APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 24, 2017

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-56207
D.C. No. 2:16-cv-01514-AB-MRW

NIKI-ALEXANDER SHETTY,

Plaintiff-Appellant,

v.

WELLS FARGO BANK, NA, as Trustee under Pooling and Servicing Agreement dated 9/1/2006 Securitized Asset Backed Receivables LLC Trust 2006-HE2 Mortgage Pass-Through Certificates, Series 2006-HE2, an entity of unknown form; et al.,

Defendants-Appellees.

August 9, 2017, Submitted*
August 24, 2017, Filed

Appeal from the United States District Court
for the Central District of California
Andre Birotte, Jr., District Judge, Presiding.

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

Before: SCHROEDER, TASHIMA, and M. SMITH, Circuit Judges.

MEMORANDUM**

Niki-Alexander Shetty, aka Satish Shetty, appeals pro se from the district court's judgment dismissing his action alleging federal and state law claims relating to a foreclosure and a third-party borrower's refinance loans. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's dismissal based on res judicata. *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002). We affirm.

The district court properly dismissed Shetty's action as barred by the doctrine of res judicata because Shetty's claims were raised, or could have been raised, in prior actions between the parties or their privies, and those prior actions resulted in final judgments on the merits. *See id.* (setting forth elements of res judicata and noting that the doctrine of res judicata bars subsequent litigation both of claims that were raised and those that could have been raised in a prior action); *see also Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1081 (9th Cir. 2003) ("Even when the parties are not identical, privity may exist if there is substantial identity between parties, that is, when there is sufficient commonality of interest" (citation and internal quotation marks omitted)).

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

The district court did not abuse its discretion by taking judicial notice of federal and state court proceedings. *See* Fed. R. Evid. 201(b)(2); *United States v. Woods*, 335 F.3d 993, 1000-01 (9th Cir. 2003) (setting forth standard of review); *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (explaining that a court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue" (citation omitted)).

The district court did not abuse its discretion by denying Shetty's motion for default judgment against GF Mortgage, Inc. *See NewGen, LLC v. Safe Cig, LLC*, 840 F.3d 606, 616 (9th Cir. 2016) (setting forth standard of review and factors relevant to entering a default judgment).

We reject as unsupported by the record Shetty's contention that the district court did not rule on his motion to strike, and reject as meritless his contention that the appearance of appellees' counsel was not authorized.

Appellees' request for judicial notice (Docket Entry No. 13) is granted in part. With respect to Exhibit 2, we take judicial notice of only the fact that the document was filed in the Southern District of New York in *Hernandez v. Wells Fargo Bank, N.A., et al.*, No. 1:14-cv-07701-VEC (S.D.N.Y. Dec. 19, 2014). Appellees' request for judicial notice is otherwise granted.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, FILED AUGUST 19, 2016

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV-16-01514 AB (MRWx)

NIKI-ALEXANDER SHETTY,

Plaintiff,

v.

WELLS FARGO BANK, *et al.*,

Defendants.

ORDER GRANTING MOTION TO DISMISS, DENYING MOTION TO STRIKE APPEARANCE, AND DENYING APPLICATION FOR ENTRY OF DEFAULT JUDGMENT

Before the Court is the Motion to Dismiss and Request for Judicial Notice filed by Defendant Wells Fargo Bank, National Association, as Trustee Under the Pooling and Servicing Agreement for September 1, 2006 Securitized Asset Backed Receivables LLC Trust 2006-HE2 Mortgage Pass-Through Certificates, Series 2006- HE2 ("Wells Fargo"), filed on April 4, 2016. (Dkt. No. 10.) Also before the Court is Plaintiff Niki-Alexander Shetty's ("Plaintiff") Motion to Strike Appearance of

Counsel as Unauthorized, filed on April 25, 2016. (Dkt. No. 27.) Both motions were opposed. Also before the Court is Plaintiff's Application for Entry of Default Judgment against defendant GF Mortgage, Inc. (Dkt. No. 32.) The Court previously took these matters under submission. After consideration of the parties' submissions, Court **GRANTS** the motion to dismiss, and **DENIES** the motion to strike and application for entry of default judgment.

