidence 1005, copies of official records can be used as evidence if the original record or document is otherwise admissible, and the copy of the record has been certified under Rule 902(4) or a witness testifies that it is a true and correct copy. Fed. R. Evid. 1005.

Here, the district court did not err in denying Otoh's motion to remand because it had subject matter jurisdiction over the case. The Appellees' notice of removal adequately stated that there was total diversity of the parties, and the amount in controversy exceeded $75,000 either based on the total value of the property in question or based on the remaining principal on the loan at issue. Accordingly, we affirm as to this issue.

II.

Since res judicata determinations are pure questions of law, we review them de novo. *Norfolk S. Corp. v. Chevron, U.S.A., Inc.,* 371 F.3d 1285, 1288 (11th Cir. 2004).

Res judicata bars the parties to a prior action from relitigating the same causes of action that were, or could have been, raised in that prior action if that action resulted in a final judgment on the merits. *In re Piper Aircraft Corp.,* 244 F.3d 1289, 1296 (11th Cir. 2001). Res judicata "generally applies not only to issues that were litigated, but also to those that should have been but were not." *Delta Air Lines, Inc. v. McCoy Rests., Inc.,* 708 F.2d 582, 586 (11th Cir. 1983). Res judicata applies where the following four elements are shown: (1) the prior decision was rendered by a court of competent jurisdiction, (2) there was a final judgment on the merits, (3) both cases involve the same parties or their privies, and (4) both cases involve the same causes of action. *In re Piper Aircraft Corp.,* 244 F.3d at 1296. Citing the Supreme Court precedent, we have held that bankruptcy

orders serve as a final judgment on the merits for purposes of res judicata. *In re FFS Data, Inc.*, 776 F.3d 1299, 1306 (11th Cir. 2015) (citing *Travelers Indem. Co. v. Bailey,* 557 U.S. 137, 140 (2009)).

As to the third factor, we have explained that "privity" comprises several different types of relationships and generally applies "when a person, although not a party, has his interests adequately represented by someone with the same interests who is a party."E.E.O.C. v. Pemco Aeroplex, Inc., 383 F.3d 1280, 1286 (11th Cir. 2004). Further, parties are in privity with one another either when the nonparty to the prior action succeeds the party's interest in property or when the party and the nonparty have concurrent interests in the same property. *Hart v. Yamaha-Parts Distribs., Inc.*, 787 F.2d 1468, 1472 (11th Cir. 1986).

As to the fourth factor, "[i]n general, cases involve the same cause of action for purposes of res judicata if the present case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action." *Israel Disc. Bank Ltd. v. Entin,* 951 F.2d 311, 315 (11th Cir. 1992) (internal quotation omitted). "In determining whether the causes of action are the same, a court must compare the substance of the actions, not their form." *In re Piper Aircraft Corp.,* 244 F.3d at 1297. "The test for a common nucleus of operative fact is whether the same facts are involved in both cases, so that the present claim could have been effectively litigated with the prior one." *Lobo v. Celebrity Cruises, Inc.,* 704 F.3d 882, 893 (11th Cir. 2013) (internal quotation omitted).

Here, the district court did not err in determining that Otoh's claims were barred by res judicata. Considering the first two elements of res judicata, the bankruptcy court's order dismissing Otoh's adversary Chapter 7 bankruptcy proceeding was a final judgment on the merits by a court with proper jurisdiction. Looking to the third element, both the

bankruptcy case and the current case involve the same parties or parties in privity with the parties of the Chapter 7 proceedings. Indeed, each of the Appellees are loan servicers, lenders, or investors asserting the same property rights. Finally, regarding the fourth element, all of Otoh's claims in the current case relied upon his assertion that a 2018 agreement with Nationstar was a refinancing of his loan rather than a loan modification. Because the bankruptcy court determined that the agreement was a loan modification, all of Otoh's claims arise out of the same nucleus of operative fact and could have effectively been raised during the bankruptcy proceedings. Accordingly, because all four elements are satisfied, res judicata applies, and we affirm the district court's grant of the Appellees' motions to dismiss.

