NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

NORTHERN DIVISION

In re: DORIS KEATING, Debtor. DORIS KEATING, Plaintiff, v. U.S. BANK, N.A., et.al., Defendants.	Case No. 9:16-bk-10286-PC Adversary No. 9:17-ap-01002-PC Chapter 11 **MEMORANDUM DECISION** Date: March 23, 2017 Time: 10:00 a.m. Place: United States Bankruptcy Court Courtroom # 201 1415 State Street Santa Barbara, CA 93101

This matter comes before the court on the motion of Defendant, JPMorgan Chase Bank, N.A., ("Chase") and the motion of Defendants, U.S. Bank, N.A., as Trustee for LSF9 Master Participation Trust and Caliber Home Loans, Inc. (collectively, "U.S. Bank") seeking a dismissal of a "Complaint to and for Damages, Declaratory and Injunctive Relief for: 1. Unfair Practices under California Business & Professions Code Section §§ 17200, et seq.); 2. Quiet Title; 3. Violation of California Civil Code Section 2924(a)(6)); 4. Declaratory Judgment that Real Property is Property of the Estate; 5. Fraud; 6. Financial Elder abuse; _ 7. Conspiracy; 8. Disallowance of Claim; and 9. Turnover under 11 U.S.C. §§ 542" ("Complaint") filed by

Plaintiff, Doris Keating ("Keating") pursuant to F.R.Civ.P. 12(b)(6).[1] Keating opposes both of the motions. Appearances were stated on the record. The court, having considered the pleadings and argument of counsel, will grant the motions of Chase and U.S. Bank and dismiss Keating's Complaint without leave to amend based upon the following findings of fact and conclusions of law made pursuant to F.R.Civ.P. 52(a)(1), as incorporated into FRBP 7052 and applied to adversary proceedings in bankruptcy cases.[2]

I. STATEMENT OF FACTS

On January 4, 2017, Keating filed the Complaint in this adversary proceeding. The subject of the litigation is an Adjustable Rate Note in the original principal sum of $1,302,000 executed by Keating to Washington Mutual Bank, FA ("WMBFA") dated November 5, 2007 ("Note"), and a Deed of Trust of even date therewith against the real property and improvements at 2278 Grand Avenue, Filmore, CA ("Fillmore Property"), recorded as Instrument No. 20071112-00208366-0 in the Official Records, County of Ventura, on November 12, 2007 ("Deed of Trust"). The Deed of Trust was assigned to Chase without recourse by Corporate Assignment of Deed of Trust executed by the Federal Deposit Insurance Corporation, as Receiver of Washington Mutual Bank, f/k/a Washington Mutual Bank, FA ("FDIC"), to Chase dated April 19, 2013, recorded as Instrument No. 20130507-00082296-0 in the Official Records, County of Ventura, on May 7, 2013. ("WMBFA Assignment"). The Note is endorsed in blank without recourse and signed on behalf of WMBFA by Cynthia Riley, Vice President ("Riley"). The Deed of Trust was thereafter assigned by Chase to U.S. Bank by California Assignment of Deed of Trust dated December 23, 2014, recorded as Instrument No. 20150102-00000107-0 in the Official Records, County of Ventura, on January 2, 2015.

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[1] Unless otherwise indicated, all "Code," "chapter" and "section" references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330. "Rule" references are to the Federal Rules of Bankruptcy Procedure ("FRBP"), which make applicable certain Federal Rules of Civil Procedure ("F.R.Civ.P."). "LBR" references are to the Local Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California ("LBR").

[2] U.S. Bank Trust, N.A. as Trustee for LSF9 Master Participation Trust and Caliber Home Loans, Inc.'s Request to Strike Untimely Opposition to Motion to Dismiss Complaint for Failure to State a Claim is denied.

Keating's Complaint seeks an unspecified amount of compensatory and punitive damages, and a judgment quieting title to the Fillmore Property in Keating and declaring that neither Chase nor U.S. Bank "hold any interest in the Deed of Trust secured by the Fillmore Property."[3] Keating also seeks an award of court costs and reasonable attorneys' fees. The substance of Keating's Complaint is that Riley's endorsement on the Note "is likely a forgery"[4] and that the WMBFA Assignment "is presumptively invalid."[5] Keating reasons that Riley could not have signed the endorsement on the Note because she left employment with WMBFA on November 11, 2006, and was not re-employed by WMBFA after November 11, 2006. In support of her contention, Keating points to Riley's deposition testimony in Case No. 09-29997, JPMorgan Chase Bank, N.A. v. Eduardo Orozco, et al., in the 11th Judicial Circuit Court, Miami-Dade County, Florida on January 15, 2013, which involved a lawsuit between unrelated parties involving an unrelated loan transaction. Each of the nine causes of action alleged in Keating's Complaint hinges upon Keating's allegation of a forged endorsement.

