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APPENDIX 1

16-3438

16-3438-bk

In re Residential Capital, LLC

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SUMMARY ORDER

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.**

**At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of September, two thousand seventeen.**

**PRESENT: DENNIS JACOBS, JOSÉ A. CABRANES,**

**RICHARD C. WESLEY,**

**Circuit Judges.**

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**Erlinda Abibas Aniel,**

**Plaintiff-Appellant,**

**v. 16-3438**

**ResCap Liquidating Trust,**

**Defendant-Appellee.***

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**FOR PLAINTIFF-APPELLANT:** Erlinda Abibas Aniel, pro se, Hillsborough, CA.

**FOR DEFENDANT-APPELLEE:** Norman S. Rosenbaum, Jessica J. Arett, Jordan A. Wishnew, Morrison & Foerster LLP, New York, NY.

* The Clerk of Court is respectfully directed to amend the caption.

Appeal from a judgment of the United States District Court for the Southern District of New York (Gardephe, *J.*).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED.**

Appellant Erlinda Abibas Aniel, pro se, filed two proofs of claim in the bankruptcy of Residential Capital, LLC, alleging wrongful foreclosure of a California property. The trustee of the bankruptcy estate, the ResCap Liquidating Trust, objected to Aniel's claims on the basis that she lacked standing. The bankruptcy court sustained the standing objections, and the district court affirmed. Aniel appeals. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues on appeal.

We conduct plenary review of orders by district courts acting as appellate courts in bankruptcy cases, reviewing conclusions of law de novo and factual findings for clear error. *In re First Cent. Fin. Corp.*, 377 F.3d 209, 212 (2d Cir. 2004). Accordingly, the ruling on standing is reviewed de novo.

To have standing, a plaintiff must show (1) an injury in fact, (2) a causal connection between the injury and the defendant's conduct, and (3) that it is likely the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks omitted). The injury-in-fact must be concrete and particularized. *Spokeo, Inc. v. Robins*, 136S.Ct.1540, 1548 (2016). Aniel alleged that her injury arose from the foreclosure of the property, but she has not demonstrated a connection to the property sufficient to establish her standing. Aniel is not named on the deed of trust or mortgage note; as evidence of ownership, she cited a later grant deed giving her a one percent interest, an alleged agreement with the property's owner to pay the mortgage, and her own

bankruptcy filing. But the grant deed postdated the foreclosure proceeding, Aniel submitted no documentary evidence establishing her alleged agreement with the property owner, and she never formally assumed any obligation for the mortgage loan with the lender's consent. Aniel's submissions in her own bankruptcy filing do not establish her standing.

We have considered all of Aniel's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

## APPENDIX 2

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Residential Captial, LLC,

Debtor,

Erlinda Abibas Aniel,

Appellant,

-v-

ResCap Borrower Claims Trust,

Appellee

**ORDER**

15 Civ. 6919 (PGG)

PAUL G. GARDEPHE, U.S.D.J.:

Erlinda Abibas Aniel has appealed United States Bankruptcy Judge Martin Glenn's June 30, 2015 order sustaining ResCap Liquidating Trust's objections to Aniel's claim for wrongful foreclosure, and expunging the claim. (Notice of Appeal (Dkt. No. 1); see also Order (Bankr. Dkt. No. 8820)) Aniel disputes Judge Glenn's conclusion that she lacks Article III standing to contest the foreclosure. For the reasons stated below, the appeal will be denied

and the order o f the Bankruptcy Court will be affirmed.

## BACKGROUND

## I. RELEVANT FACTS

### A. The Loan

This case arises from a foreclosure on a property located at 801 Foothill Drive in San Mateo, California. On March 22, 2007, Raul and Corazon Estiva- non-parties to this action - obtained a $ 1 million loan from MortgageIT, Inc. (Note (Bankr. Dkt. No. 8237-8)) The loan note was secured by the 801 Foothill Drive property. (Deed of Trust (Bankr. Dkt. No. 8237-9) at 4[4]) Appellant Aniel was not a party to the loan note or deed of trust. (See Note (Bankr. Dkt. No. 8237-8); Deed of Trust (Bankr. Dkt. No. 8237-9))

On December 15, 2008, Executive Trustee Services, LLC ("ETS") - the substitute trustee on the loan (see Substitution of Trustee (Bankr. Dkt. No. 8237-12)) - issued a notice of default to the Estivas. (Notice of Default (Bankr. Dkt. No. 8237-11)) The Estivas failed to cure their default on the loan, and ETS issued a notice of foreclosure sale on March 18, 2009. (Notice of Trustee's Sale (Bania. Dkt. No. 8237-13))

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[4] 1 The page numbers of documents referenced in this order correspond to the page numbers designated by this District's Electronic Case Filing system.

On February 3, 2011, Corazon Estiva executed a grant deed providing that Appellant Erlinda Aniel and her husband, Fermin Aniel, each had a one percent interest in the title of the property.[5] (Grant Deed (Bankr. Dkt. No. 8237-20)) The Aniels did not assume any obligation as to the Estivas' mortgage. (See Note (Bankr. Dkt. No. 8237-8); Deed of Trust (Bankr. Dkt. No. 8237-9)) On March 10, 2011, HSBC purchased the property at a foreclosure sale. (Trustee's Deed Upon Sale (Bankr. Dkt. No. 8237-21))

### B. The Aniels' Bankruptcy and Litigation History

On February 25, 2009, Appellant Aniel and her husband, Fermin Aniel, filed a Chapter 11 bankruptcy petition in the Northern District of California. (N.D. Cal. Bankr. Dkt. Sheet (Bankr. Dkt. No. 8237-14)) The Aniels listed a fee simple ownership interest in the 801 Foothill Drive property on their amended bankruptcy schedule. (Aniel Amended Schedule (Bankr. Dkt. 8237-15) at 10) On August 2, 2010, the Aniels' Chapter 11 case was

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[5] 2 Aniel also asserts that she entered into an agreement with the Estivas in which they promised her a "50% ownership in the property and 50% of any profits received from the property." (Appellant Br. (Dkt. No. 16) at 10; Aniel Opp. (Bankr. Dkt. No. 8370), Ex. 1 (Erlinda Aniel 13) The record does not reveal when Aniel entered into this agreement. Moreover, as Judge Glenn noted, Aniel has presented no documentary evidence ofany such agreement. (Bankr. Dkt. No. 8820 at 20)

converted to a Chapter 7 case pursuant to 11 U.S.C. § 701 et seq. (N.D. Cal. Bankr. Dkt. Sheet (Bankr. Dkt. No. 8237-14)) On November 2, 2010, the California bankruptcy court entered an order authorizing the Chapter 7 trustee to abandon, inter alia, the Aniels' purported interest in the 801 Foothill Drive property (Bankr. Dkt. No. 8237-17)), and on December 2, 2010, the court granted the Aniels a discharge (Bankr. Dkt. No. 8237-16)).