I. BACKGROUND

The present action is the fourth lawsuit arising from a non-judicial foreclosure. The following background encapsulates not only the statement of facts contained in the Plaintiff's Complaint, but also includes relevant facts from the three previous lawsuits. (*See* Dkt. No. 11, Def.'s Request for Judicial Notice ("RJN") Exhs. 3, 8, 10.) The Plaintiff's Complaint is at times incoherent and difficult to follow. Given this difficulty, and applying a liberal interpretation of the Complaint in Plaintiff's favor, the Court puts forth its best attempt to chronicle and surmise the following events in the most accurate manner possible.

This case arises from a disputed foreclosure on a residential property in Burbank, California ("Subject Property"). The original property owner, and previous plaintiff in the first three actions, Elizabeth Hernandez ("Hernandez"), refinanced her home multiple times between 1993 and 2005. (Compl. at ¶ 16.) In 2006, Hernandez had the opportunity to refinance her debt for a significantly lower rate. (*Id.* at ¶ 17.) In response to this solicitation, Hernandez decided to consolidate her mortgage debt with her credit card debt and executed a new loan with lender GF Mortgage, Inc., DBA Greystone Financial ("GF Mortgage") (*Id.* at ¶¶ 20, 21.)[1] This loan comprised a promissory note secured by two separate deeds of trust. (*Id.* at ¶ 20.) The first loan was in the amount of $516,000 and the second loan was for $129,000. (*Id.*) Hernandez then defaulted on her home loan in 2008.[2] (Def.'s RJN, Exh. 2.) The notice of default was recorded on August 5, 2008. (Compl. at ¶ 48.)

On October 3, 2008, Hernandez sent a notice of rescission to Barclays Capital, the entity she believed held the note for the mortgage. (*Id.* at ¶ 96.) It is unclear from the Complaint which lender held the note at this time, because GF Mortgage had assigned the deeds of trust to a different lender. Shortly thereafter, the notice of trustee's sale was recorded against Hernandez's property. (Def.'s RJN, Exh. 2.) This notice of sale set off the following sequence of events.

The foreclosure sale was initially set for December 9, 2008. (Def.'s RJN, Exh. 2.) Evidently, the property failed

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1. Plaintiff disputes that this action qualifies as a re-finance, but as discussed later, the District Court for the Southern District of New York already ruled that this consolidation was a refinance. *See Elizabeth Hernandez v. Wells Fargo Bank, N.A. et al*, Case No. 1:14-cv-07701-VEC (S.D.N.Y. Mar. 1, 2016), Order at Dkt. No. 47. Unfortunately, Wells Fargo did not provide the Order itself, but the Court located it on PACER and takes judicial notice of it. Hereinafter, the Court will refer to it as the "SDNY Order."

2. Default was acknowledged through Notice of Trustee Sale, dated on November 6, 2008, attached in Def.'s RJN, Exh. 2.

to sell on this date.[3] On January 28, 2009, Hernandez filed a lawsuit against various lenders including GF Mortgage, and the case was removed to the District Court for the Central District of California. (Def.'s RJN, Exh. 3, docket from *Elizabeth Hernandez v. GF Mortgage, Inc. et al*, Case No. 2:09-cv-00681-ODW-JWJx (filed C.D. Cal. Jan. 28, 2009)). This lawsuit disrupted the foreclosure process, and for purposes of this order is referred to as "**Action 1**". The following year, in January of 2010, Hernandez filed for bankruptcy. (Def.'s RJN, Exh. 5.) On April 30, 2010 the District Court returned a judgment in Action 1. (Def.'s RJN, Exh. 4.) The Court granted summary judgment in favor of defendants, ruling against Hernandez on the merits of her claims. (*Id.*)

On January 27, 2011 another notice of default and election to sell was recorded against Hernandez. (Def.'s RJN, Exh. 7.) Although it's unclear exactly when Wells Fargo became the assignee of this note, in the most recent action regarding this case, the District Court for the Southern District of New York found that at the time of this recording the note had been assigned to Wells Fargo. *See* SDNY Order p 3.