On February 3, 2017, U.S. Bank filed its Motion of Defendants U.S. Bank, N.A. and Caliber Home Loans, Inc. to Dismiss Complaint for Failure to State a Claim ("U.S. Bank Motion") seeking a dismissal of Keating's Complaint pursuant to F.R.Civ.P. 12(b)(6) without leave to amend.[6] On February 13, 2017, Chase filed its Motion to Dismiss Plaintiff's Complaint ("Chase Motion") seeking a dismissal of Keating' Complaint under F.R.Civ.P. 12(b)(6).[7] On February 23, 2017, Keating filed opposition to the U.S. Bank Motion to which U.S. Bank replied

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[3] Complaint, 26:1-2

[4] Id. at 7:4.

[5] Id. at 5:13.

[6] The court grants Caliber Home Loans, Inc. and U.S. Bank, N.A., as Trustee for LSF9 Master Participation Trust's Request for Judicial Notice in Support of Motion to Dismiss Complaint ("U.S. Bank's RJN") and takes judicial notice of the documents attached thereto as Exhibits A through H pursuant to Rule 201(c)(1) of the Federal Rules of Evidence.

[7] The court grants Chase's Request for Judicial Notice in Support of Motion to Dismiss Plaintiff's Complaint ("Chase's RJN"), and takes judicial notice of the documents attached thereto as Exhibits 1 through 13 pursuant to Rule 201(c)(1) of the Federal Rules of Evidence.

on March 2, 2017. On March 9, 2017, Keating filed opposition to the Chase Motion to which Chase replied on March 16, 2017.

After a hearing on March 23, 2017, the court took each of the matters under submission.

II. DISCUSSION

This court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(b) and 1334(b). This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (E), (K) and (O). To the extent that the claims made the basis of Keating's Complaint constitute "Stern claims,"[8] Chase and Keating expressly consent to the entry of final orders and a final judgment by this court. Venue is appropriate in this court. 28 U.S.C. § 1409(a).

A. Standard for Dismissal Under Rule 12(b)(6).

Rule 12(b)(6) authorizes the court, upon motion of the defendant, to dismiss a complaint for failure to state a claim upon which relief can be granted.[9] F.R.Civ.P. 12(b)(6). "The purpose of F.R.Civ.P. 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery." Rutman Wine Co. v. E.&J. Gallo Winery, 829 F.2d 729, 738 (9th Cir. 1987).

Under Rule 8(a), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[10] F.R.Civ.P. 8(a)(2). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 555 (2007)). "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible

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[8] "These claims are called 'Stern claims,' so named after the Supreme Court's decision in Stern v. Marshall, [564 U.S. 462] (2011). Stern claims are claims 'designated for final adjudication in the bankruptcy court as a statutory matter, but prohibited from proceeding in that way as a constitutional matter.'" Mastro v. Rigby, 764 F.3d 1090, 1093 (9th Cir. 2014) (citation omitted).

[9] Rule 12(b)(6) is applicable to adversary proceedings by FRBP 7012(b).

[10] Rule 8(a) is applicable to adversary proceedings by FRBP 7008(a).

on its face.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 556). "[A] complaint [that] pleads facts that are 'merely consistent with' a defendant's liability . . . 'stops short of the line between possibility and plausibility of entitlement to relief.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557). The trial court need not accept as true conclusory allegations in a complaint, or legal characterizations cast in the form of factual allegations. Twombly, 550 U.S. at 555-56.

"[S]tanding is a threshold question" the court must "resolve before proceeding to the merits." Los Angeles County Bar Ass'n v. Eu, 979 F.2d 697, 700 (9th Cir. 1992). "Article III standing requires the plaintiff to establish standing for each challenge he wishes to bring and each form of relief he seeks." Sacks v. Office of Foreign Assets Control, 466 F.3d 764, 771 (9th Cir. 2006). "To survive a Rule 12(b)(6) motion to dismiss, [the plaintiff] must allege facts in his [Complaint] that, if proven, would confer standing upon him." Id.

A Rule 12(b)(6) dismissal may be based on either the lack of a cognizable legal theory, or the absence of sufficient facts alleged under a cognizable legal theory. Johnson v. Riverside Healthcare Sys., 534 F.3d 1116, 1121 (9th Cir. 2008). A claim cannot be plausible when it has no legal basis.

B. Court's Inquiry is Not Limited to the Allegations of the Complaint.

"In deciding Rule 12(b)(6) motions, courts are not strictly limited to the four corners of complaints." Outdoor Cent., Inc. v. GreatLodge.com, Inc., 643 F.3d 1115, 1120 (8th Cir. 2011). Courts may consider "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned; these items may be considered by the [court] without converting the motion into one for summary judgment." Wright & Miller, Federal Practice and Procedure: Civil 3d § 1357, at 376 (2004). See, e.g., U.S. v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003) ("A court may . . . consider certain materials –

documents attached to the complaint, documents incorporated by reference into the complaint, or matters of judicial notice – without converting the motion to dismiss into a motion for summary judgment."); Sears, Roebuck & Co. v. Metropolitan Engravers, Ltd., 245 F.2d 67, 70 (9th Cir. 1956) ("[J]udicial notice may be taken of a fact to show that a complaint does not state a cause of action."); Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994) ("[W]e hold that documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss."), cert. denied, 512 U.S. 1219 (1994); Barapind v. Reno, 72 F.Supp.2d 1132, 1141 (E.D. Cal. 1999) ("Matters of public record may be considered, including pleadings, orders, and other papers filed with the court or records of administrative bodies."); Roe v. Unocal Corp., 70 F.Supp.2d 1073, 1075 (C.D. Cal. 1999) ("[E]ven if a document is neither submitted with the complaint nor explicitly referred to in the complaint, the . . . court may consider the document in ruling on a motion to dismiss so long as the complaint necessarily relies on the document and the document's authenticity is not contested.").