On February 2, 2011, the Aniels filed a complaint in California Superior Court asserting state law claims against multiple defendants, including GMAC Mortgage ("GMACM"), ETS, HSBC, and Mortgage Electronic Registration Systems, Inc. ("MERS"). arising from the foreclosure. (See CA Sup. Ct. Cmplt. (Bankr. Dkt. No. 8237-4) at 10-33) On March 7, 2011, the GMACM, ETS, HSBC, and MERS defendants filed a demurrer, which the Superior Court sustained without leave to amend on June 8, 2011. (CA Superior Ct. Dkt. Sheet (Bankr. Dkt. No. 8237-19)) The Aniels appealed to the California Court of Appeal on February 2, 2012, but the appeal was stayed on May 14, 2012, as a result of the instant bankruptcy proceeding. (Bankr. Dkt. No. 1; see also 11 U.S.C. § 362 (providing for an automatic stay of litigation against a debtor following the filing of a bankruptcy petition))

## II. PROCEDURAL HISTORY

On May 14, 2012, Residential Capital, LLC and its indirect subsidiaries, including ETS and GMACM, filed petitions for voluntary relief under Chapter 11 of the United States Bankruptcy Code, § 1101 et seq., in the United States Bankruptcy Court for the Southern District of New York. (Bankr. Dkt. No. 1)

On June 19, 2012, Erlinda, Fermin, and Marc Aniel filed Claim Numbers 112 and 114 - the claims at issue in this appeal[6] - asserting a $ 10,000 general unsecured claim against Debtor ETS and a $1,075,000 secured claim against Debtor GMACM. (Proof of Claims (Bankr. Dkt. No. 8237-4))

On December 11, 2013, Judge Glenn entered an order approving the terms of Residential Capital's Chapter 11 plan. (Bankr. Dkt. No. 6065-1) On December 17, 2013 - the Effective Date of the Plan - ResCap Liquidating Trust was established "to make distributions and other payments in accordance with the Plan and the Liquidating Trust agreement," and to handle the affairs of the Debtors' estates. (Id. at 42)

On March 5, 2015, the Trust filed an objection to the Aniels' claims on the grounds that they failed to

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[6] 3 While the underlying claims were filed by Erlinda, Fermin, and Marc Aniel, Erlinda Aniel is the only appellant

state a viable cause of action. (Bankr. Dkt. No. 8237) On June 30, 2015, Judge Glenn sustained the objection, finding that the Aniels lacked standing to challenge the 801 Foothill Drive foreclosure. (Bankr. Dkt. No. 8820 at 21) Judge Glenn concluded that the Aniels did not have a sufficient interest in the property to challenge the foreclosure sale, because they were not parties to the loan agreement at the time the foreclosure sale took place. (Id. at 20) On July 9, 2015, the Aniels moved for reconsideration. (Bankr. Dkt. No. 8897) Judge Glenn denied the Aniels' motion for reconsideration on August I8, 20I5. (Bankr. Dkt. No. 9027)

On August 24, 2015, Erlinda Aniel filed the instant appeal. (Dkt. No. 1) Aniel alleges that she had a fifty percent interest in the 80I Foothill Drive property, and "lost all her interest in the property" as a result of the foreclosure sale. (Appellant Br. (Dkt. No. 16) at 8-9) Aniel states that her interest in the property is established by (1) an agreement with Raul Estiva, under which Aniel agreed to make payments on the mortgage, maintain the property, collect rent, and pay insurance and taxes in exchange for "a 50% ownership in the property and 50% of any profits received from the property" (Id. at 8-10); (2) the grant deed, executed on February 3, 2011, that transferred a 1 percent interest in the deed to Erlinda Aniel and a 1 percent interest to Fermin

Aniel (Id. at 8); and (3) Aniel's Amended Schedule in her Chapter 11 bankruptcy case. (Id.)

DISCUSSION

## I. STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 158(a)(l), district courts are vested with appellate jurisdiction over bankruptcy court rulings. When sitting as an appellate court, the district court may "affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106. "A district court reviews a bankruptcy court's findings of fact for clear error...." In re Bernard L. Madoff Inc. Sec. LLC, 531 B.R. 345, 350 (S.D.N.Y. 2015) (citing In re Bell, 225 F.3d 203, 209 (2d Cir. 2000); In re Metaldyne Corp., 421 B.R. 620, 624 (S.D.N.Y. 2009)).

A finding of fact is clearly erroneous where,

"although there is evidence to support it, the ... court on the entire record is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). While the trial court's findings of fact are not conclusive on appeal, the party that

seeks to overturn them bears a heavy burden. See 9C Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure§ 2585 (1995). If two views of evidence are possible, the trial judge's choice between them cannot be clearly erroneous. See Anderson v. City of Bessemer, 470 U.S. 564, 574 (1985). "To be clearly erroneous, a decision must strike [the reviewing court] as more than just maybe or probably wrong; it must ... strike [the reviewing court] as wrong with the force of a five-week-old, unrefrigerated dead fish." Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228 (7th Cir.), cert. denied, 493 U.S. 847 (1989).

H & C Dev. Group, Inc. v. Miner (In re Gregory & Dawn Miner), 229 B.R. 561, 565 (B.A.P. 2d Cir. 1999).

A bankruptcy judge's conclusions of law are reviewed de novo. Official Comm. of Unsecured Creditors of Applied Theory Corp. v. Halifax Fund, L.P. (In re Applied Theory Corp.), 493 F.3d 82, 85 (2dCir.2007). When reviewing an issue de novo, the Court "decide[s] the issue as if no decision had previously been rendered." In re Miner, 229 B.R. at 565.

Mixed questions of law and fact are reviewed "de novo or under the clearly erroneous standard depending on whether the question is predominantly legal or factual." Bay Harbor Mgmt., L.C. v. Lehman Bros. Holdings, Inc. (In re Lehman Bros. Holdings,

Inc.), 415 B.R. 77, 83 (S.D.N.Y. 2009) (quoting Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchants' Litig.), 554 F.3d 300, 316 n.11 (2d Cir.2009)).

## II. THE BANKRUPTCY COURT PROPERLY CONCLUDED THAT APPELLANT LACKS STANDING

### A. Applicable Law

It is well established that "'[a] plaintiff must demonstrate standing for each claim and form of relief sought.'" Carver v. City of New York, 621 F.3d 221, 225 (2d Cir. 2010) (quoting Baur v. Veneman, 352 F.3d 625, 642 n.15 (2d Cir. 2003)). "'Because standing is jurisdictional under Article III of the United States Constitution, it is a threshold issue in all cases since putative plaintiffs lacking standing are not entitled to have their claims litigated in federal court.'" Picard v. JPMorgan Chase & Co., 460 B.R. 84, 91 (S.D.N.Y. 2011) (quoting Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 117 (2d Cir. 1991)), affd sub nom. In re Bernard L. Madoff Inv. Sec. LLC., 721F.3d 54 (2d Cir. 2013).

[T]he "irreducible constitutional minimum ·• of standing consists of three elements. Lujan v. Defs. Of Wildlife, 504 U.S. 555, 560 (1992). The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable

judicial decision. Id., at 560-561; Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000). The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990).

> Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016), as revised (May 24, 201.6).
> "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" Id. at 1548 (quoting Lujan, 504 U.S. at 560). "An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a '"substantial risk" that the harm will occur.'" Susan B. Anthony List v. Drichaus, 134 S. Ct. 2334, 2341 (2014) (quoting Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1150 n.5 (2013)). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" Spokeo, 136 S. Ct. at 1548 (quoting Lujan, 504 U.S. at 560 n.l). '"As a general rule,' this means 'plaintiff must have personally suffered.'" In re the Bear Stearns Companies, Inc. Sec., No. 08 MDL 1963 (RWS), 2016 WL 4098385, at* 17 (S.D.N.Y. July 25, 2016) (quoting W.R. Huff

Asset Mgmt. Co., LLC v. Deloitte & Touche LLP, 549 F.3d 100, 107 (2d Cir. 2008)). "Concreteness" refers to an injury that is "real, and not abstract." Spokeo, 136 S. Ct. at 1548 (internal quotation marks omitted).

**B. Analysis**

Aniel argues that - although she was never a party to the loan note or deed of trust - she has standing to challenge the foreclosure because she has an equitable ownership interest in the 801 Foothill Drive property as a result of, inter alia, tax, home insurance, and mortgage payments she made relating to the property. [7] (Appellant Dr. (Dkt. No. 16 at 9-10) Aniel claims that she suffered a concrete injury when the Debtors foreclosed on the property, because she thereby "lost all her interest in the property and all of her investments and contributions to the property." (Id. at 8-10)

Judge Glenn found that Anolik v. Bank of Am. Loans, No. 2:1 l-CV-00406-MCE, 2011 WL 1549291 (E.D. Cal. Apr. 21, 2011) forecloses Appellant's claim. (Bankr. Dkt. No. 8820 at 20) In Anolik, the court held that plaintiff lacked standing to challenge the

[7] 4 The record contains no documentary evidence of such payments, nor does it indicate when any such payments were made.

validity of a foreclosure proceeding because plaintiff (I) "was not the borrower on the subject loan," and (2) "had not assumed the obligations under the loan in writing and with the lender's consent, as required by the Deed of Trust." Anolik, 2011WL1549291, at *3.