On November 26, 2012, Hernandez brought another lawsuit against the lenders. (RJN, Exh. 8, docket from *Elizabeth Hernandez v. Wells Fargo Bank, N.A., et al*, Case No. EC059728 (filed Sup. Ct. Los Angeles Cty, Jul. 5, 2013) (hereafter "**Action 2**"). This time, the case

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3. As discussed below, the subject property was finally sold to Wells Fargo in June, 2014. (*See* Def.'sRJN, Exh. 9).

was heard in the Superior Court of California, County of Los Angeles. Hernandez alleged eleven causes of action, including fraud and intentional misrepresentation by the various lenders named in the action. (*Id.*) These claims were all closely related to and derived from the original non-judicial foreclosure (deed of trust) dispute. Wells Fargo was named as one of the defendant lenders. (*Id.*) On June 14, 2013, the Superior Court sustained the Defendants' demurrer, and Hernandez lost her case on the merits. *See* SDNY Order p. 4 (describing the opinion from the California Superior Court "Action 2"). The Superior Court held that the Plaintiff failed to state a claim for relief, and failed to plead her claims with particularity. (*Id.*) Each of the eleven claims brought in that action was dismissed without leave to amend.

On June 17, 2014 the property was finally foreclosed upon and sold at a foreclosure sale to Wells Fargo for $612,000. (Def.'s RJN, Exh. 9.) The total outstanding debt on the loans was a combined $836,119.85. (*Id.*)

On September 23, 2014, Hernandez filed a third lawsuit, this time in the District Court for the Southern District of New York. (RJN, Exh. 10, docket from *Elizabeth Hernandez v. Wells Fargo Bank, N.A. et al*, Case No. 1:14-cv-07701-VEC (S.D.N.Y. Mar. 2, 2016) (hereafter "**Action 3**")). While this action was still pending, on February 10, 2016 Hernandez sold her property and conveyed her interest in the property via grant deed to the present Plaintiff, Satish Shetty ("Plaintiff"). (Compl. At ¶ 156; Exh. A.) Wells Fargo contends that this grant deed was illusory and did not convey any property interest to Plaintiff because Hernandez no longer owned the property after the foreclosure sale was consummated approximately 18 months prior to this conveyance.[4] On March 1, 2016, the New York court returned a judgment dismissing Hernandez's case with prejudice on the ground that all of her claims were res judicata because they were either previously adjudicated or were derived from claims already adjudicated in Action 2, the litigation in the Superior Court of California. *See* SDNY Order.

On March 4, 2016, Plaintiff filed the present action (**"Action 4"**). Plaintiff essentially claims that Hernandez was an unsophisticated party who fell victim to improper lender solicitation when she refinanced in 2006. (*See* Compl. at ¶¶ 17-19.) Plaintiff purports to bring his claims as a privy and assignee of original property owner and Plaintiff Hernandez.[5]

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4. Plaintiff claims that the original Deed of Trust was rescinded or should have been rescinded, and by operation of this rescission the foreclosure was wrongful and never consummated. Plaintiff asserts Hernandez maintained title until she conveyed it to him via grant deed. This assertion is contradicted by the Trustee's Deed Upon Sale. (*See* Compl. Exh. AB).

5. Significant portions of Plaintiff's Complaint are incoherent, unorganized, and at times appear contrary to sound logic and reasoning. The Court has put forth a great deal of time and effort to recount the facts and allegation in the most accurate and appropriate manner, as well as resolve the Motions according to the Court's best understanding of the surrounding context and claims asserted.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), the court may dismiss a complaint if it fails to state a claim upon which relief may be granted. To withstand a motion to dismiss for failure to state a claim, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L. Ed. 2d 929 (2007). These "factual allegations must be enough to raise a right to relief above the speculative level." (*Id.*)

In considering a Rule 12(b)(6) motion, the complaint must be read in the light most favorable to the nonmoving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). When ruling on the motion, "a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). But a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678 (2009) (internal quotation marks omitted).