C. Claim Preclusion.

"Claim preclusion, often referred to as res judicata, bars any subsequent suit on claims that were raised or could have been raised in a prior action." Cell Therapeutics, Inc. v. Lash Group, Inc., 586 F.3d 1204, 1212 (9th Cir. 2009). Claim preclusion requires a showing of the following three elements: (1) identity of claims; (2) a final judgment on the merits; and (3) identity or privity between the parties. Id. at 1212. "Newly articulated claims based on the same nucleus of facts may still be subject to a res judicata finding if the claims could have been brought in the earlier action." Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg. Planning Agency, 322 F.3d 1064, 1078 (9th Cir. 2003).

D. Keating's First, Second, Third, Fourth, Fifth, Sixth and Seventh Claims for Relief Against Chase and U.S. Bank Must be Dismissed for Failure to State a Claim Upon Which Relief Can be Granted.

Chase asserts that Keating's First, Second, Third, Fourth, Fifth, Sixth and Seventh Claims for Relief are barred by the doctrine of res judicata. Chase argues that Keating's "claims fall squarely within claim preclusion standards" because Keating's "2009 Action and 2013 Action were both premised upon the theory that the [l]oan suffered from procedural improprieties and that the defendants lacked standing to foreclose on the [Fillmore] Property."[11] Chase further argues that "[t]hese theories also form the basis of [Keating's] current Complaint against the current Defendants."[12] Keating responds that res judicata is inapplicable to bar her claims because her "current lawsuit is based on newly-discovered facts which Chase's own fraud prevented her from discovering."[13] Keating believes that application of the doctrine of res judicata given the facts of this case "would defeat the ends of justice."[14]

1. Case No. 56-2009-00355857-CU-FR-VTA, Keating v. JPMorgan Chase Bank, N.A. et al., in the Superior Court of California, County of Ventura ("Keating I")

On October 20, 2009, Keating filed a complaint against Chase, Bank of America, N.A., and three other defendants in Case No. 56-2009-00355857-CU-FR-VTA, Keating v. JPMorgan Chase Bank, N.A. et al., in the Superior Court of California, County of Ventura, seeking, among other things, to stop a foreclosure sale of the Fillmore Property under the Deed of Trust. Keating's Third Amended Complaint in Keating I alleged 14 causes of action against the defendants, including the following claims against Chase based on the Note and Deed of Trust: (a) Sixth Cause of Action for Fraud and Deceit; (b) Seventh Cause of Action for Negligent Misrepresentation; (c) Eighth Cause of Action for violation of California Business & Professions

[11] Chase Motion, 6:2-6.

[12] Id.

[13] Opposition to Motion to Dismiss Complaint for Failure to State a Claim Filed by JPMorgan Chase Bank, N.A. ("Keating Chase Opposition"), 2:9-10.

[14] Id. at 3:26.

Code § 17200, et seq.; (d) Tenth Cause of Action for Declaratory Relief; (e) Eleventh Cause of Action for Breach of Contract; (f) Twelfth Cause of Action for Promissory Estoppel; (g) Thirteenth Cause of Action for Breach of Third Party Beneficiary Obligations; and (h) Fourteenth Cause of Action for Breach of the Covenant of Good Faith and Fair Dealing. With respect to her claims against Chase involving the Note and Deed of Trust, Keating alleged in her Third Amended Complaint that:

> 33. Beginning in February of 2009, Plaintiff contacted Rodney K. Reuscher ("Mr. Reuscher") Vice President of the Executive Resolution Group for Chase Home Finance LLC. ("Chase Home Finance"). . . .
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> 34. Plaintiff had numerous conversations with Mr. Reuscher. Plaintiff requested copies of her loan documents for . . . Fillmore Loan Two[15] from Mr. Reuscher, which he property [sic] sent to Plaintiff . . . Plaintiff alleges that after Chase Home Finance acquired rights in or began servicing the loan, it began to engage in a pattern of unlawful and fraudulent conduct. . . .
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> 38. Upon receiving copies of the loan application for Fillmore Loan Two, Plaintiff recognized for the first time several misrepresentations and defects on the face of the document. This included, among other things, number of signatures on the loan application were not her own handwriting. . . .
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> 41. On or about April 23, 2009, Plaintiff sent a letter to Mr. Reuscher seeking to rescind Fillmore Loan Two. . . .
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> 43. On or about May 14, 2009, a Notice of Default in connection with the [Deed of Trust] was recorded with the Ventura County Recorder office as Instrument Number 20090514-00078307. . . .
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> 45. On or about August 20, 2009, Plaintiff also received a Notice of a Trustee's Sale for the Fillmore Property to occur on September 10, 2009. . . .
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> 47. [O]n September 9, 2009, Plaintiff sought a Temporary Restraining Order from the Ventura County Superior Court enjoining the Trustee's Sale of the Fillmore Property. . . .
>
> 99. Defendant Chase has committed fraud and deceit by making false representations to Plaintiff that she would be able to successfully pursue loan modifications in [sic] if the subject loans were in default. . . .

