UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: Ashley Susan Aarons, Debtor.	Case No.: 2:19-bk-18316-NB Chapter: 7
Julius Aarons, Plaintiff. v. Patch of Land Lending, LLC, FCI Lender Services, Inc., California TD Specialists, Versus Residential LoanCo, LLC, Defendants.	Adv. No.: 2:22-ap-01104-NB **MEMORANDUM DECISION GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM, WITHOUT LEAVE TO AMEND** Hearing: Date: August 9, 2022 Time: 1:00 p.m. Place: Courtroom 1545 255 E. Temple Street Los Angeles, CA 90012 (or via Zoomgov per posted procedures)

Plaintiff has filed a First Amended Complaint (adv. dkt. 16, "FAC") asserting claims against Patch of Land Lending, LLC ("Patch") and others purportedly acting with it (collectively, "Defendants"). Plaintiff, who is Debtor's father, purchased a junior lien on the real property then owned by Debtor (the "Property"). Shortly after Plaintiff

purchased that junior lien, it was wiped out in a nonjudicial foreclosure sale of the Property under Patch's senior deed of trust ("DOT").[1]

The FAC does not allege any direct wrongs by Defendants against Plaintiff. Rather, it alleges that the foreclosure was fraudulent and wrongful as against Debtor, and therefore was fraudulent and wrongful as against Plaintiff. Broadly speaking, the FAC relies on two lines of attack.

First, the FAC alleges that there was no authority to foreclose because of assignments of Patch's DOT or the associated promissory Note that were somehow deficient in unspecified ways. But, as Defendants point out in their motion to dismiss (the "MTD," adv. dkt. 26), this is an unsupported, conclusory allegation. (In fact, the assignments appear on their face to be entirely proper.) Plaintiff has offered nothing in response, either in his written Opposition (adv. dkt. 36) or at oral argument, and he has not established that there were any irregularities in the foreclosure process, let alone any defects that would breach some sort of contractual or tort duty running from Defendants to him.

Second, the FAC alleges that Debtor offered to tender a sufficient payoff amount to Patch to stop the foreclosure, and that Patch (and/or the other Defendants) refused to accept that offer, allegedly based on flawed calculations of the amount owing. But Plaintiff has not shown that he has standing to assert these claims against Defendants based their alleged violations of their contracts with Debtor, to which Plaintiff was not a party. Alternatively, supposing for the sake of discussion that Plaintiff had standing to renew Debtor's arguments as to the dollar amounts, this Court has already rejected those arguments because (a) Debtor settled all of those claims and, alternatively, (b) those claims lack merit. *See* Memorandum Decision (Adv. No. 2:22-ap-01008-NB, adv. dkt. 43) *and* Order (*id.,* adv. dkt. 55).[2]

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[1] Unless the context suggests otherwise, a "chapter" or "section" ("§") refers to the United States Bankruptcy Code, 11 U.S.C. § 101 et seq. (the "Code"), a "Rule" means the Federal Rules of Bankruptcy Procedure or other federal or local rule, and other terms have the meanings provided in the Code, Rules, and the parties' filed papers.

[2] This Court also dismissed Debtor's claims for a third reason. But this Court presumes for current purposes that this third alternative is inapplicable to Plaintiff in this adversary proceeding.

For these reasons, the FAC fails to assert any plausible claims on which any relief can be granted. This Court will issue a separate order granting Defendants' MTD. In addition, that order will deny leave to further amend the FAC, because Plaintiff's Opposition (adv. dkt. 36) and oral argument have not suggested any amendment that would overcome the defects in the FAC.

1. BACKGROUND

In September of 2020 Debtor executed a Modification and Release Agreement, both in her individual capacity (as guarantor) and as trustee of the Ashley S. Aarons 2015 Trust (as borrower). *See* dkt. 383 (copied at Ex. 9 to Request for Judicial Notice ("RJN"), adv. dkt. 26-3), at Ex. 9.[3] That agreement included Debtor's broad release of all claims, whether known or unknown, against Defendants. *Id.,* pp. 12-13 (dkt. 383 at PDF pp. 68-69 out of 153).