While considering the merits of the claims presented on a motion to dismiss, the court can only consider matters contained within the pleadings. Fed. R. Civ. P. 12(d). However, the court may consider matters beyond the pleadings so long as they are subject to judicial notice and comport with Federal Rule of Evidence 201. *See Dancy v. Aurora Loan Services, LLC*, 2011 WL 835787, at *1 (N.D. Cal. Mar. 4, 2011). "A court shall take judicial notice if requested by a party and supplied with the necessary information." Fed. R. Evid. 201(d). "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the trial court's territorial jurisdiction; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Dancy*, 2011 WL 835787 at *4; *see also* Fed. R. Evid. 201(b)).

Rule 12(b)(6) also allows a court to dismiss any claim in the complaint *sua sponte* if it appears that the plaintiff cannot prevail on the claim as alleged. *See Omar v. Sea–Land Serv., Inc.*, 813 F.2d 986, 991 (9th Cir. 1987) ("A trial court may dismiss a claim sua sponte under [Rule] 12(b)(6). Such a dismissal may be made without notice where the claimant cannot possibly win relief."). Upon dismissal, leave to amend a complaint should be freely granted. *See* Fed. R. Civ. P. 15(a). However, the Court retains its discretion to deny a plaintiff leave to amend the complaint when alleging additional facts would fail to cure the original deficiency. *See Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

III. DISCUSSION

A. The Plaintiff's Motion to Strike Counsel As Unauthorized is <u>DENIED.</u>

Before addressing the merits of the 12(b)(6) Motion to Dismiss, the Court will resolve the Plaintiff's Motion to Strike.

The Court **DENIES** the Plaintiff's Motion to Strike Appearance of Counsel as Unauthorized because this Motion fails to meet the requirements of Local Rule 7-3. In addition to this local rule violation, any previous error that existed in the filing of Certificate of Interested Parties ("COIP") was corrected when Plaintiff filed an amended COIP correcting those errors. See Dkt. Nos. 17 (amended COIP), 12 (original COIP stricken by the court). Plaintiff's motion based the initial COIP is unfounded and is therefore **DENIED.**

B. Requests for Judicial Notice

Judicial notice as defined by the Federal Rules of Evidence permits notice of adjudicative facts only. *See* Fed. R. Evid. 201(a). "Adjudicative facts are simply the facts of the particular case . . . If particular facts are outside of reasonable controversy, this process is dispensed with as unnecessary. A high degree of indisputability is the essential prerequisite" in this determination. Advisory Notes to Fed R. Evid. 201. In adjudicating a motion to dismiss, the Court can look to materials beyond what is included in the pleadings if they are exhibits attached to the Complaint or incorporated by reference in the pleadings. *See Swartz v. KMPG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). Both the Plaintiff and Defendant seek judicial notice of certain exhibits attached to their pleadings. If Notice is granted, the Court is permitted to look beyond the pleadings without converting the motion to a motion for summary judgment

Appendix B

1. Plaintiff's Request for Judicial Notice

Plaintiff asks the Court to take judicial notice of two exhibits. Exhibit No. 1 is *Jesinoski v. Countrywide Home Loans,* 135 S. Ct. 790, 190 L. Ed. 2d 650 (2015). The Court **DENIES** this request because the Court does not need to take judicial notice of a Supreme Court opinion that can easily be located and cited by the Plaintiff.

Further, the Court also finds that this opinion does not change the analysis of the case before us, nor does it revive any claims from the previous res judicata rulings. This case is irrelevant to the claims presented and not instructive to the Court's analysis. The Plaintiff has misinterpreted the rule in *Jesinoski* as implicating the merits of the case he presents, and the Court does not find it instructive.

The second item Plaintiff asks to judicially notice is the notice of rescission that Hernandez filed with the County Recorder on November 4, 2008. *See* Pl.'s RJN Exh. 2. The Court will take notice of the existence and authenticity of this document, but this notice does not establish the validity of the rescission or give rise to any legal conclusions. *See Swartz v. KPMG LLP*, 476 F.3d at 756, 763; *see also Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001) *impliedly overruled on other grounds in Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125-26 (9th Cir. 2002) (holding that matters of public record may be noticed by the court upon consideration of a motion to dismiss). The Court will take Notice that Plaintiff Hernandez attempted to rescind the loan, but this does not establish whether the rescission is effective.