Moreover, in Worthy-Pugh v. Deustche Bank Nat'l Tr. Co., No. 3:14-CV-1620 (AWT), 2016 WL 2944535, at *3 (D. Conn. Jan. 29, 2016), the court likewise held that plaintiff "lack[ed] standing to challenge the foreclosure proceedings because he was not a party to the Note or the Mortgage." Although plaintiff resided at the property at issue, he did not have the requisite "cognizable legally protected interest in the Property" to sufficiently allege an injury-in- fact. Id.; see also Robertson v. GMAC Mortg. LLC, 982 F. Supp. 2d 1202, 1206-08 (W.D. Wash. 2013) (the law does not permit "any person with an interest in the property" to sue a lender for wrongful foreclosure; a person has standing only ifhe or she has a "financial stake in the loan transaction" (emphasis added)).

Here, as in Anolik, the Estivas' deed of trust required the execution of a formal agreement- with the lender's consent - in order for a third party, such as Aniel, to assume any obligations under the loan. (Deed of Trust (Bankr. Dkt. No. 8237-9) at 11 ("Borrower shall not be released from Borrower's obligations and liability under this Security

Instrument unless Lender agrees to such release in writing.")) Assuming arguendo that Erlinda Aniel held a one percent interest in the title of the property pursuant to the grant deed, Aniel never formally assumed any part of the Estivas' obligations under the mortgage. (See Appellant Br. (Dkt. No. 16) at 10-11) Accordingly, Aniel cannot allege an injury-in-fact based on the foreclosure.[8] See Worthy-Pugh, 2016 WL 2944535, at *3; Robertson, 982 F. Supp. 2d at 1206-08; Anolik, 2011 WL 1549291, at *3.

Aniel argues, however, that she has standing because (1) she "listed the subject property as her property" in her bankruptcy petition; (2) "Appellees never challenged her standing in the Bankruptcy Court"; and (3) "[t]he California Bankruptcy Court even abandoned the subject property from Appellant's estate." (Appellant Br. (Dkt. No. 16) at 13)

The fact that the Aniels listed an interest in the 801 Foothill Drive property in documents they submitted during their bankruptcy proceeding is not evidence that Appellant actually had an interest in that property. Nor did the bankruptcy court handling the

[8] 5 To the extent that Aniel argues that the Estivas had promised her a "50% ownership in the property and 50% ofany profits received from the property" (see Appellant Br. (Dkt. No. 16) at 10), as noted above, there is no documentary evidence of any such agreement. (Bankr. Dkt. No. 8820 at 20) In any event, under Anolik, any such agreement would not be sufficient to establish standing

Aniels' petition make a finding as to whether the Aniels had an interest in the 801 Foothill Drive property.

The fact that Appellees never "challenge[d] Appellant's disclosure of [her alleged] ownership interest" in the property during the Aniels' bankruptcy proceeding (see id.) is irrelevant, because Appellees were not parties to the Aniels' California bankruptcy proceeding.

Finally, as Judge Glenn noted in denying Aniel's motion for reconsideration, "Aniel's chapter 7 trustee could only abandon whatever ownership interest in [801 Foothill Drive] that Aniel possessed before she filed for bankruptcy; the abandonment of her alleged ownership interest could not augment her rights and confer her with co-borrower status under the loan." (Banla. Dkt. No. 9027 at 6) In short, the fact that Aniel's Chapter 7 trustee abandoned any ownership interest Aniel had in 801 Foothill Drive does not establish that she had an ownership interest in that property, much less that she had assumed obligations under the loan concerning that property.[9]

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[9] Aniel also argues that Judge Glenn's "factual and legal determination of Appellant's standing ... was outside of [his] jurisdiction at the time[,] because that issue was already pending in the California Court of Appeals." (Appellant Br. (Dkt. No. 16) at 11) Judge Glenn was required to address Aniel's standing, however, because she had filed a claim in the

****

Because Aniel has not demonstrated an injury-in-fact, Judge Glenn made no error in concluding that she lacks Article III standing to challenge the foreclosure.

## CONCLUSION

For the reasons stated above, the judgment of the Bankruptcy Court for the Southern District of New York is affirmed. This appeal is dismissed in its entirety and the Clerk of the Court is directed to close this case.

Dated: New York, New York
September 24, 2016

SO ORDERED.

Paul G. Gardephe

Unites States District Judge

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bankruptcy proceeding before him, and Article III standing is a threshold requirement for asserting a claim in federal court. SeePicard,460B.R.at91.

## APPENDIX 3

**United States Court of Appeals for the Second Circuit Thurgood Marshall U.S. Courthouse**
**40 Foley Square**
**New York, NY 10007**

**ROBERT A. KATZMANN CHIEF JUDGE**

Date: July 27, 2017
Docket #: 16-3438bk
Short Title: In re: Residential Capital, LLC

**CATHERINE O'HAGAN WOLFE CLERK OF COURT**

DC Docket #: 15-cv-6919
DC Court: SDNY (NEW YORK CITY)
DC Judge: Gardephe

**NOTICE OF HEARING DATE**

**Argument Date/Time: Location:**

Wednesday, September 13, 2017 at 10:00 a.m. Thurgood Marshall U.S. Courthouse, 40 Foley Square, New York, NY, 10007, 17th Floor, Room 1703

**Time Allotment:**

Erlinda Abibas Aniel 5 minutes
v. ResCap Liquidating Trust On Submission

Counsel and non-incarcerated pro se litigants presenting oral argument must register with the courtroom deputy 30 minutes before argument.

A motion or stipulation to withdraw with or without prejudice must be filed no later than 3 business days prior to the scheduled date of argument. The Court will consider the motion or stipulation at the time of argument, and counsel's appearance is required with counsel prepared to argue the merits of the case. If a stipulation to withdraw with prejudice is based on a final settlement of the case, the fully-executed settlement must be reported immediately to the Calendar Team, and a copy of it must be attached to the stipulation.

Inquiries regarding this case may be directed to 212-857-8595.

## APPENDIX 4

**United States Court of Appeals for the Second Circuit Thurgood Marshall U.S. Courthouse**

**40 Foley Square**
**New York, NY 10007**

**ROBERT A. KATZMANN CHIEF JUDGE**

Date: August 01, 2017
Docket #: 16-3438bk
Short Title: In re: Residential Capital, LLC

**CATHERINE O'HAGAN WOLFE CLERK OF COURT**

DC Docket #: 15-cv-6919
DC Court: SDNY (NEW YORK CITY)
DC Judge: Gardephe

**LOCAL RULE 34.1(b) NOTICE OF THE COURT'S INTENT TO HEAR THE FOLLOWING APPEAL ON SUBMISSION**

The Court has determined that oral argument of this appeal is unnecessary according to the standard set forth in FRAP 34(a)(2). Accordingly, this appeal will be determined on submission of the briefs on September 13, 2017.

cc: All counsel of record

## APPENDIX 5

**(Edited to be relevant only to the Subject Property)**

**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF NEW YORK**

**NOT FOR PUBLICATION**

Case No. 12-12020 (MG)

In re:

RESIDENTIAL CAPITAL, LLC, *et al.*,

Debtors.