In exchange, Patch agreed to modify its claim. The modifications included the following:

(x) Patch agreed to reduce its claim from $4,006,291.07 (as of June 1, 2020) (*id.,* Ex. 1, p. 4, recital L.) to a New Principal Balance of $3,432,916.07,

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Specifically, this Court ruled that, even if Debtor could assert any un-settled claims, those claims now belong to her chapter 7 estate, not her, and they have been waived and forfeited by Debtor's successor in interest, her Chapter 7 Trustee. True, in considering whether to grant leave for Debtor to amend her Complaint, this Court noted that she theoretically *might* be able to assert a partial interest in any such claims, by asserting an exemption in them under California law. But any such hypothetical exemption (if she were to claim it) would appear to be limited to a maximum of $10,275.00 under Cal. Code Civ. P. 703.140(b)(5) (*see* dkt. 546 at PDF p. 23), and it would cost her far more to litigate such claims than the theoretical (and very unlikely) $10,275.00 potential recovery (in other words, the present value of her remote chances of success on such claims was far less than the present value of what she would have to pay to litigate them, so from a financial standpoint she has no reason to pursue such claims). Therefore, it appears that her only purpose in seeking leave to amend her claims would be to harass, cause unnecessary delay, or needlessly increase the cost to Defendants of her litigation against them. *See* Rule 9011 (Fed. R. Bankr. P.). This Court concluded that, even under the liberal standards for amending complaints, an amendment could not be permitted when Debtor could not articulate any proper purpose for it.

In contrast, in this adversary proceeding, Debtor's father (Plaintiff) *might* have much more at stake than $10,275.00 (this Court does not know whether, if his claims had any merit, he could seek substantially greater damages). Therefore, although this Court certainly questions whether his claims are presented for anything but improper purposes of harassment, delay, and needless increase in the costs of litigation, this Court does not rely on that ground in ruling (below) that he is not granted leave to amend his FAC.

[3] The RJN includes copies of various documents, but the page numbers are obscured on some papers, so for ease of reference this Court generally refers to the docket and page numbers of the original documents as filed in this bankruptcy case, rather than the copies attached to the RJN.

plus a reserve then held by Defendants of $73,200.00 (*id.,* p. 7, para. 4.a.),

(y) Patch agreed to apply that $73,200.00 reserve to the first three new monthly payments of $21,455.73 and some smaller obligations (*id.,* p. 8, para. 4.d.), and

(z) Patch agreed to additional terms including a new interest rate, a new default rate, and a new maturity date of April 1, 2021 (*id.,* p. 8, para. 4.b.), with a conditional waiver of the $60,000.00 extension fee for that new maturity date provided that certain Conditions for Waiver of Extension Fee were satisfied, including remaining current. *Id.,* p. 9, para. 4.f.

This agreement was modified by four addenda to become the Final Modification Agreement, which Debtor incorporated into her proposed Plan (the "Final Settlement," dkt. 313). The fourth addendum includes an even broader release than the original agreement, by expanding the scope of Debtor's releases to include any claims related to the "CARES" Act. *See* dkt. 383, Ex. 1, p. 6, para. 6.d (at PDF p. 28 of 153).

The Plan, accompanied by a disclosure statement, was served on all creditors, including Plaintiff's predecessor in interest, Mr. Haycock. Mr. Haycock did not object to confirmation of the Plan (which incorporated the Final Settlement). In fact, he voted in favor of it. *See* Ballot Summary (dkt. 330), p. 2:17 & Ex. 1 at PDF p. 16.

On February 11, 2021, this Court issued an order confirming the Plan and approving the Final Settlement (the "Confirmation Order," dkt. 390, para. 20). This Court expressly relied on Debtor's January 12, 2021 statement and declaration in support of the Plan. *Id.,* p. 2:6-8 (relying on dkt. 369). Debtor did not, at that time, mention any concerns or alleged fraud in connection with the Final Settlement or confirmation of the Plan (nor did Mr. Haycock ever raise any such concerns).

On February 26, 2021, fifteen days after the Confirmation Order was issued, Debtor filed her declaration confirming that all preconditions had been satisfied "such that the Final Modification Agreement is effective." Aarons Decl. (dkt. 402), p. 2:10-11.

In other words, she agreed that she had released Defendants (and that, in reliance on those releases, their claim had been reduced).