2. Defendant's Request for Judicial Notice

Defendant requests judicial notice of the following ten documents:

1. April 2006 Deed of Trust (Def.'s RJN, Exh. 1)

2. Notice of Trustee's Sale, recorded on November 20, 2008 (Def.'s RJN, Exh. 2)

3. Court docket from Action 1, *Elizabeth Hernandez v. GF Mortgage Inc.*, et al., Case No. CV-09-00681-ODW-JWJx (filed C.D. Cal. 1/28/2009) (Def.'s RJN, Exh. 3)

4. Judgment in Action 1 (Def.'s RJN, Exh. 4)

5. Voluntary Petition for Bankruptcy filed by Hernandez on April 8, 2010 (Def.'s Exh. 5)[6]

6. Order Dismissing Plaintiff Hernandez's Chapter 7 Bankruptcy Case on April 30, 2010 (Def.'s RJN, Exh. 6)

7. Notice of Default, recorded on January 27, 2011 (Def.'s RJN, Exh. 7)

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6. Plaintiff's Request for Judicial Notice misidentified this document as a dismissal of Defendant MERS from Action 1. The Court's list corrects this error.

8. Court docket from Action 2, *Elizabeth Hernandez v. Wells Fargo Bank, N.A., et al.,* Case No. EC059738, filed 11/26/2012 in Sup. Ct. Los Angeles County (Def.'s RJN, Exh. 8)

9. Trustee's Deed Upon Sale, signed by the trustee and recorded on July 17, 2014 (Def.'s RJN, Exh. 9)

10. Court docket from Action 3, *Elizabeth Hernandez v. Wells Fargo Bank, N.A., itself and trustee and Ocwen Loan Servicing, LLC,* Case No. CV-14-07701-VEC (filed S.D.N.Y. 9/23/2014) (Def.'s RJN, Exh. 10)

All of these documents are either orders and/or judgments issued by other courts, or matters of public record. They are also essential to the Plaintiff's complaint. *See Terry v. O'Donnell,* 797 F.2d 1346-1351 (9th Cir. 1984) (matters of public record are appropriate for Judicial Notice); *see also Alicea v. GE Money Bank,* No. C 09-00091 SBA, 2009 WL 2136969, at *2 (N.D. Cal. July 16, 2009) ("The Court may consider documents referred to by the Complaint if they are authentic and central to plaintiff's claim.") (internal quotations omitted).

Unlike the Requests for Judicial Notice made by the Plaintiff, the Exhibits offered by the Defendant concerning case dockets and judgments are relevant and appropriate for notice because the Court needs to take account of the prior litigation history that surrounded the claims and parties at issue. The Plaintiff's argument that these documents are irrelevant and should not be given Judicial Notice fails because each and every Exhibit directly relates to the foreclosure of the subject property. These Exhibits concerning the court opinions are of particular relevance to this case because Wells Fargo's res judicata defense is predicated upon the claims and court rulings from prior cases.

It is also worth noting that Plaintiff concedes that the April 2006 Deed of Trust (RJN Exh. 1) is proper for judicial notice because it is a true and correct copy. See Pl.'s Opp'n (Dkt. No. 26) 2:15-21. Given this, it is illogical for the Plaintiff to accept the authenticity or veracity of one public record, while maintaining that other public records less favorable to his case are inauthentic and not fit for notice.

Therefore, the Court **GRANTS** Defendant's request for judicial notice. However, the Court also notes that Defendant's RJN was incomplete or misleading in several respects. For example, it omitted the SDNY Order, so the Court itself had to locate it. Similarly, the RJN identified Exh. 3 as a "lawsuit," when in fact it is only a docket sheet and reflects little about the action. Again, the Court had to locate and access the necessary documents, like the complaint, on PACER to understand what was actually litigated in this action.

C. Defendant's Motion to Dismiss is GRANTED.

Defendant moved to dismiss Plaintiff's Complaint on numerous grounds. Although the Motion did not include an extensive discussion of res judicata, this ground is dispositive. Therefore, the Court will address only res judicata and one alternative ground for dismissal.