Chapter 11

Jointly Administered

**MEMORANDUM OPINION AND ORDER SUSTAINING IN PART AND OVERRULING IN PART THE RESCAP LIQUIDATING TRUST AND THE RESCAP BORROWER CLAIMS TRUST'S OBJECTION TO CLAIM NOS. 112, 114, 416, AND 417 FILED BY ERLINDA ABIBAS ANIEL, FERMIN SOLIS ANIEL, AND MARC JASON ANIEL**

*APPEARANCES:*

MORRISON & FOERSTER LLP

*Attorneys for ResCap Borrower Claims Trust*

250 West 55th Street New York, New York 10019

By: Norman S. Rosenbaum, Esq.

Jordan A. Wishnew, Esq.

Jessica J. Arett, Esq.

ERLINDA ABIBAS ANIEL, FERMIN SOLIS ANIEL, MARC JASON ANIEL

*Pro Se*

75 Tobin Clark Drive

Hillsborough, California 94010

By: Erlinda Abibas Aniel

**MARTIN GLENN**

**UNITED STATES BANKRUPTCY JUDGE**

Pending before the Court is the ResCap Liquidating Trust's (the "Liquidating Trust") and the ResCap Borrower Claims Trust's (the "Borrower Trust" and, together with the Liquidating Trust, the "Trusts") objection (the "Objection," ECF Doc. # 8237) to (i) Claim Numbers 112 and 114 (the "Estiva Claims," ECF Doc. # 8237-4) filed by Erlinda Abibas Aniel ("Erlinda Aniel"), and (ii) Claim Numbers 416 and 417 (the "Aniel Claims," ECF Doc. # 8237-5, and together with the Estiva Claims, the "Claims") filed by Erlinda Aniel, Fermin Solis Aniel, and Marc Jason Aniel (collectively, the "Aniels").[10] The Claims

[10] 1 The Objection is supported by the declarations of Kathy Priore (the "Priore Declaration," ECF Doc # 8237-2) and Norman S. Rosenbaum (the "Rosenbaum Declaration," ECF Doc. # 8237-45).

are based on a litany of state and federal causes of action the Aniels previously asserted against Debtors GMAC Mortgage, LLC ("GMACM") and Executive Trustee Services, LLC ("ETS") in two separate actions commenced in California courts, which actions arose from the Debtors' foreclosure on two separate properties allegedly owned by the Aniels (the "Estiva Property" and the "Aniel Property," respectively). As set forth more fully below, the Court holds that the Aniels fail to state a claim for many of these causes of action; however, factual issues preclude the resolution of several of their claims with respect to the Aniel Property at this time. Specifically, the Court concludes that an evidentiary hearing is required to resolve the Aniels' claims premised on an allegedly invalid assignment to GMACM of the deed of trust encumbering the Aniel Property. With respect to the Aniel Property, the Aniels' causes of action for wrongful foreclosure, fraudulent concealment, violations of California's Unfair Competition Law, CAL. BUS. & PROF. CODE §§ 17200 *et seq.* (the "UCL"), declaratory relief, and to set aside the trustee's sale all hinge on whether the signatory of the assignment had authority to execute the assignment.

Erlinda Aniel filed an opposition to the Objection on behalf of the Aniels (the "Opposition," ECF Doc. # 8370), and the Trust filed a reply (the "Reply," ECF Doc. # 8472).[11] The Court held a hearing on the

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[11] 2 The Reply is supported by the supplemental declaration of Kathy Priore (the "Priore Supp.," ECF Doc. # 8475-1).

Objection on April 16, 2015; Erlinda Aniel appeared on behalf of the Aniels by telephone. The Court took the matter under submission. This Opinion sustains in part and overrules in part the Trust's Objection to the Aniels' Claims.

## I. BACKGROUND

### A. The Estiva Property

Raul and Corazon Estiva (together, the "Estivas") obtained a $1,000,000 loan (the "Estiva Loan") from non-debtor MortgageIT, Inc. ("MortgageIT") in March 2007. (Obj. ¶ 15.) The Estiva Loan was evidenced by a note (the "Estiva Note," Priore Decl. Ex. D) secured by a deed of trust (the "Estiva DOT," Priore Decl. Ex. E) encumbering the Estiva Property located at 801 Foothill Drive, San Mateo, California 94402. (Obj. ¶ 15.) The Estiva DOT named Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary. (*Id.*; *see* Priore Decl. Ex. E at 3.) None of the Aniels were identified in the Estiva DOT or the Estiva Note. (*See* Obj. ¶ 15; *see* Priore Decl. Exs. D, E.)

The Estiva Loan was transferred to HSBC Bank U.S.A. ("HSBC"), as Trustee for DALT 2007-AO3, on May 1, 2007.[12] (Obj. ¶ 16.) MERS assigned the Estiva DOT to HSBC pursuant to an assignment executed on May 26, 2009 (the "Estiva Assignment,"

[12] 3 The Estiva Note was negotiated from MortgageIT to HSBC. (*See* Priore Decl. Ex. D at 7.)

Priore Decl. Ex. F).[13] (*See* Obj. ¶ 16; Priore Decl. Ex. F at 2.) GMACM was the subservicer of the Estiva Loan from March 2007 until March 10, 2011, when the Estiva Property was sold at a foreclosure sale. (*See* Obj. ¶ 16.)

By December 2008, the Estivas had not made a payment on the Estiva Loan since September 8, 2008. (*See* Obj. ¶ 17.) On December 15, 2008, MERS executed a Substitution of Trustee (the "2008 Estiva Substitution," Priore Decl. Ex. H), appointing ETS as substitute trustee under the Estiva DOT.[14] (*See* Obj. ¶ 17; Priore Decl. Ex. H at 2.) As a result of the Estivas' delinquency, ETS issued a Notice of Default on December 15, 2008 (the "2008 Estiva NOD," Priore Decl. Ex. G).[15] (*See* Obj. ¶ 17; Priore Decl. Ex. G at 3.) Because the Estivas failed to cure their default under the Estiva Loan, ETS issued a Notice of Trustee's Sale on March 18, 2009 (the "2009 Estiva NOS," Priore Decl. Ex. I), which scheduled a foreclosure sale on April 13, 2009.[16] (*See* Obj. ¶ 17;

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[13] 4 The Estiva Assignment was recorded on July 16, 2009. (*See id.* at 2.)

[14] 5 The 2008 Estiva Substitution was recorded on December 17, 2008 as document number 2008-135230. (*See id.* at 2.)

[15] 6 The 2008 Estiva NOD was recorded on December 17, 2008 as document number 2008-135231. (*See id.* at 2.)

[16] 7 The 2009 Estiva NOS was recorded on March 20, 2009. (*See id.* at 2.)

Priore Decl. Ex. I at 2.) The scheduled foreclosure sale was continued upon the Estivas' request for a loan modification; however, the Estivas never submitted a completed loan modification application. (*See* Obj. ¶ 17.)

On February 25, 2009, Erlinda and Fermin Aniel (together, the "Aniel Debtors") filed a chapter 11 bankruptcy petition (the "Aniel Chapter 11 Case") in the United States Bankruptcy Court for the Northern District of California (the "California Bankruptcy Court"). (*Id.* ¶ 18.) On their amended schedules, the Aniel Debtors listed a 50% interest in the Estiva Property. (*Id.*) On August 4, 2010, the Aniel Chapter 11 Case was converted to a case under chapter 7 of the Bankruptcy Code (the "Aniel Chapter 7 Case"). (*Id.*) On November 2, 2010, the California Bankruptcy Court entered an order (the "Abandonment Order," Priore Decl. Ex. M), authorizing the chapter 7 trustee to abandon certain assets to the Aniel Debtors, including their purported interest in the Estiva Property. (*See* Obj. ¶ 18; Priore Decl. Ex. M at 2–3.) The California Bankruptcy Court granted the Aniel Debtors a discharge on December 2, 2010 (the "Aniel Discharge Order," Priore Decl. Ex. L). (*See* Obj. ¶ 18; Priore Decl. Ex. L at 2.)