[15] Keating's reference in the Third Amended Complaint to the "Fillmore Loan Two" means the loan transaction between Keating and WMBFA evidenced by the Note and Deed of Trust on the Fillmore Property.

> 110. The conduct of Defendants Chase and BofA, in connection with WaMu, LaSalle and WaMu's agents, affiliates, subsidiaries, employees, Co-conspirator, and/or alter egos Centek, Shulman and Hughes' predatory loan practices, fraud and deceit, constitute unlawful, unfair, business practice in violation of Section 17200 et.,seq., of the California Business and Professions Code. The conduct of Defendants Chase and BofA in connection with Chase's inducement of Plaintiff to default on her loans and efforts to foreclose Plaintiff's Frazier Park an [sic] Fillmore Properties despite Chase's inducement of that default and material misrepresentations, inconsistencies and defects that appear on the face of the loan application of the Frazier Park Loan Three and Fillmore Loan Two also constitutes unlawful, unfair, business practice in violation of Section 17200 et.,seq., of the California Business and Professions Code. Plaintiff is informed and believes that Defendants Chase and BofA have also conducted and are conducting these unlawful, unfair, business practices in connection with other vulnerable individuals seeking to refinance or obtain loans as well. Additionally, beginning September 2008 and continuing to the present Defendant Chase Home Finance have engaged in unfair business practices by charging unauthorized fees, specifically corporate advance fees, improperly assessing fees, specifically property inspections fees contrary to the terms of the Deed of Trust, misapplying plaintiff's payments, initiating foreclosure on the subject property without legal standing to do so, specifically recorded assignment from JPMorgan to Bof A is deceptive and misleading and failing to contact plaintiff to explore foreclosure alternatives in violation of Civil Code section 2923.5.[16]

The trial court sustained demurrers without leave to amend as to all causes of action except the 13th cause of action (breach of third party beneficiary obligations) as to Chase Home Finance, and the 8th (violation of Cal. Bus. & Prof. Code § 17200, et seq.) and 9th and 10th (declaratory relief) causes of action against Chase and Bank of America.[17] On August 2, 2011, Chase and Bank of America were granted a summary judgment on all causes of action asserted in Keating's Third Amended Complaint.[18] Keating appealed and the California Court of Appeals affirmed the trial court's judgment on October 29, 2012.

[16] Chase's RJN, Exhibit 1, 9:4-12:5; 20:27-21:1; 22:15-23:4.

[17] Id. Exhibits 2, 3 & 4.

[18] Id. Exhibit 6.

2. Case No. 56-2013-00433068-CU-OR-UTA, Keating v. JP Morgan, et al., in the Superior Court of California, County of Ventura ("Keating II")

On March 8, 2013, Keating filed a complaint against Chase and California Reconveyance Company in Case No. 56-2013-00433068-CU-OR-UTA, Keating v. JP Morgan, et al., in the Superior Court of California, County of Ventura, alleging violations of California Civil Code §§ 2429g, 2923.55 and 2920.5 and seeking, with respect to the Fillmore Property, an injunction permanently enjoining Chase from foreclosing its Deed of Trust on the Fillmore Property, and a judgment quieting title to the Fillmore Property and declaring Chase's Note and Deed of Trust void. In paragraph 41 of her complaint in Keating II, Keating alleged that Chase was not "the Current Owner of the Promissory Note NOR the real owner's Authorized Agent" and that Chase was an "unauthorized entity" with no standing to conduct the foreclosure sale. Keating further alleged that "the sale and future sales should be cancelled and VOIDED and the rightful owner be made known."[19] By Minute Order entered on May 22, 2013, the court sustained Chase's demurrer to Keating's complaint and dismissed all claims without leave to amend.[20] A judgment of dismissal was entered on May 29, 2013.[21]

a. Identity of the Parties

Keating was the plaintiff and Chase was a defendant in Keating I and Keating II. Keating and Chase are the parties to this action – Keating III. Chase is asserting res judicata against Keating, who is the plaintiff in this case and was the plaintiff in each of the prior proceedings. There is an identity of parties sufficient to apply res judicata. Moreover, U.S. Bank is in privity with Chase for res judicata purposes. See U.S. v. Schimmels (In re Schimmels), 127 F.3d 875, 881 (9th Cir. 1997) ("[T]he doctrine of privity extends the conclusive effect of a judgment to nonparties who are in privity with parties to the earlier action." (citation omitted)); Tuitama v. Nationstar Mortgage LLC, 2015 WL 12744269, *9 (C.D. Cal. 2015) ("[I]n the context of home

[19] Id. Exhibit 9, 12:11-15.