1. Res Judicata

Within the constructs of a Rule 12(b)(6) motion to dismiss, a defendant can raise the affirmative defense of res judicata. Res judicata, or claim preclusion, is rooted in the common law, and is made available as a tool for defendants to bar previously litigated claims, and for the court to conserve resources and ensure full faith and credit is given to a prior court's ruling. *See* 28 U.S.C. § 1738; *see also San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 336 (2005). Res judicata is a 'judge made' doctrine that in substance operates similarly between the federal and state courts. Modernly, res judicata encompasses the legal theories of 'claim preclusion' and 'issue preclusion', where "the cause is merged into the judgment and may not be asserted in a subsequent lawsuit." *Mycogen Corp. v. Monsanto Co.*, 28 Cal.4th 888, 896-897 (2002).

In California, the applicability of res judicata is determined using the primary rights theory. *See San Diego Police Officers' Ass'n v. San Diego City Employees' Retirement Sys.*, 568 F.3d 725, 734 (9th Cir. 2009) (citing *Crowley v. Katleman*, 8 Cal. 4th 666, 881 P.2d 1083 (1994), *as modified* (Nov. 30, 1994)). "If two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery." *Id.* "California courts apply res judicata when '(1) [a] claim or issue raised in the present action is identical to a claim or issue litigated in the prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding.'" *Tobin v. Nationstar Mortgage, Inc.*, 2016 WL 1948786, at *5 (C.D. Cal. May 2, 2016) (citing *Boeken v. Phillip Morris USA, Inc.*, 48 Cal. 4th 788, 797 (2010)). Further, res judicata applies to more than just identical claims asserted in prior litigation, but also to claims that are so similar to or derivative of those claims alleged in the prior proceeding, that they should have been included and asserted in the prior case. *See Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002).

The present case is the fourth time Plaintiff or his predecessor Hernandez have brought essentially the same action. Although the Plaintiff may assert that the claims are discrete, the Court finds that the five primary causes of action alleged in the Complaint are all either identical to or derivative of claims that were previously decided in the District Court for the Central District of California (Action 1), the California Superior Court for the County of Los Angeles (Action 2), and the District Court for the Southern District of New York (Action 3).

Furthermore, case law proffered by the Plaintiff regarding TILA is irrelevant to the claims presented here because in Action 3 the District Court in New York decided that the original loan transaction described on the

April 2006 Deed of Trust is a refinance, and a refinance is not subject to TILA's right of rescission. *See* 15 U.S.C. § 1635(e)(1),(2) (transactions defined as a refinance or consolidation under 15 USCA § 1602(w) are exempt from TILA rescission rights). Accordingly, res judicata compels this Court to honor the prior court's ruling.

2. Plaintiff Shetty and Plaintiff Hernandez are Privies.

As mentioned above, res judicata is a bar to re-litigation when a new Plaintiff brings identical or derivative claims to Court and that new Plaintiff is a privy of the previous Plaintiff. *Boeken,* 48 Cal. 4th at 809. Privity connects the first Plaintiff to a subsequent plaintiff, and precludes a Plaintiff from undercutting the policy goals of res judicata by substituting another to bring its claim. Here, Plaintiff Shetty asserts that he is an assignee and in privity with the previous Plaintiff Hernandez because she deeded him her interest in the subject property. (*See* Compl. at ¶ 6-8.) The Court will not analyze the merits of whether this new Plaintiff has standing to sue as a valid assignee of claims and interest. However, assuming that Plaintiff is in fact a privy of Elizabeth Hernandez, as Plaintiff asserts he is, then Plaintiff's present claims are dependent on this established privity. However, because Hernandez's claims were litigated and defeated in previous courts of competent jurisdiction, Plaintiff by way of privity is also bound to these rulings. Therefore, as her privy, Plaintiff is barred from re-litigating these identical and derivative claims surrounding the April 2006 Deed of Trust.

Because Shetty is a privy of Plaintiff Hernandez, and the claims he asserts are in substance the same claims, the Court finds this Plaintiff to be a privy of the previous Plaintiff to this initial dispute. Even if these claims were found to be superficially distinct, Hernandez herself should have asserted any claims arising from the Subject Property foreclosure in previous actions, for "California, as most states, recognizes that the doctrine of res judicata will bar not only those claims litigated in a prior proceeding, but also claims that could have been litigated." *Palomar v. Mobilehome Ass'n v. City of San Marcos*, 989 F.2d 364 (9th Cir. 1993).