ETS issued a second Notice of Trustee's Sale on December 28, 2010 (the "2010 Estiva NOS," Priore Decl. Ex. N), which scheduled a foreclosure sale on January 27, 2011.[17] (*See* Obj. ¶ 19; Priore Decl. Ex. N

[17] 8 The 2010 Estiva NOS was recorded on December 31, 2010. (*See id.* at 2.)

at 2–3.) However, the scheduled foreclosure sale was postponed and continued to February 9, 2011. (Obj. ¶ 19.)

On February 2, 2011, Erlinda and Fermin Aniel (the "Estiva Plaintiffs") filed a verified complaint (the "Estiva Complaint," Priore Decl. Ex. A at 10–33) in the Superior Court of the State of California, County of San Mateo (the "Superior Court"), asserting causes of action under California state law against a number of defendants, including GMACM, ETS, HSBC, and MERS (collectively, the "Estiva Defendants") (the "Estiva Action"). (*See* Obj. ¶ 20; Priore Decl. Ex. A at 10–14.) The Estiva Complaint alleged the following causes of action against the Estiva Defendants: (i) violation of the Rosenthal Fair Debt Collection Practices Act, CAL. CIV. CODE §§ 1788 *et seq.* (the "Rosenthal Act"); (ii) fraud (misrepresentation); (iii) wrongful foreclosure; (iv) violation of the UCL; (v) injunctive relief; and (vi) quiet title. (*See* Priore Decl. Ex. A at 5.) On February 3, 2011, Corazon Estiva executed a grant deed (the "Estiva Grant Deed," Priore Decl. Ex. P), granting Erlinda and Fermin Aniel each a 1% interest in the Estiva Property.[18] (*See* Obj. ¶ 21; Priore Decl. Ex. P at 2.) On March 7, 2011, the Estiva Defendants filed a demurrer to the Estiva Complaint on the grounds that the Estiva Plaintiffs lacked standing and failed to sufficiently plead their alleged causes of action. (*See* Obj. ¶ 22.)

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[18] 9 The Estiva Grant Deed was also recorded on February 3, 2011. (*See id.* at 2.)

The Estiva Property was sold to HSBC at a foreclosure sale on March 10, 2011. (*See id.* ¶ 23.) On April 11, 2011, ETS executed a Trustee's Deed (the "Estiva Trustee Deed," Priore Decl. Ex. Q) granting the Estiva Property to HSBC.10 (*See* Obj. ¶ 23; Priore Decl. Ex. Q at 2–4.)

On June 8, 2011, the Superior Court entered an order (the "Estiva Order," Priore Decl. Ex. S), sustaining the Estiva Defendants' demurrer without leave to amend as to all causes of action on the basis that the Estiva Plaintiffs lacked standing because they were not borrowers under the Estiva Loan. (*See* Obj. ¶ 24; Priore Decl. Ex. S at 5–6.) The Estiva Plaintiffs appealed the Estiva Order on February 2, 2012; however, the appeal was stayed by the Debtors' chapter 11 cases on May 14, 2012. (*See* Obj. ¶ 25.)...

**...C. The Claims**

On June 9, 2012, Erlinda Aniel timely filed the Estiva Claims, asserting a $10,000 general unsecured claim and a $1,075,000 secured claim against ETS and GMACM separately. (*See* Priore Decl. Ex. A at 3, 125.) The Estiva Claims are premised on the causes of action asserted against ETS and GMACM in the Estiva Action, and the Estiva Complaint is attached to each proof of claim. (*See id.* at 10–33, 132–55.) According to the Estiva Complaint, the "very core of the complaint is the execution of the assignment of deed [of trust] by Jeffrey Stephan, who is an infamous robo-signer." (*See id.* at 6.) Also attached to each Estiva Claim is: (1) a transcript of a deposition of Jeffrey Stephan,

taken December 10, 2009 (*see id.* at 35–103, 157–225); (2) a copy of the Estiva Assignment (*see id.* at 105, 227); and (3) a copy of the Estiva Plaintiffs' appeal brief filed with respect to their appeal of the Estiva Order (*see id.* at 108–23, 230–45)...

**D. The Objection**

The Trusts argue that the Estiva Claims lack merit for several reasons. First, the Aniels lack standing to assert the Estiva Claims because the Aniels were never borrowers under the Estiva Note or Estiva DOT and the Aniels did not acquire any interest in the Estiva Property until over two years after the non-judicial foreclosure process commenced with respect to the Estiva Property. (*See* Obj. ¶ 41.) The Trusts assert that the Aniels lack standing to contest the validity of the Estiva Property foreclosure and, because all of the causes of action asserted in the Estiva Action "are implicitly tied to the foreclosure," the Aniels also lack standing to bring the Estiva Claims. (*Id.* ¶ 42.) Second, the Trusts argue that the Estiva Claims fail to the extent they rely on the incorrect allegations that HSBC was not the owner of the Estiva Loan and that ETS was not properly appointed as substitute trustee of the Estiva DOT. (*See id.* ¶¶ 45–51.) According to the Trusts, the Estiva Note was properly endorsed from MortgageIT to HSBC, HSBC was the owner of the Estiva Loan at the time foreclosure proceedings were commenced, and GMACM, as subservicer for HSBC, had standing to initiate foreclosure proceedings. (*Id.* ¶ 46.) The fact that the Estiva Assignment was not recorded until 2009 does not affect the validity of the Estiva Property foreclosure because the Estiva Note was

transferred to HSBC in May 2007 and, under California law, a deed of trust follows the note it secures. (*See id.*) The Estiva Assignment is valid notwithstanding the Aniels' allegations that it was signed by an alleged robo-signer, Jeffrey Stephan ("Stephan"), because such allegations are conclusory and lack factual support. (*See id.* ¶ 47.) Additionally, the Aniels incorrectly assert that ETS was not properly appointed as substitute trustee under the Estiva DOT when it filed the 2008 Estiva NOD; in fact, ETS was properly appointed as substitute trustee under the Estiva DOT pursuant to the 2008 Estiva Substitution. (*See id.* ¶ 50.) Finally, the Trusts argue that the Aniels fail to state a claim for any of the causes of action underlying the Estiva Claims. (*See id.* ¶¶ 52–72.)...

**E. The Opposition**

...

The Aniels also argue that the Trusts have not rebutted the prima facie validity of the Estiva Claims. (*See id.* ¶ 7.) First, the Aniels assert that the Debtors have not and cannot rebut the presumption that the Aniels have standing to assert the Estiva Claims. (*See id.* ¶¶ 66–67.) At the time the Aniels filed the Aniel Chapter 11 Case, they disclosed a 50% interest in the Estiva Property on their schedules. (*Id.* ¶ 67.) Despite having notice and an opportunity to challenge the Aniels' alleged ownership interest in the Estiva Property in the California Bankruptcy Court, the Debtors never challenged the Aniels' standing prior to entry of the Abandonment Order and, therefore, are barred from doing so now. (*See*

*id.*) Second, the Aniels contend that the Trusts have not established that the Estiva Loan was transferred to HSBC in May 2007 because the Trusts have not supported this assertion with sufficient documentary evidence. (*See id.* ¶ 70.) Additionally, the Aniels assert that the Estiva Assignment is invalid because its signatory, Stephan, lacked personal knowledge of its contents. (*See id.* ¶ 71.) Finally, the Aniels assert that they suffered damages as result of the Estiva Property foreclosure because they held a 50% interest in the Estiva Property. (*See id.* ¶¶ 68–69.) The Aniels contend that they are limited to seek money damages with respect to the Estiva Claims because the Estiva Property foreclosure mooted their quiet title claim and claim for injunctive relief.[19] (*See id.* ¶ 78.)