[20] Id. Exhibit 11.

[21] Id. Exhibit 12.

foreclosures, courts have found that assignors and assignees of a mortgage are in privity with one another." (citation omitted)).

b. Prior Proceedings Resulting in a Final Judgment on the Merits

"[A] judgment on a general demurrer will have the effect of barring a new action in which the complaint states the same facts which were held not to constitute a cause of action on the former demurrer or, notwithstanding differences in the facts alleged, when the ground on which the demurrer in the former action was sustained is equally applicable to the second one." McKinney v. County of Santa Clara, 110 Cal.App.3d 787, 794 (1980). Similarly, "a summary judgment dismissal . . . is considered a decision on the merits for res judicata purposes. MPoyo v. Litton Electro-Optical Sys., 430 F.3d 985, 988 (9th Cir. 2005). In Keating I and Keating II, the state court sustained a demurrer to Keating's complaint without leave to amend. In Keating I the state court granted summary judgment to Chase on all claims that survived Chase's demurrer. In Keating II the state court entered a judgment dismissing all claims against Chase. Each of the judgments constitutes a final judgment on the merits entitled to res judicata.

c. Identity of Claims

To determine whether there is an identity of claims, the court considers the following factors: "(1) whether the two suits arise out of the same transactional nucleus of facts; (2) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (3) whether the two suits involve infringement of the same right; and (4) whether substantially the same evidence is presented in the two actions." ProShipLine Inc. v. Aspen Infrastructures Ltd., 609 F.3d 960, 968 (9th Cir. 2010) (emphasis in original).

Keating I, Keating II and Keating III each arise out of the same transactional nucleus of facts. In each action the claims asserted by Keating were based on the Note and Deed of Trust secured by the Fillmore Property. Keating challenged the right of Chase, as assignee, to enforce the Note and foreclose on the Fillmore Property under the Deed of Trust. Each action involved infringement of the same primary right, and turned upon presentation of substantially the same evidence.

In Keating I Keating sought injunctive relief to stop Chase from enforcing the Note and foreclosing on the Fillmore Property under the Deed of Trust alleging that Chase committed fraud, made false representations, and deceived her. In Keating II Keating claimed that Chase was not the owner and holder of the Note and lacked standing to conduct the foreclosure sale under the Deed of Trust. In Keating III Keating now claims that Chase received no beneficial interest in the Note and Deed of Trust from WMBFA because the Note allegedly contains a forged endorsement and the Deed of Trust is presumptively invalid. Keating further alleges that (1) Chase could not have received any beneficial interest in the Note and Deed of Trust from WMBFA because the loan was sold by WMBFA to a mortgage-backed securities trust prior to WMBFA's takeover by the FDIC; (2) Chase was never the owner or holder of the Note or the beneficiary under the Deed of Trust, and lacked standing to enforce the Note or to authorize a foreclosure under the Deed of Trust; and that (3) U.S. Bank, as assignee of Chase, therefore lacks standing to enforce the Note or to authorize a foreclosure under the Deed of Trust.

The claims made the basis of Keating's First, Third, Fifth and Sixth Claims for Relief were fully and finally adjudicated in Keating I and Keating II and thus barred. Keating's newly articulated claims based on the same transactional nucleus of facts are also barred because they could have been brought in the earlier action. See Tahoe Sierra Preservation Council, 322 F.3d at 1078. Chase's rights and interests under the Note and Deed of Trust were adjudicated by a final judgment in Keating I and Keating II. Chase's rights would be impaired or destroyed by prosecution of the Complaint in this adversary proceeding – Keating III.

d. Extrinsic Fraud Exception is Inapplicable

Extrinsic fraud constitutes an exception to res judicata. E&J Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1287 (9th Cir. 1992) ("Extrinsic fraud essentially entails preventing a party 'from presenting all of his case to the court,' as opposed to defrauding the party with respect to the substantive rights being adjudicated at a proceeding."); Barker v. Carver, 144 Cal.App.2d 487, 492 (1956) ("[T]here must be a showing of extrinsic fraud. Intrinsic fraud will not suffice to justify equitable intervention."). "Extrinsic fraud is a broad concept which covers a number of situations." Lake v. Capps (In re Lake), 202 B.R. 751, 758 (9th Cir. BAP 1996).