AFFIRMED.

APPENDIX D — ORDER OF THE

UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION,

DATED SEPTEMBER 1, 2022

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

CIVIL ACTION FILE NO. 1:22-cv-2488-TCB

PETER OTOH,

Plaintiff,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

NATIONSTAR MORTGAGE, LLC d/b/a Mr. Cooper, et al.,

Defendants.

ORDER

In this action, Plaintiff Peter Otoh attempts to cancel a security deed against property to avoid a foreclosure sale. He appears to contend that he refinanced the loan at issue in 2018 and that, as a result, the security deed is invalid. Otoh filed his complaint [1-1] in the Superior Court of Gwinnett County against Defendants Federal National Mortgage Association; Nationstar Mortgage, LLC; Newrez, LLC; and US Bank Trust National Association. He also filed a motion [2] for a

temporary restraining order, seeking to cancel the foreclosure sale that initially was scheduled for July 5. The Court denied [14] that motion as moot because Defendants voluntarily postponed the foreclosure sale.

Defendants Federal National Mortgage Association, Newrez, and US Bank Trust have filed a motion [3] to dismiss for failure to state a claim. Defendant Nationstar Mortgage, LLC filed its own motion [9] to dismiss, indicating that it adopts by reference the other Defendants' motion. Otoh has responded to these motions and also has filed a motion [11] to remand. These motions are now ripe for the Court's review.

I. Background

On or about December 20, 2013, Otoh executed a security deed in favor of Mortgage Electronic Registration Systems, Inc. acting solely as a nominee for Nationstar and its successors and assigns. The deed conveys legal title to real property known as 6645 Princeton Park Court, Lithonia, Georgia 30058, securing a note in the amount of $138,417, and was recorded on December 30 in the DeKalb County deed records.

On or about June 6, 2019, the deed was assigned to Nationstar, with the assignment being recorded on June 14. On or about November 5, the deed was then assigned to U.S. Bank Trust, with that assignment being recorded on November 22, 2021.

Since 2019, Otoh has filed numerous bankruptcies, adversary proceedings, and appeals. In a September 27, 2019 adversary proceeding, he sought cancellation of the security deed based on the same reasoning presented in this

action. On September 14, 2020, Judge Barbara Ellis-Monro dismissed the adversary proceeding. *Otoh v. Fed. Nat'l Mortg. Ass'n,* No. 19-5310 [Doc. 94] (Bankr. N.D. Ga. Sept. 14, 2020).

Defendants contend that Otoh's current claims are barred by res judicata-based on the bankruptcy proceedings-and otherwise fail to state a claim.

II. Motion to Remand

Before turning to the motions to dismiss, the Court will address Otoh's motion to remand. Otoh contends that the Court lacks diversity jurisdiction because (1) Nationstar did not state its citizenship in its notice of consent to removal (though Otoh does not contest that its citizenship was properly identified in the notice of removal); and (2) he does not plead a specific amount of damages in his complaint, so the threshold $75,000 amount-in-controversy requirement is not satisfied. He also contends that the Court lacks federal-question jurisdiction and that Defendants are using the federal courts to "harass" him.

This Court has diversity jurisdiction over the removal of this action. The fact that Nationstar did not include its citizenship in its notice of consent to removal does not vitiate diversity jurisdiction from this Court. Nationstar's citizenship was included in the notice of removal, [1]¶15, satisfying the consent requirement under 28 U.S.C.§ 1446(b)(2)(A). All Defendants are citizens of states other than Georgia, and Otoh is a citizen of Georgia. Therefore, complete diversity among the parties exists.