Debtor also reaffirmed her intention "to proceed with take-out financing to implement the Plan." *Id.,* p. 2:12-13. But thereafter no take-out financing occurred, and she does not deny that meanwhile she failed to make any of the new monthly payments to which she had agreed.

Thereafter, this Court converted the case to chapter 7 on October 18, 2021. *See* Order (dkt. 464). On January 1, 2022, Plaintiff acquired Mr. Haycock's junior lien on the Property. Adv. dkt. 16, p. 4:22-5:4.

On March 30, 2022, the Property was sold at a nonjudicial foreclosure sale.

2. PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff's FAC alleges that the foreclosure sale was "wrongful and illegal," for broadly two reasons, either one of which purportedly renders the sale void. FAC (adv. dkt. 16). First, the FAC alleges that (a) Patch did not have the power to foreclose because previously it had transferred its lien to Invictus Residential Pooler Trust 3A ("Invictus") and (b) the various alleged transfers of the lien were improper because they lacked the correct endorsements or assignments. *Id.*, p. 7:6-10. These allegations are referred to herein as the "Chain Of Title" assertions.

Second, the FAC alleges that Defendants violated California Civil Code section 2924.11(b)(2) by failing to cancel the foreclosure sale after receiving Debtor's "unconditional offer to tender the <u>full</u> payoff" of the first lien by providing "written proof of funds of $5,000,000 from Simon Mundy." *Id.,* pp. 7:11-8:18 (emphasis added). The allegation of a "full" payoff appears to rest on the FAC's allegation that Defendants' June 15, 2020 notice of default was "false and fraudulent" because the "amount owed is overstated by hundreds of thousands of dollars in fees, interest and late charges that should not have been calculated <u>based on the February 15, 2019 payment of $73,200.00</u>." *Id.* p. 8:21-26 (emphasis added).

The FAC does not include any allegations addressing how any claims relating to this $73,200.00 payment could continue to exist, when they had been settled as part of the Final Settlement and confirmation of the Plan. Plaintiff implicitly relies on Debtor's allegations of some sort of unspecified fraud in connection with the Final Settlement.

In any event, whether or not this Court's attempt to discern the FAC's opaque assertions is accurate, Plaintiff's overall assertion in the FAC is that Defendants wrongfully failed to accept what he alleges was a correct payoff amount under their contractual obligations with Debtor. These allegations are referred to herein as the "Payoff Amount" assertions.

Based on the foregoing allegations, the FAC asserts two claims. One is for wrongful foreclosure. The other is that the "foreclosure sale was an unfair business practice under the Unfair Competition Law, Business & Professions Code sections 17200, *et seq.,* because the defendants did not have the right to foreclose." *Id.* p. 9:8-14.

3. JURISDICTION, AUTHORITY, AND VENUE

This Bankruptcy Court has jurisdiction, and venue is proper, under 28 U.S.C. §§ 1334, 1408, and 1452. The FAC "does not concede that this Court has subject matter jurisdiction over this action." FAC (adv. dkt. 16), p. 6:6-10. But this Bankruptcy Court concludes that the FAC's claims are squarely within this Court's retention of jurisdiction to interpret and enforce the Plan. *See* Confirmation Order (dkt. 390), p. 11:24-26 (retention of jurisdiction over any "proceedings, whether or not commenced or contemplated as of the Effective Date, regarding the implementation, interpretation, or enforcement of this Plan or the administration of the bankruptcy case or estate"); Plan (dkt. 313), p. 7 (same). *See also* § 1141(a) (with inapplicable exceptions, "the provisions of a confirmed plan bind the debtor, … [and] any creditor, … whether or not such [person] has accepted the plan").