"The basic requirement for invoking the extrinsic fraud exception is that there has been no fair adversary trial at law, either because the aggrieved party was kept in ignorance of the action or proceeding, or in some way fraudulently prevented from presenting his claim or defense. Id. Intrinsic fraud, on the other hand, "'goes to the merits of the proceeding which the moving party should have guarded against at the time.'" Bailey v. Internal Revenue Serv., 188 F.R.D. 346, 354 (D. Ariz. 1999) (citation omitted). "Relief is granted for extrinsic fraud but not intrinsic fraud on the theory that the latter deceptions should be discovered during the litigation itself, and to permit such relief undermines the stability of all judgments." Id. In other words, "a judgment can not be set aside where there is intrinsic fraud because the defrauded party had an opportunity to present his case and protect himself from the fraud but unreasonably failed to do so." Portnoy v. US Bank NA, 2007 WL 4258829, *3 (E.D. Cal. 2007), report and recommendation adopted, 2008 WL 540183 (E.D. Cal. 2008), aff'd, 286 Fed.Appx. 441 (9th Cir. 2008). "The judgment will not be set aside in such cases because the fraud should have been discovered during the litigation." Id.

Even assuming the Note contains a forged endorsement, Keating "has not made out a claim of fraudulent concealment because [she] has not pleaded with particularity the circumstances surrounding the concealment nor stated facts establishing that [she] diligently attempted to uncover the information." Bailey, 188 F.R.D. at 354. Riley's endorsement on behalf of WMBFA appears on the face of the Note. Keating does not allege that the Note was concealed from her. In fact Keating admits in her Third Amended Complaint in the 2009 Action that she "contacted Rodney K. Reuscher ("Mr. Reuscher") Vice President of the Executive Resolution Group for Chase Home Finance LLC" in February 2009; that she "had numerous conversations with Mr. Reuscher" regarding the Fillmore Loan Two; that she "requested copies of her loan documents for . . . Fillmore Loan Two from Mr. Reuscher, which he property [sic] sent to [her];" and that she was concerned that Chase at the time was engaged "in a pattern of unlawful and fraudulent conduct."[22] In her opposition, Keating simply claims that "the

[22] Chase's RJN, Exhibit 1, 9:4-20.

Defendant's fraud in forging Cynthia Riley's signature was successful in preventing [her] from learning of such fraud."[23] Keating does not explain what efforts were undertaken to verify or challenge the veracity of the Note in the prior actions or why she could not have discovered the alleged fraud in the exercise of due diligence.

Finally, Keating cites Greenfield v. Mather, 32 Cal.2d 23, 35 (1948) for the proposition that res judicata should not be applied under circumstances that "would defeat the ends of justice."[24] The court in Greenfield stated:

> We are mindful of the rule that a judgment rendered in an action in personam by a court having jurisdiction over the subject matter and the parties is not void and subject to collateral attack merely because it may erroneously determine some matter not specifically raised in the pleadings, and not covered by the evidence before the trial court, and that such a judgment is res judicata. We adhere to this rule. But in rare cases a judgment may not be res judicata, when proper consideration is given to the policy underlying the doctrine, and there are rare instances in which it is not applied. In such cases it will not be applied so rigidly as to defeat the ends of justice or important considerations of policy.

Id. at 35 (emphasis added). "[R]es judicata relieves parties of the cost and vexation of multiple lawsuits, conserves judicial resources and, by preventing inconsistent decisions, encourages reliance on adjudication." Bailey, 188 F.R.D. at 351. The doctrine, judicial in origin, rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations." Id. The court finds that application of the doctrine of res judicata in this case serves the policy considerations underlying the doctrine without defeating the ends of justice. In sum, Keating's First, Third, Fifth and Sixth Claims for Relief against Chase and U.S. Bank are barred by the doctrine of res judicata.

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[23] Keating Chase Opposition, 3:15-16.

[24] Id. at 3:21-26.

E. Keating's Claims for Relief Against U.S. Bank are Undermined by Keating's Judicial Admissions.

"Statements made in bankruptcy schedules are executed under penalty of perjury and when offered against a debtor are eligible for treatment as judicial admissions." In re Bohrer, 266 B.R. 200, 201 (Bankr. N.D. Cal. 2001). In her Schedule D filed on March 16, 2016, Keating listed U.S. Bank's servicing agent, Caliber, as the holder of a "contingent and unliquidated" claim in the amount of $1,302,000 secured by the Fillmore Property.[25] "Contingent and unliquidated" does not mean disputed. See, e.g., Fostvedt v. Dow (In re Fostvedt), 823 F.2d 305, 306 (9th Cir. 1987) ("[A] contingent debt is 'one which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability of the debtor to the alleged creditor.'" (citation omitted)); In re RNI Wind Down Corp., 369 B.R. 174, 183 (Bankr. D. Del. 2007) ("An unliquidated claim is a 'claim in which the amount owed has not been determined.'" (citation omitted)); In re Hanson, 275 B.R. 593, 596 (Bankr. D. Colo. 2002) ("'[M]erely because a debtor disputes a debt, or has potential defenses or counterclaims that might reduce the creditors' actual collection, the debt is not thereby rendered 'contingent' or 'unliquidated'" (citation omitted)). Because Keating did not list Caliber's claim as disputed nor has she amended Schedule D to do so, Keating judicially admits that the Note and Deed of Trust are valid and enforceable.