## F. The Reply

The Trusts advance three arguments in their Reply. First, the Trusts note that the Aniels' reliance on *Glaski* to support their allegation that they have standing to contest the validity of the Aniel Assignments or the Estiva Assignment is misplaced because "*Glaski* is an outlier and has been soundly rejected by California courts as being inconsistent with California's foreclosure jurisprudence." (*Id.* ¶ 6 (citing *In re Residential Capital, LLC*, No. 12-12020

[19] 22 Because the Aniels admit that their claims for injunctive relief and quiet title are mooted by the Estiva Property foreclosure, the Objection is **SUSTAINED** to the extent the Estiva Claims seek such relief with respect to the Estiva Property.

(MG), 2013 WL 8701997, at *5 (Bankr. S.D.N.Y. June 24, 2013)).) Rather, the breadth of applicable case law stands for the proposition that "in California . . . a borrower does not have standing to challenge a foreclosure based on issues with the assignment of the deed of trust or the securitization of a loan." (*Id.* (citing Obj. ¶ 49).) Additionally, the Trusts assert that the Aniels' allegations of robo-signing are not supported by any relevant evidence. (*Id.* ¶ 7.) The only evidence offered by the Aniels to support their allegation that the Estiva Assignment was robo-signed is a transcript of a deposition of Stephan from another case. (*Id.*) As to the Aniels' assertion that the 2011 Aniel Assignment is void because Smoot did not have authority to execute such document, the Trusts argue that Smoot did in fact have authority to execute the 2011 Aniel Assignment pursuant to a power of attorney that HSBC Bank granted to GMACM (the "HSBC Bank Power of Attorney," Priore Supp. Ex. A). (Reply ¶ 8; *see* Priore Supp. Ex. A.) Second, the Trusts contend that the Aniels have not met their burden of proving the validity of the Estiva Claims because: (i) the Aniels lack standing to challenge the Estiva Property foreclosure (*see* Reply ¶¶ 10–11); and (ii) the Aniels fail to state a claim under the UCL because they have failed to establish any wrongdoing of the Debtors with respect to the Estiva Loan (*see id.* ¶ 12.)....

## II. DISCUSSION

### A. Claims Objections

Correctly filed proofs of claim "constitute prima facie evidence of the validity and amount of the claim . . . . To overcome this prima facie evidence, an objecting party must come forth with evidence which, if believed, would refute at least one of the allegations essential to the claim." *Sherman v. Novak (In re Reilly)*, 245 B.R. 768, 773 (2d Cir. B.A.P. 2000). By producing "evidence equal in force to the prima facie case," an objector can negate a claim's presumptive legal validity, thereby shifting the burden back to the claimant to "prove by a preponderance of the evidence that under applicable law the claim should be allowed." *Creamer v. Motors Liquidation Co. GUC Trust (In re Motors Liquidation Co.)*, No. 12 Civ. 6074 (RJS), 2013 WL 5549643, at *3 (S.D.N.Y. Sept. 26, 2013) (internal quotation marks omitted). If the objector does not "introduce[] evidence as to the invalidity of the claim or the excessiveness of its amount, the claimant need offer no further proof of the merits of the claim." 4 COLLIER ON BANKRUPTCY ¶ 502.02 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014).

Bankruptcy Code section 502(b)(1) provides that claims may be disallowed if "unenforceable against the debtor and property of the debtor, under any agreement or applicable law." 11 U.S.C. § 502(b)(1). To determine whether a claim is allowable by law, bankruptcy courts look to "applicable nonbankruptcy law." *In re W.R. Grace & Co.*, 346 B.R. 672, 674 (Bankr. D. Del. 2006).

Federal pleading standards apply when assessing the validity of a proof of claim. *See, e.g.*, *In re Residential Capital, LLC*, 518 B.R. 720, 731 (Bankr.

S.D.N.Y. 2014); *In re DJK Residential LLC*, 416 B.R. 100, 106 (Bankr. S.D.N.Y. 2009) ("In determining whether a party has met their burden in connection with a proof of claim, bankruptcy courts have looked to the pleading requirements set forth in the Federal Rules of Civil Procedure." (citations omitted)). Accordingly, a claimant must allege "enough facts to state a claim for relief that is plausible on its face." *Vaughn v. Air Line Pilots Ass'n, Int'l*, 604 F.3d 703, 709 (2d Cir. 2010) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "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." *Iqbal*, 556 U.S. at 678 (citation and internal quotation marks omitted). Plausibility "is not akin to a probability requirement," but rather requires "more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citation and internal quotation marks omitted). The court must accept all factual allegations as true, discounting legal conclusions clothed in factual garb. *See, e.g.*, *id.* at 677–78; *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 124 (2d Cir. 2010) (stating that a court must "assum[e] all well-pleaded, nonconclusory factual allegations in the complaint to be true" (citing *Iqbal*, 556 U.S. at 678)). The court must then determine if these well-pleaded factual allegations state a "plausible claim for relief." *Iqbal*, 556 U.S. at 679 (citation omitted).

Courts do not make plausibility determinations in a vacuum; it is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* (citation omitted). A claim is plausible when the factual allegations permit "the

court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted). A claim that pleads only facts that are "merely consistent with a defendant's liability" does not meet the plausibility requirement. *Id.* at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Id.* (quoting *Twombly*, 550 U.S. at 555) (internal quotation marks omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citation omitted). "The pleadings must create the possibility of a right to relief that is more than speculative." *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 183 (2d Cir. 2008) (citation omitted).

To support claims grounded in fraud, Federal Rule of Civil Procedure ("FRCP") 9(b) requires the claimant to "state with particularity the circumstances constituting fraud or mistake." FED. R. CIV. P. 9(b). FRCP 9(b) is grounded in the purpose "to protect the defending party's reputation, to discourage meritless accusations, and to provide detailed notice of fraud claims to defending parties." *Silverman v. Arctrade Capital, Inc. (In re Arctrade Fin. Techs. Ltd.)*, 337 B.R. 791, 801 (Bankr. S.D.N.Y. 2005) (internal quotation marks and citation omitted).

Although "[claims] drafted by *pro se* [claimants] are to be construed liberally, [] they must nonetheless be supported by specific and detailed factual allegations sufficient to provide the court and the defendant with 'a fair understanding of what the [claimant] is

complaining about and . . . whether there is a legal basis for recovery.'" *Kimber v. GMAC Mortg., LLC (In re Residential Capital, LLC)*, 489 B.R. 489, 494 (Bankr. S.D.N.Y. 2013) (ellipsis in original) (quoting *Iwachiw v. N.Y.C. Bd. of Elections*, 126 F. App'x 27, 29 (2d Cir. 2005)).

**B. The Estiva Claims**

*1. Wrongful Foreclosure*

The Aniels lack standing to challenge the validity of the Estiva Property foreclosure. Federal courts are limited to adjudicating "cases" and "controversies" under Article III of the United States Constitution. *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009). The standing doctrine "requires federal courts to satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction." *Id.* at 493 (emphasis omitted) (citation and internal quotation marks omitted). "In order to establish standing, the plaintiff must demonstrate (1) an injury in fact, which is defined as a concrete and particularized invasion of a legally protected interest; (2) causation which is fairly traceable between the alleged injury in fact and alleged conduct of the defendant; and (3) redressability." *Anolik v. Bank of Am. Home Loans*, No. 2:11-cv-00406 (MCE), 2011 WL 1549291, at *3 (E.D. Cal. Apr. 21, 2011) (citing *Spring Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273–74 (2008)).