That said, there is a distinction between (a) the broad statutory grant of jurisdiction and (b) whether this Bankruptcy Court has authority to enter a final judgment

or order (generally for so-called "core" matters), as distinguished from making proposed findings of fact and conclusions of law to be reviewed by the District Court (generally for so-called "non-core" matters). *See In re AWTR Liquidation, Inc.*, 547 B.R. 831 (Bankr. C.D. Cal. 2016) (Bason, J.) (discussing *Stern v. Marshall*, 131 S.Ct. 2594 (2011)); *and see In re Deitz*, 469 B.R. 11 (9th Cir. BAP 2012) (same). Plaintiff has not expressly declined to consent to entry of any final judgment or order by this Bankruptcy Court (*see* Status Report (adv. dkt. 32), p. 4), but he has demanded a jury trial (FAC, adv. dkt. 16, p. 6:11-14), so implicitly he has not consented to entry of any final ruling and therefore this Bankruptcy Court must address its authority to issue any final ruling on the MTD. *See AWTR Liquidation*, 547 B.R. 831, 836.

The short answer is that, regardless whether any given proceeding is "core" or "noncore" under the statute and the U.S. Constitution, this Bankruptcy Court can issue final rulings on pretrial matters that do not require findings on disputed factual issues (*i.e.,* factual issues that would not have to go to a jury), including claim-dispositive motions such as the MTD. *See AWTR Liquidation,* 547 B.R. 831, 839 (citing authorities). Alternatively, this Bankruptcy Court respectfully concludes that the matters to be adjudicated under the MTD are indeed "core" matters, so it is not necessary to burden an Article III Court with *de novo* adjudication of the findings of fact and conclusions of law addressed in this Memorandum Decision.[4]

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[4] There are two components to determining whether a matter is "core" or "non-core." First, there is a statutory component under 28 U.S.C. §§ 157(b) and 1334. Second, there are limitations under the U.S. Constitution, as set forth in *Stern,* 131 S.Ct. 2594.

(1) Statutory analysis

On the one hand, the FAC involves claims by one non-debtor against other non-debtors, so there are serious questions whether the matters raised by the FAC and the MTD are only "related to" this bankruptcy case and hence "non-core" – as distinguished from "arising under" the Bankruptcy Code or "aris[ing] in" this case (within the meaning of 28 U.S.C. § 1334), which would make the matters "core." *See AWTR,* 547 B.R. 831, 833-35. On the other hand, it is difficult to conceive of matters that would be more central to this bankruptcy case than the FAC's attempts to disregard Patch's chain of title, and the validity, priority, and dollar amount of its claims, all of which were established by the Final Settlement that was incorporated into the Plan and that was the lynchpin of the Plan and this Court's Confirmation Order. All of that strongly suggests that the matters in dispute are "core."

This Bankruptcy Court concludes that matters to be decided under the FAC and the MTD are statutorily "core" because: (i) the FAC challenges the validity, priority, and extent of the liens asserted by Defendants against the subject Property (28 U.S.C. § 157(b)(2)(K)); (ii) the FAC asserts fraud in connection with the settlement that forms

Notwithstanding the foregoing, if any court with jurisdiction over these matters were to conclude in future that this Bankruptcy Court lacks authority to enter any final ruling on the MTD, this Bankruptcy Court requests that this Memorandum Decision be deemed to be proposed findings of fact and conclusions of law for *de novo* review by an Article III Court.

4. DISCUSSION

This Court has reviewed the FAC (adv. dkt. 16), the MTD (adv. dkt. 26), Plaintiff's opposition papers (adv. dkt. 26), and Defendants' reply papers (adv. dkt. 37), and has heard oral argument and offers of proof or representations of counsel at the above-captioned hearing. For the reasons set forth below, the MTD will be granted and the FAC will be dismissed by separate order, without leave to amend.

a. Legal Standards

The parties' briefs summarize the legal standards applicable to the MTD, so this Court will only note key legal principles here. First, this Court generally must accept all factual allegations as true and draw all reasonable inferences in the light most favorable to the plaintiff. *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005). But to "survive a motion to dismiss, a complaint must contain sufficient factual matter,

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the heart of the Plan, and thus concerns "confirmations of plans" (28 U.S.C. § 157(b)(2)(L)); and (iii) more generally, the FAC concerns "the administration of the estate" and is a proceeding "affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship," within the meaning of 28 U.S.C. § 157(b)(2)(A) and (O), because the FAC's claims are inextricably intertwined with the Plan preparation and confirmation process presided over by this Bankruptcy Court (and which could not have been presided over by any nonbankruptcy court). *See generally, e.g., In re Harris,* 590 F.3d 730, 738-41 (9th Cir. 2009) (debtor's state law breach of contract action, against bankruptcy trustee and other estate representatives, was "core" proceeding under "catchall" provisions of 28 U.S.C. § 157(b)(2)(A) and (O)).