More importantly, on November 7, 2016, the court approved a Stipulation Resolving Motion for Relief from the Automatic Stay [Dkt 130] and for Plan Treatment on First Lien Secured by Real Property at 2278 Grand Avenue, Fillmore, CA 93015 ("Stipulation") executed by Keating and U.S. Bank, by and through its servicing agent, Caliber, in which Keating agreed, in pertinent part, that:

> 2. Secured Creditor will have a secured claim in the amount of $1,050,000.00 and an unsecured claim of approximately $889,945.56. . .
>
> 10. All other terms of the Deed of Trust and Note not directly altered by this agreement will remain in full force and effect. . .

[25] U.S. Bank's RJN, Exhibit G.

> 13. In the event of a default on payments to Secured Creditor under the terms of this stipulation after the entry of the confirmation order, Secured Creditor shall may [sic] proceed pursuant to the terms of the underlying deed of trust and note, and state and federal law, to obtain complete possession of the Subject Property, including unlawful detainer, without further court order or proceeding being necessary. Any and all default provisions included in the Debtor's Chapter 11 plan are not applicable to Secured Creditor, and Secured Creditor is only bound by the terms included in this stipulation. . .
>
> 16. If the instant Chapter 11 bankruptcy petition is dismissed and/or converted to another chapter under title 11, Secured Creditor's lien shall remain a valid secured lien for the full amount due under the original Promissory Note and all payments received under this agreement will be applied contractually under the original terms of the Deed of Trust and original Promissory Note.[26]

By virtue of the Stipulation, Keating is barred from challenging U.S. Bank's standing to enforce the Note and to foreclose on the Fillmore Property under the Deed of Trust. See Berr v. Fed. Deposit Ins. Corp. (In re Berr), 172 B.R. 299, 306 (9th Cir. BAP 1994) (A stipulated judgment "may be given preclusive effect if that was the intent of the parties" [which] "can be inferred from either the judgment or the record."); Knigge v. SunTrust Mortg., Inc. (In re Knigge), 472 B.R. 808, 813 (Bankr. W.D. Mo. 2012) ("[T]he consent orders granting SunTrust relief from the automatic stay bar the Debtors from challenging SunTrust's standing to enforce the Note and Deed of Trust as a matter of res judicata."), aff'd, 479 B.R. 500 (B.A.P. 8th Cir. 2012); Washington v. Deutsche Bank Nat'l Trust Co. (In re Washington), 468 B.R. 846, 852 (Bankr. W.D. Mo. 2011) ("[T]he Court's determination in the First and Second Stay Relief Orders that Deutsche Bank has a valid security interest in the Property and can enforce the Note and Deed of Trust is entitled to res judicata and collateral estoppel effect.").

F. Keating is Estopped from Attacking the Validity of the Note, Deed of Trust and Assignments Under the Doctrine of Judicial Estoppel.

"[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed,

[26] Id. Exhibit H, 2-5.

assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." New Hampshire v. Maine, 532 U.S. 742, 749 (2001).

> Several **factors** typically inform the decision whether to apply the doctrine in a particular case: (1) a party's later position must be "clearly inconsistent" with its earlier position; (2) whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled; (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id., at 750-51.

Keating's Complaint is clearly inconsistent with the judicial admissions contained in her Schedule D and the Stipulation. Keating agreed in the Stipulation that U.S. Bank had a valid secured claim. There is nothing in the Stipulation to indicate that Keating reserved her right to challenge U.S. Bank's claim, the lien, or standing to enforce the Note and Deed of Trust at a later date. Given the judicial admissions in her Schedule D and the Stipulation, Keating is judicially estopped from arguing in this adversary proceeding that U.S. Bank lacks authority or standing to enforce the Note and Deed of Trust. See Knigge, 472 B.R. at 813.

G. Keating's Second Claim for Relief to Quiet Title Must be Dismissed for Failure to State a Claim Upon Which Relief Can be Granted.

> To state a cause of action to quiet title under California law, a plaintiff must allege:
>
> a. A description of the property that is the subject of the action. . . . In the case of real property, the description shall include both its legal description and its street address or common designation, if any.
>
> b. The title of the plaintiff as to which a determination under this chapter is sought and the basis of the title. . . .
>
> c. The adverse claims to the title of the plaintiff against which a determination is sought.
>
> d. The date as of which the determination is sought. If the determination is sought as of a date other than the date the complaint is filed, the complaint shall include a statement of the reasons why a determination as of that date is sought.

> e. A prayer for the determination of the title of the plaintiff against the adverse claims.