Further, regarding the privity of Wells Fargo to previous Defendants, Wells Fargo is named in Action 2 and Action 3, and is again named as the Defendant in this action. Although Wells Fargo was not named in Action 1, it appears that Wells Fargo was in privity to a named defendant in that action, GF Mortgage, by way of the Deed of Trust assignment from GF Mortgage. Given that all the parties are the same or in privity to each other, this factor is satisfied, and the present claims are barred.

3. The Present Claims Are the Same as the Claims Litigated in Prior Suits.

Plaintiff in this suit ("Action 4") brings five claims against Defendant. (1) Rescission Pursuant to 15 U.S.C. § 1601, 1640, 1635 et. seq., 12 C.F.R. 226 Cal Civ. Code § 1689(b)(5); (2) Wrongful Foreclosure; (3) Cancellation and Expungement of Written Instruments; (4) Quiet Title; and (5) Declarative Judgment. (Compl. at 1.)

In applying the primary rights test, the Court first looks to whether any of these claims are identical, or similar enough to be derivative of a claim in the previous action.

First, Plaintiff's current claim for "Rescission Under TILA" is identical to the claims entitled "Rescission" and "Violations of the Truth in Lending Act" that Hernandez asserted in Action 1. *See* Compl. in Case No. 09-00681 (Dkt. 1). The present claims and those in Action 1 are substantively identical in that they seek the same relief for the same alleged misconduct arising out of Hernandez's 2006 refinance. The District Court granted summary judgment in Action 1, so Hernandez already lost these claims on the merits. As a result, any additional claims that Plaintiff may seek to attach within the frame work of the loan rescission grievance should have been brought in the first action.

Second, the "Wrongful Foreclosure" claim was in effect already adjudicated in Action 2 before the California Superior Court. There, Hernandez claimed "Fraud," "Deceit," and "Intentional Misrepresentation" among eight other causes of action. Although she did not entitle any claim "Wrongful Foreclosure," she asserted the same injury that the current Plaintiff pleads here. Under the "Primary Rights Test," this same injury is sufficient for res judicata. The Superior Court in Action 2 sustained the defendants' demurrer and dismissed these claims without leave to amend. *See* SDNY Order p. 4. Previous to that lawsuit, the District Court in Action 1 granted ruled summary judgment in favor of the Defendant for "Fraud."

Finally, in the most recent litigation, the District Court in Action 3 found that the claim asserted there "seeks redress for the same injury of wrongful collection and foreclosure on the same mortgage loan; thus, this claim [for wrongful foreclosure], too, is part of the same cause of action." SDNY Order p. 8. Consistent with these findings, this claim is also barred in this action.

Third, the "Cancellation and Expungement of Written Instruments" claim was asserted by Hernandez and defeated on summary judgment in the Action 1. Additionally, this claim is derivative of the Wrongful Foreclosure claim, and based upon the same factual allegations as asserted in the previous actions. This claim should have been asserted in one of the previous actions.

Fourth, the "Quiet Title" claim was also asserted in the second and third actions by Hernandez, and each time the claim failed on the merits. Plaintiff now asserts the same claim, and by operation of res judicata this claim is precluded.

Finally, the "Declarative Judgment" request was asserted and defeated on the merits upon dismissal in Action 2. This request for declaratory judgment is also entirely duplicative and derivative of the substantive claims in adjudicated in the previous three actions. For Plaintiff to obtain declaratory relief, he would have to prevail on an underlying substantive claim. Unfortunately for Plaintiff, all of the underlying substantive claims are barred by res judicata, so Plaintiff's fifth and final claim is also barred.

4. The Prior Cases Ended in Final Judgments on the Merits.

The next factor to analyze is whether rulings in prior court proceedings were judgments on the merits. All three previous actions were adjudicated on the merits: Action 1 was resolved when the court granted summary judgment against the Plaintiff; Action 2 was resolved when the court sustained the defendant's demurrer; and Action 3 was resolved when the court granted the defendants' motion to dismiss (on res judicata grounds). All three are adjudications on the merits, and all of Plaintiff's claims in this action were already litigated in the previous three actions. Therefore, applying res judicata to all of Plaintiff's claims in this action is appropriate.