(2) Constitutional authority

In the view of this Bankruptcy Court, the statutory authority to issue final judgments or orders is not superseded by any limitations under the U.S. Constitution. For one thing, it is impossible to untangle the settlement/Plan that allowed Patch's claim against the bankruptcy estate (in a reduced dollar amount) from the FAC's claims that Patch's chain of title and the dollar amounts included in its claim are wrong and fraudulent. The allowance of Patch's (reduced) claim, and settlement of disputes as to that claim, were the lynchpin of the settlement/Plan and of this Court's order confirming the Plan, which is binding on all creditors, including Haycock and Plaintiff as Haycock's successor in interest. *See* § 1141(a). Therefore, the FAC's claims were "necessarily" resolved as part of the "claims allowance process," and are part of "determining the parties' hierarchically ordered claims to a *pro rata* share of the bankruptcy *res,*" which is an alternative basis that the Supreme Court has articulated for final adjudication by the bankruptcy courts. *See Stern,* 131 S.Ct. 2594, 2618; *AWTR Liquidation,* 547 B.R. 831, 834-37.

accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (emphasis added) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when a court can draw a reasonable inference that the defendant is liable for misconduct. *Id.*

Second, fraud must be alleged with particularity. "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud and mistake." Rule 9(b) (Fed. R. Civ. P.) (incorporated by Rule 7009, Fed. R. Bankr. P.) (emphasis added). A complaint alleging fraud must "identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false." *Davidson v. Kimberly-Clark Corp.,* 889 F.3d 956, 964 (9th Cir. 2018) (citation and internal quotation marks omitted, emphasis added).

Plaintiff asserts that he does not always need to allege fraud with particularity. He argues that, if he is given leave to amend his FAC, he could assert a claim for cancellation of instrument and, supposedly,

> fraud in the context of a cancellation of instrument cause of action need not be pled specifically; general allegations of fraud are sufficient to allege the invalidity of an instrument. *See Larkin v. Mullen,* 128 Cal. 449, 453-454 (Cal. 1900); *see also Campbell v. Genshlea,* 180 Cal. 213, 218 (Cal. 1919)." [Opp. To MTD (adv. dkt. 36), at PDF p. 6:22-26 (emphasis added).]

Plaintiff is being disingenuous. The holding in *Larkin* is exactly the opposite of what he asserts. In that case the Supreme Court of California held that fraud was "defectively alleged" but evidence of fraud was "introduced without any objection thereto" and "received by the court with his consent" so it was "too late" to object "after verdict" to "the defective allegations in the complaint, which, if he had pointed them out by specific demurrer before the trial, or by objections to the evidence at the trial, might have been obviated by amendment." *Larkin,* 128 Cal. 449, 453 (citations omitted).[5]

[5] Plaintiff is cautioned that disingenuous arguments may lead to sanctions. More generally, this Court has serious questions whether Plaintiff's claims are being advanced in good faith, and are not being advanced to harass Defendants, cause unnecessary delay in their disposition of the Property, or needlessly increase the cost of litigation.

Similarly, in *Campbell* the court held:

> Where, as in this case, the pleadings allege fraud in general terms and the parties go to trial without special objection to the allegation of facts and circumstances constituting the fraud, such infirmity of the complaint may not be successfully urged on appeal. [*Campbell,* 180 Cal. 213, 218 (emphasis added).]

In sum, Defendants' assertion that they need not plead fraud with particularity are specious. (In addition, Defendants have not addressed on what theory they could disregard a federal rule, in favor of a State rule, as to the requirements for a pleading to withstand a motion to dismiss.)

b. Defendants' request for Judicial Notice

Defendants filed a request for judicial notice of a number of documents from the bankruptcy case in chief and related adversary proceedings. *See* MTD (adv. dkt. 26), PDF pp. 29-507 & Reply (adv. dkt. 37), PDF pp. 9-40. That request for judicial notice is granted.