Cal. Civ. Proc. Code § 761.020. "Quieting title is the relief granted once the court determines that title belongs to the plaintiff." Leeper v. Beltrami, 53 Cal.2d 195, 216 (1959). The plausibility of Keating's quiet title claim hinges on the viability of her allegation that the Note and U.S. Bank Assignment are invalid, and that U.S. Bank lacks standing to enforce the Note and authority to foreclose on the Fillmore Property under the Deed of Trust. The court has determined that Keating's First, Third, Fifth and Sixth Claims for Relief are barred by res judicata. Moreover, "a borrower may not assert 'quiet title' against a mortgagee without first paying the outstanding debt on the property." Rosenfeld v. JPMorgan Chase Bank, N.A., 732 F.Supp.2d 952, 975 (N.D. Cal. 2010). It is undisputed that Keating has not paid the Note secured by the Deed of Trust. Finally, Keating's reliance on Yvanova v. New Century Mortg. Corp., 62 Cal.4th 919 is misplaced. Yvanova stands for the proposition that tender is excused when a borrower seeks to set aside a foreclosure sale and alleges that the foreclosure deed is facially void. Id. at 929 n.4. There has been no foreclosure of the Deed of Trust on the Fillmore Property. Accordingly, Keating's Second Claim for Relief must be dismissed without leave to amend.

H. Keating's Fourth Claim for Relief for Declaratory Judgment Must be Dismissed for Failure to State a Claim Upon Which Relief Can be Granted.

Keating's fourth claim seeks declaratory relief. Keating requests a declaratory judgment "that the Fillmore Property is not subject to [the Deed of Trust]."[27] A declaratory judgment is not a theory of recovery." Commercial Union Ins. Co. v. Walbrook Ins. Co., Ltd., 41 F.3d 764, 775 (1st Cir. 1994). "[W]here a plaintiff has alleged a substantive cause of action, a declaratory relief claim should not be used as a superfluous 'second cause of action for the determination of identical issues' subsumed within the first." Jensen Quality Loan Serv. Corp., 702 F.Supp.2d 1183, 1189 (E.D. Cal. 2010) (citation omitted). Keating's Fourth Claim for Relief for

[27] Complaint, 23:5-6.

declaratory judgment is entirely duplicative of her quiet title claim. Having determined that her First, Third, Fifth and Sixth Claims for Relief and quiet title claim should be dismissed, the court must dismiss Keating's claim for declaratory relief as redundant.

I. Keating's Seventh Claim for Relief for Civil Conspiracy Must be Dismissed for Failure to State a Claim Upon Which Relief Can be Granted.

Under California law, there is no separate and distinct tort cause of action for civil conspiracy. Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal.4th 503, 510 (1994) ("Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves share with the immediate tortfeasors a common plan or design in its perpetration."). Keating concedes that the conspiracy allegations are part of the other theories of recovery in the case."[28]

J. Keating's Eighth Claim for Relief for Disallowance of Claim and Ninth Claim for Relief for Turnover Under 11 U.S.C. § 542 Must be Dismissed for Failure to State a Claim Upon Which Relief Can be Granted.

Keating's claims for claim disallowance and turnover are predicated upon Keating's challenges to the Note and Deed of Trust. Because Keating has failed to state any valid claim for relief with regard to said documents, Keating, as a matter of law, has no basis to assert a bankruptcy claim for disallowance of claim or turnover against Chase or U.S. Bank.

K. Leave to Amend Will Be Denied.

Rule 15(a)(2) of the Federal Rules of Civil Procedure states that "[t]he court should freely give leave [to amend] when justice so requires." F.R.Civ.P. 15(a)(2).[29] If a complaint lacks facial plausibility, a court must grant leave to amend unless it is clear that the complaint's deficiencies cannot be cured by amendment. See, e.g., Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1298 (9th Cir. 1998) ("Although there is a general rule that parties are allowed to amend their pleadings, it does not extend to cases in which any amendment would be an exercise in futility."); Rutman Wine, 829 F.2d at 738 ("Denial of leave to amend is not an abuse of

[28] Keating's U.S. Bank Opposition, 8:16-18.

[29] Rule 15(a)(2) is applicable to adversary proceedings by virtue of FRBP 7015.

discretion where the pleadings before the court demonstrate that further amendment would be futile.").

Keating's First, Third, Fifth and Sixth Claims for Relief are barred by res judicata and must be dismissed without leave to amend. Keating's Seventh Claim for Relief is not a cause of action recognized under California law. Because Keating's Second and Fourth Claims for Relief are essentially remedies sought by Keating in conjunction with her First, Third, Fifth and Sixth Claims for Relief, Keating's Second and Fourth Claims for Relief must be dismissed without leave to amend as well.

CONCLUSION

In sum, the court will grant the U.S. Bank Motion and the Chase Motion pursuant to F.R.Civ.P. 12(b)(6). Keating's Complaint fails to state a claim upon which relief can be granted as to Keating's First through Ninth Claims for Relief. Because it is clear that the Complaint's deficiencies as to each of the claims cannot be cured by amendment, the claims made the basis of Keating's Complaint must be dismissed without leave to amend. The status conference in this adversary proceeding, which was continued at the hearing to 10:00 a.m. on June 8, 2017, is taken off calendar.

A separate order will be entered as to each motion consistent with this opinion.

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Date: March 31, 2017

Peter H. Carroll
United States Bankruptcy Judge