Regarding the amount-in-controversy requirement, the security deed from which Otoh seeks relief is for property

valued at $289,000 "per the Board of Tax Accessors for DeKalb County, Georgia." [1] ¶21. Because Otoh seeks to invalidate a security deed and permanently enjoin any foreclosure of the property, the value of the object of the litigation is the entire value of the property. See *Abedi v. U.S. Bank Nat'l Assoc.*, No. 1:19-cv-3544-SCJ-JCF, 2020 WL 9594288, at *3 (N.D. Ga. May 19, 2020).

Moreover, Otoh challenges the validity of a loan agreement that places the value the loan- the unpaid principal of which is $115,000- as the amount in controversy. See *Sanders v. Bank of Am.*, No.1:13-cv-1904-WSD, 2013 WL 6587742, at *4 (N.D. Ga. 2013); *Walker v. U.S. Bank Nat'lAss'n*, 1:12-cv-2911-RWS, 2013 WL 1137006, at *2 (N.D. Ga. Mar. 25, 2013), aff'd, 572 F. App'x 740 (11th Cir. 2014).

Using either the loan amount or the value of the property, the amount in controversy clearly exceeds the $75,000 threshold. The Court therefore has diversity jurisdiction over this action. Otoh's motion to remand will be denied.[2]

III. Motion to Dismiss

A. Legal Standard

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" This pleading standard does not require "detailed factual allegations," but it does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation."

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[2] The Court therefore need not address Otoh's remaining arguments regarding federal-question jurisdiction. Nor is the Court persuaded by Otoh's contention that Defendants are using the federal courts to harass him. The Court has jurisdiction over this action pursuant to federal law.

Chaparro v. Carnival Corp., 693 F.3d 1333, 1337 (11th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). To survive a 12(b)(6) motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Chandler v. Sec'y of Fla. Dep't of Transp.*, 695 F.3d 1194, 1199 (11th Cir. 2012) (quoting id.).

The Supreme Court has explained this standard as follows:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. 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.

Iqbal, 556 U.S. at 678 (citation omitted) (quoting *Twombly*, 550 U.S. at 556); see also *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324-25 (11th Cir.2012).

Thus, a claim will survive a motion to dismiss only if the factual allegations in the complaint are "enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555-56 (citations omitted). "[A] formulaic recitation of the elements of a cause of action will not do." Id. at 555 (citation omitted). While all well-pleaded facts must be accepted as true and construed in the light most favorable to the plaintiff, *Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir. 2011), the Court need not accept as true the plaintiffs legal conclusions, including those couched as factual allegations, *Iqbal*, 556 U.S. at 678.

Accordingly, evaluation of a motion to dismiss requires two steps: (1) eliminate any allegations in the pleading that are merely legal conclusions, and (2) where there are well-pleaded factual allegations, "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

B. Discussion

Defendants contend and the Court agrees that Otoh's claims are barred by res judicata. Even if they were not, they would fail to state a claim.[3]

1. Res Judicata

Although Otoh's complaint purports to assert seven claims for relief, Defendants correctly point out that the underlying basis for each of his claims is his argument that the 2013 security deed was cancelled based on a supposed refinancing the exact issue presented in the bankruptcy proceeding. A prior adversary proceeding ruling by a bankruptcy court can form the basis for res judicata preclusion of a subsequent action. See, e.g., *DCFS USA, LLC v. Dist. of Columbia,* 820 F. Supp. 2d 1, 3 (D.D.C. 2011).

The Eleventh Circuit has found that,

> In order for the doctrine of res judicata to bar a subsequent suit, four elements must be present: (1)

[3] Otoh largely focuses on his argument that Nationstar's former attorney referred to the transaction at issue as a refinancing. However, this statement was made by a former attorney, not a Nationwide representative, and does not bind the bank. The Court agrees with Defendants that the purported admission is "actually just one attorney's on-the-spot opinionated response of what was indicated on a transaction history that he was not authorized or qualified to opine on." [18] at 4.