In *Anolik*, the court held that a plaintiff lacked standing to challenge the validity of non- judicial

foreclosure proceedings taken with respect to certain real property because the plaintiff was not the borrower under the applicable deed of trust and had not formally assumed the borrower's obligations under the applicable loan despite making payments on the loan. *See id.* at *3. Although the plaintiff recorded his interest in the subject property in the form of a grant deed, the court noted that the grant deed was not recorded until several months after foreclosure proceedings were commenced by a notice of default and, therefore, the plaintiff lacked standing to challenge the foreclosure. *See id.* In reaching its holding, the court noted that were it "to permit [p]laintiff's now-asserted interest in the property to subvert the foreclosure proceedings, its ruling would amount to permitting any third party to halt foreclosure proceedings simply by claiming that it made some payment on the loan and did not thereafter receive the requisite procedure/notice attendant to foreclosure." *Id.*

The Aniels assert that they held an interest in the Estiva Property under the Estiva Grant Deed and a 50% interest in the Estiva Property "as agreed upon with the Estivas." (Opp. Ex. 1 ¶ 13.) However, they have not submitted any written agreement evidencing their 50% interest in the Estiva Property, nor have they alleged that they assumed the Estiva Loan. To the contrary, the Aniels admit that their names were not on the Estiva DOT but state that they made regular payments on the Estiva Loan to GMACM. (*See* Priore Decl. Ex. A at 18.) Additionally, as in *Anolik*, the Estiva Grant Deed was not recorded until February 3, 2011, several years after the foreclosure process was commenced upon the

issuance of the 2008 Estiva NOD and several months after the 2010 Estiva NOS was recorded. Accordingly, the Aniels lack standing to challenge the Estiva Property foreclosure. The Objection to the Estiva Claims is **SUSTAINED** as to the Aniels' wrongful foreclosure cause of action.

*2. The Rosenthal Act*

The Aniels argue that the Debtors violated the Rosenthal Act by making false, deceptive, and misleading statements in their attempts to collect payments on the Estiva Loan, including by: (i) misrepresenting the identity of the owner of the Estiva Loan; (ii) claiming an interest in the Estiva DOT through a fraudulent assignment; (iii) submitting the fraudulent Estiva Assignment; (iv) asserting an inflated amount owed on the Estiva Loan, including false charges; (v) attempting to foreclose on the Estiva Property without proper chain of title; and (vi) making a misleading statement that ETS was the Trustee of the Estiva DOT. (Priore Decl. Ex. A at 21– 22.) The Trusts argue that the Aniels cannot state a claim under the Rosenthal Act because they are not, and have never been, borrowers under the Estiva Note. (Obj. ¶ 54.) Additionally, the Trusts argue that the Aniels fail to state a claim for violations of the Rosenthal Act because such claim is based on alleged actions that do not constitute debt collection activities under the Rosenthal Act. (*See id.* ¶ 55.)

"The Rosenthal Act protects consumers from debt collection practices for 'consumer debts,' created through transactions in which 'property, services or

money is acquired on credit . . . primarily for personal, family, or household purposes.'" *Pittman v. Barclays Capital Real Estate, Inc.*, No. 09 CV 0241 (JM), 2009 WL 1108889, at *3 (S.D. Cal. Apr. 24, 2009) (quoting CAL. CIV. CODE § 1788.2(e)–(f)). The Rosenthal Act also incorporates the provisions of the FDCPA. *Colbert v. Sage Point Lender Servs., LLC*, No. 1:14-cv-01626 (JLT), 2014 WL 7409291, at *4 (E.D. Cal. Dec. 30, 2014) (citing CAL. CIV. CODE § 1788.17). Accordingly, conduct that violates the FDCPA constitutes a violation of the Rosenthal Act as well. *Id.* (citations omitted).

Foreclosure on property pursuant to a deed of trust does not constitute debt collection within the meaning of the Rosenthal Act. *Valenzuela v. Wells Fargo Bank Nat'l Ass'n*, No. CV F 13-1620 (LJO), 2014 WL 309438, at *17 (E.D. Cal. Jan. 28, 2014) (citations omitted); *accord Collins v. Power Default Servs., Inc.*, No. 09-4838 (SC), 2010 WL 234902, at *3 (N.D. Cal. Jan. 14, 2010) ("The law is clear that foreclosing on a deed of trust does not invoke the statutory protections of the [Rosenthal Act]." (collecting cases)). While some courts have held that a residential mortgage loan does not constitute a "consumer debt" within the meaning of the Rosenthal Act, *see Tirabassi v. Chase Home Fin., LLC*, No. CV 14-08790 (BRO), 2015 WL 1402016, at *9 (C.D. Cal. Mar. 24, 2015) (collecting cases), their reasoning has been based "on other decisions holding that foreclosure sales do not constitute 'debt collections' within the meaning of the Rosenthal Act," *id.* (citing *Lopez v. Am Solutions, LLC*, 5:13-cv-01689 (CVW), 2014 WL 1272773, at *3 (C.D. Cal. Mar. 3, 2014)). Recognizing the distinction between

foreclosure activities and debt collection activities, however, several courts have held that "residential mortgage loans are not categorically excluded from the Rosenthal Act." *Id.* at *10; *see Lopez*, 2014 WL 1272773, at *3 ("[L]ike the FDCPA, the Rosenthal Act does not categorically bar all claims based on a debt collector's communications in connection with a debt secured by a residential mortgage loan."); *Walters v. Fidelity Mortg. of Cal.*, 730 F. Supp. 2d 1185, 1203 (E.D. Cal. 2010) ("[P]laintiff's claim arises out of debt collection activities beyond the scope of the ordinary foreclosure process, and consequently, a remedy may be available under the [Rosenthal Act]." (citation omitted)).

As set forth above, the Aniels lack standing to challenge foreclosure of the Estiva Property and, therefore, they cannot state a claim under the Rosenthal Act for actions taken in connection with foreclosure. Additionally, the Aniels do not adequately allege actions taken by the Debtors in violation of the Rosenthal Act, as they simply allege legal conclusions in support of their Rosenthal Act claim. *See Colbert*, 2014 WL 7409291, at *5 (dismissing Rosenthal Act claim with leave to amend where plaintiff failed to allege "which [d]efendant contacted her and when, who falsely stated the amount of [the] debt and when, how the debt was increased, or what 'unfair and unconscionable means' were used in the course of debt collection"). The Aniels do not make sufficient factual allegations in support of their Rosenthal Act claim. *See Jacobson v. Balboa Arms Drive Trust No. 5402 HSBC Fin. Tr.*, No. 10-CV-2195 (JM), 2011 WL 3328487, at *8 (S.D. Cal. Aug. 1, 2011) (dismissing Rosenthal Act claim

without prejudice as to defendant who held beneficial interest in deed of trust at relevant time where none of the complaint's "vague statements recite any facts that would give [d]efendants fair notice of what . . . the claim is and the grounds upon which it rests"). Accordingly, the Objection to the Estiva Claims is **SUSTAINED** as to the Aniels' Rosenthal Act cause of action.

*3. Fraud*

The Aniels argue that the Debtors made false representations of material facts to the Aniels, including by: (i) misrepresenting the identity of the owner of the Estiva Loan; (ii) filing a Notice of Trustee's Sale without filing a Notice of Default; and (iii) stating that ETS was the Trustee under the Estiva DOT without recording a Substitution of Trustee. (Priore Decl. Ex. A at 22–24.) The Aniels assert that their reliance on these misrepresentations "cause[d] the debt to rise on their property" (*id.* at 23) and allowed ETS to continue with foreclosure (*id.* at 24). Additionally, the Aniels allege they relied on these misrepresentations when they filed the Aniel Chapter 11 Case in order to stop foreclosure on the Estiva Property, and such misrepresentations hampered their reorganization efforts. (*Id.*) The Trusts argue that the Aniels' fraud claim fails because: (1) the Debtors did not misrepresent HSBC as the true owner of the Estiva Loan (Obj. ¶ 57); (2) ETS recorded the 2008 Estiva NOD prior to recording any Notice of Trustee's Sale (*id.* ¶ 59); and (3) the Aniels fail to specifically allege how the Debtors interfered with the Aniels' reorganization efforts (*id.* ¶ 57).