If Hernandez, the Plaintiff in any of the three previous actions, truly believed that any of those judgments was erroneous, the appropriate step was to file an appeal. Instead the Plaintiff, a privy of Hernandez, attempts to re-litigate this matter with creative variations of the original claims asserted. The doctrine of res judicata prevents such tactics.

5. Plaintiff's Claims Also Fail Because he Does Not Allege Facts Satisfying the Tender Rule.

Defendant is correct when it cites the tender rule as applicable California law in this case. *See United States Cold Storage v. Great W. Sav. & Loan Assn.*, 165 Cal. App. 3d 1214, 1225 (1985) (defining the tender rule as, "[I]t is sensible to require that a trustor, whose default to begin with resulted in the foreclosure, give proof before the sale is set aside that he now can redeem the property"). California has adopted the tender rule from the rule of equity in common law to apply to specific foreclosure scenarios. The case law is particularly instructive regarding the application of the tender rule to actions seeking to set aside a foreclosure sale. "[A] growing number of federal courts have explicitly held that the tender rule only applies in cases seeking to set aside a completed sale, rather than an action seeking to prevent a sale in the first place." *Barrionuevo v. Chase Bank, N.A.*, 885 F. Supp. 2d 964, 969 (N.D. Cal. 2012). More specifically, in California, "[i]t 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." *Arnolds Management Corp. v. Eischen*, 158 Cal.App.3d 575, 578 (1984) (citing *Karlsen v. America Sav. & Loan Ass'n*, 15 Cal. App. 3d 112, 117 (1971)). Here, Plaintiff seeks to set aside a foreclosure sale that was carried out in 2014. Part of Plaintiff's allegations involve irregularities in the sale notice and procedure, including the assignability of the Deed of Trust. Assuming Plaintiff could otherwise pursue any of his claims to reverse the foreclosure sale, Plaintiff has not alleged that he could tender the amount due in loans to pay off the note for the property. Plaintiff fails to address this point, and appears to want to rescind a loan without giving back the money he borrowed or alternatively the property of which he claims ownership. Because all of Plaintiff's claims appear to involve some attempt to reclaim ownership of the property, they trigger the tender rule. Because Plaintiff has not pled that he can tender the amount due, he has not adequately pled his claims.

D. Plaintiff's Request for Default Judgment Ruling Against GF Mortgage, Inc., is DENIED.

The last motion to be resolved by the Court is the application for a default judgment ruling against the remaining defendant named in the Complaint, GF Mortgage. The Court **DENIES** application for default judgment. Plaintiff asserts that GF Mortgage is a defunct corporate entity, and has failed to answer its Complaint. Assuming this allegation is true, it raises the question of whether a default judgment should be entered at all, or whether such an order would be moot. But setting such issues aside, default judgment is unavailable because, like Plaintiff's claims against Wells Fargo, Plaintiff's claims against GF Mortgage are barred by res judicata. In Action 1, Plaintiff named GF Mortgage as a defendant, and as discussed above, Plaintiff's claims here are the same claims that were adjudicated in Action 1. Because res judicata bars relitigating these claims, Plaintiff cannot obtain a default judgment on them. Plaintiff's motion for default judgment is therefore **DENIED**.

IV. CONCLUSION

The Court has liberally construed the Plaintiff's Complaint and read his allegations in a light most favorable to the Plaintiff. This effort has shown that all of Plaintiff's claims were already litigated on the merits in the three previous actions filed by Plaintiff's predecessor-in-interest. Therefore, all of Plaintiff's claims are already settled and barred by the doctrine of res judicata. The Court therefore **GRANTS** Wells Fargo's Motion to Dismiss, and **DENIES** Plaintiff's Request for Default Judgment. The Court also **DENIES** Plaintiff's Motion to Strike.

Because no amendment can overcome the bar of res judicata, Plaintiff's Complaint is hereby **DISMISSED WITH PREJUDICE.**

Dated: August 19, 2016

/s/
HONORABLE ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT COURT JUDGE