> there must be a final judgment on the merits,(2) the decision must be rendered by a court of competent jurisdiction, (3) the parties, or those in privity with them, must be identical in both suits[,] and (4) the same cause of action must be involved in both cases.

I.A. Durbin, Inc. v. Jefferson Nat'l Bank, 793 F.2d 1541, 1549 (11th Cir.1986) (citations omitted). Res judicata bars not only those claims actually raised in the first suit, but also whatever claims the plaintiff could have raised if those claims arise out of the same transactions or events at issue in the first suit. *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1355 (11th Cir. 2000).

The first two elements are clearly met, as there was a final judgment on the merits by a court of competent jurisdiction when the bankruptcy court entered its order dismissing Otoh's adversary proceeding.[4] The third element is met as well: Fannie Mae and Nationstar were named as defendants in the adversary proceeding. And Shellpoint and U.S. Bank Trust are in privity with those defendants: they have common interests in the subject property because they were all servicers, lenders, or investors enforcing the same property right with directly aligned interests.[5] See *Beckmann v. NewRez, LLC*, No.1:19-cv-143-MLB-JFK, 2019 WL 5322647, at *8 n. 17 (N.D. Ga. June 10, 2019) adopted at 2019 WL 5387980 (Aug. 29, 2019) (citation omitted).

[4] Otoh argues that there was no final judgment on the merits in the earlier case. However, the exhibit to which he points in support of his argument is an order filed in a different adversary proceeding.
[5] Otoh's argument that the parties are not in privity because they had knowledge of the alleged admission and conspired together is meritless.

And the fourth element is met as well because this action involves the same claims as, or claims that could have been brought in, the adversary proceeding. See *Ragsdale v. Rubbermaid, Inc.,* 193 F.3d 1235, 1238 (11th Cir. 1999) (citations omitted). In both actions, Otoh's underlying contention was that the 2013 security deed should be cancelled based on a purported 2018 refinance. The bankruptcy court found that the 2018 agreement was not a refinancing but a modification of the 2013 security deed. Each of Otoh's current claims- which rely on the argument that failed before the bankruptcy court-could have been brought at the time of the adversary proceeding.

The Court thus finds that Otoh's claims are barred by the order from the bankruptcy court in his adversary proceeding.

2. Failure to State a Claim

Even if Otoh's claims were not barred by res judicata, they would be subject to dismissal for failure to state a claim. For the same reasons articulated in the bankruptcy court's order, the 2018 agreement was not a refinance; rather, it was a loan modification. Otoh signed a loan modification agreement and was sent correspondence congratulating him on his modification. His exhibits do not support his argument to the contrary. As Defendants point out, his Exhibit 6 relates to a loan number that is not the account associated with the relevant security deed.[6]

[6] Although the Court is not persuaded by Otoh's argument that anyloan modification in 2018 was a forgery, the logical result of that argument would simply be that the 2013 loan and security deed remains in effect. And although Otoh contends that Nationstar was an indispensable party, it is a party and has moved to dismiss.

Otoh's argument that the assignment was invalid or fraudulent fails because he, as a non-party, lacks standing to challenge the assignment. *Ames v. JP Morgan Chase Bank, N.A.*, 783 S.E.2d 614, 619-20 (Ga. 2016).

Finally, as Defendants point out, Otoh's claims suffer from additional flaws that warrant dismissal. His fraud claim is not pleaded with the requisite particularity; the claim for unjust enrichment fails because there is a contract governing the parties' rights and responsibilities at issue; the claim for attempted wrongful foreclosure requires more than a statement of intent to foreclose; and his claims for punitive damages and injunctive relief fail because the substantive claims fail.

IV. Conclusion

For the foregoing reasons, Defendants' motions [3, 9] to dismiss are granted, and Otoh's motion [11] to remand is denied. The Clerk is directed to close this case.

IT IS SO ORDERED this 1st day of September, 2022

s/

Timothy C. Batten, Sr.
Chief United States District Judge