To state a claim for fraud under California law, a plaintiff must allege: "(1) a knowingly false representation by the defendant; (2) an intent to deceive or induce reliance; (3) justifiable reliance by the plaintiff; and (4) resulting damages.'" *Hasso v. Hapke*, 173 Cal. Rptr. 3d 356, 373 (Ct. App. 2014) (quoting *Serv. by Medallion, Inc. v. Clorox Co.*, 52 Cal. Rptr. 2d 650, 655 (Ct. App. 1996)). A plaintiff must specifically plead every element of a fraud cause of action with particularity. *Serv. by Medallion, Inc.*, 52 Cal. Rptr. 2d at 655 (citation omitted); *see also* FED. R. CIV. P. 9(b).

The Trusts rebut the Aniels' allegations that ETS improperly filed foreclosure notices by submitting the 2008 Estiva Substitution, the 2008 Estiva NOD, and the 2009 Estiva NOS. Although the 2008 Estiva Substitution and the 2008 Estiva NOD were each executed on December 15, 2008 and recorded on December 17, 2008, the recorded document numbers provided by the San Mateo County Recorder's Office indicate that the 2008 Estiva Substitution was recorded before the 2008 Estiva NOD was recorded. (*Compare* Priore Decl. Ex. H (Doc. No. 2008-135230), *with* Priore Decl. Ex. G (Doc. No. 2008-135231).) Additionally, the 2009 Estiva NOS was executed on March 18, 2009 and recorded on March 20, 2009, after the 2008 Estiva NOD was recorded. (*See* Priore Decl. Ex. I.) In response, the Aniels have not provided any evidence supporting their allegations of fraud with respect to these notices filed by ETS.

Additionally, the Aniels fail to sufficiently plead a claim for fraud with specificity. The Aniels do not allege specific facts demonstrating their justifiable

reliance on any alleged misrepresentations, particularly since they were not parties to the Estiva Note or Estiva DOT. The Estiva Complaint alleges that Pite Duncan, LLP ("Pite Duncan") was HSBC's counsel in the foreclosure proceeding (Priore Decl. Ex. A at 12), and that Pite Duncan "committed 'fraud upon the court' by filing an objection to [the Aniels'] reorganization plan by stating that HSBC is the secured creditor when there [wa]s no evidence to prove th[at] HSBC was the secured creditor" (*id.* at 23). However, the Aniels do not specifically allege that GMACM or ETS made any misrepresentations in connection with the Aniel Chapter 11 Case or the Aniel Chapter 7 Case and, in any event, the Aniels have not adequately alleged how their reorganization efforts were harmed by any of the purported misrepresentations. Rather, the Aniels merely assert that they could not properly reorganize the Estiva Property because they could not locate the actual owner of the Estiva Loan. (*See* Opp. ¶ 77.) The Objection to the Estiva Claims is therefore **SUSTAINED** as to the fraud cause of action.

*4. The UCL*

The Aniels predicate their UCL cause of action on the same allegations underlying the other causes of action asserted in the Estiva Action. (*See* Priore Decl. Ex. A at 26.) Additionally, the Aniels argue that the Debtors violated the UCL by (1) recording the Estiva Assignment, which was robo-signed by Stephan (Opp. ¶ 76); and (2) concealing HSBC as the owner of the Estiva Loan until foreclosure proceedings were initiated (*id.*).

The UCL prohibits "unfair competition," which includes "any unlawful, unfair or fraudulent business act or practice . . . ." CAL. BUS. & PROF. CODE § 17200. Because the UCL refers to unlawful, unfair, or fraudulent business acts or practices in the disjunctive, a claim for violation of the UCL may be based on any of these independent theories of relief. *See Birdsong v. Apple, Inc.*, 590 F.3d 955, 959 (9th Cir. 2009) ("Each prong of the UCL is a separate and distinct theory of liability." (citing *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009))). A claim brought under the UCL may also be based on the violation of another law. *Leonel v. Am. Airlines, Inc.*, 400 F.3d 702, 714 (9th Cir. 2005) ("Under the statute, '[u]nfair competition encompasses anything that can properly be called a business practice which at the same time is forbidden by law.'" (quoting *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194, 206 (Ct. App. 1989))). "By proscribing 'any unlawful' business practice, section 17200 'borrows' violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1048 (9th Cir. 2000) (quoting *Cel–Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 539–40 (Cal. 1999)). However, a defense to the predicate unlawful act is a defense to the alleged violation of the UCL. *People v. Duz-Mor Diagnostic Lab., Inc.*, 80 Cal. Rptr. 2d 419, 432 (Ct. App. 1998) ("[T]he [UCL] requires a violation of law, and . . . a defense to the underlying offense is a defense under the [UCL]." (citation omitted)); *Cel-Tech'*, 973 P.2d at 562 ("A plaintiff may . . . not plead around an absolute bar to relief'

simply by recasting the cause of action as one for unfair competition." (citation and internal quotation marks omitted)); *see also In re Residential Capital, LLC*, 518 B.R. at 739.

Because the Aniels fail to state a claim for any of the other causes of action asserted in the Estiva Action, they must allege that the Debtors' actions constituted unfair or fraudulent business practices. An act or practice is "unfair" within the meaning of the UCL if it is "one that either offends an established public policy or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *McDonald v. Coldwell Banker*, 543 F.3d 498, 506 (9th Cir. 2008) (citation and internal quotation marks omitted). "A business practice is 'fraudulent' within the meaning of Section 17200 if 'members of the public are likely to be deceived.'" *Bias v. Wells Fargo & Co.*, 942 F. Supp. 2d 915, 934 (N.D. Cal. 2013) (quoting *Comm. on Children's Television v. Gen. Foods Corp.*, 673 P.2d 660, 668 (Cal. 1983), *superseded by statute on other grounds*, 2004 Cal. Legis. Serv. Prop. 64 (West 2004)). "The fraudulent practice 'may be based on representations to the public which are untrue, and also those which may be accurate on some level, but will nonetheless tend to mislead or deceive. . . . A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under the UCL.'" *Id.* (quoting *Klein v. Chevron U.S.A., Inc.*, 137 Cal. Rptr. 3d 293, 324 (Ct. App. 2012)).

The Aniels do not identify any actions taken by the Debtors that offend public policy or are immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Nor do they specifically allege that the Debtors engaged in fraudulent business practices. As set forth above, the Aniels lack standing to challenge the Estiva Property foreclosure and, as a result, lack standing to assert a UCL claim for the Debtors' actions in connection with foreclosure. To establish standing to bring a UCL action, a plaintiff must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that the economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 885 (Cal. 2011) (emphasis in original). While the Aniels assert that the Debtors recorded the allegedly robo-signed Estiva Assignment (*see* Opp. ¶ 77), they cannot establish economic injury caused by this allegedly unfair business practice because they lack standing to challenge the Debtors' foreclosure on the Estiva Property. Accordingly, the Objection to the Estiva Claims is **SUSTAINED** as to the Aniels' UCL cause of action...

...**III. CONCLUSION**

...The Objection to the Estiva Claims is **SUSTAINED** and the Estiva Claims are hereby **DISALLOWED** and **EXPUNGED** in their entirety.

**IT IS SO ORDERED.**

Dated: June 30, 2015 New York, New York

_____*/s/ Martin Glenn*_____

MARTIN GLENN

United States Bankruptcy Judge

## APPENDIX 6

## UNITED STATES COURT OF APPEALS

## FOR THE

## SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of November, two thousand seventeen.

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**Erlinda Abibas Aniel,**

***Plaintiff - Appellant,***

**v.**

**ResCap Liquidating Trust,**

***Defendant - Appellee.***

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**ORDER**

**Docket No: 16-3438**

Appellant, Erlinda Abibas Aniel, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the

active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

*/s/ Catherin O'Hagan Wolfe (United States Court of Appeals Second Circuit)*