As a general rule, a court "may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (citation omitted). But a court may consider documents, even if they are not attached to the complaint, if the documents' "authenticity … is not contested" and the "plaintiff's complaint necessarily relies" on them. *Id.* (citations omitted, emphasis added).

In this instance, the "Chain Of Title" allegations in the FAC "necessarily rel[y]" on the documents transferring Patch's DOT and promissory note, and Plaintiff has not challenged the authenticity of those documents. Likewise, the "Payoff Amount"

As discussed below, the FAC's Chain of Title allegations appear to have been abandoned, and it is not apparent how they ever had any evidentiary support or were likely to have any such support after an opportunity for further investigation or discovery. Likewise, the FAC's Payoff Amount allegations appear to rely entirely on dollar amounts that were resolved by the Final Settlement and are binding on all creditors, including Plaintiff, because they were incorporated into the confirmed Plan.

To be clear, any issue of sanctions is not presently before this Court, and all rights are reserved. This Court only seeks to give fair warning to Plaintiff about the possible consequences of advancing arguments that do not appear to be made in good faith.

allegations in the FAC "necessarily rel[y]" on the dollar amounts agreed to in the Final Settlement and incorporated into the Plan, and Plaintiff has not challenged the authenticity of those documents.

Alternatively, a court may take judicial notice of "matters of public record" under Rule 201 (Fed. R. Evid.); *see also Reed v. Wilmington Trust, N.A.,* 2016 U.S. Dist. LEXIS 72792, at *6 (N.D. Cal. June 3, 2016) (citations omitted) ("The Court can take judicial notice of the existence of public records or court documents, but it may not take judicial notice of disputed facts in those documents"). Matters of public record include court filings, deeds of trust, assignments of deed of trust, notices of default, substitutions of trustee, notices of trustee's sale. *Santana v. BSI Fin. Servs., Inc.,* 495 F.Supp.3d 926, 936 (S.D. Cal. 2020) (citations omitted).

In this instance, judicial notice is appropriate as to the assignments of the DOT, because they are recorded documents and the Chain of Title allegations assert that the *undisputed* contents of those documents are insufficient, in some unspecified way, to establish a chain of title for foreclosure. In other words, this Court is not taking judicial notice of any *disputed* facts.

Likewise, the Final Settlement, the Plan, and this Court's Confirmation Order are all subject to judicial notice, and their establishment of Patch's claim is a legal consequence of those documents, not an assertion of a disputed fact. Put differently, the FAC does not allege any *disputed* facts regarding the contents of those documents, so it is appropriate for this Court to take judicial notice of their contents regarding the validity, extent, and dollar amount of Patch's claims as established by Debtor's Final Settlement and this Court's Confirmation Order. *See* § 1141(a) (binding effect of confirmed plan on all creditors, whether or not they have accepted it).

Additionally and alternatively, Plaintiff's opposition papers neither argue nor cite any legal authority that this Court cannot take judicial notice of these documents. Therefore he has waived and forfeited any arguments to the contrary. *See In re Hamer*, 138 S.Ct. 13, 17 n.1 (2017) (distinguishing forfeiture and waiver).

Alternatively, this Court would reach the same conclusions even without such judicial notice, because Plaintiff lacks standing; the FAC's allegations are conclusory; and to the extent the FAC asserts fraud, it does not plead fraud with particularity.

c. Plaintiff lacks standing

As a preliminary matter, this Court must address whether Plaintiff has standing. As of the above-captioned hearing, this Court had not yet concluded that Plaintiff lacks standing, but on further reflection this Court is persuaded that no basis has been cited to expand standing to the factual situation alleged in the FAC. *See generally In re White Crane Trading Co.,* 170 B.R. 694, 700-01 (Bankr. E.D. Cal. 1994) (trial court's freedom to revise its thinking).

Plaintiff asserts that he has an independent right to bring an action against Defendants because his lien was wiped out by Defendants' purportedly illegal and wrongful foreclosure sale. FAC, p. 9:1-4 & Opp (adv. dkt. 36), p. 2:14-19. He relies on *Bank of Seoul & Trust Co. v. Marcione*, 198 Cal.App.3d 113, 118 (1988). Opp (adv. dkt. 36), p. 2:14-19.

Defendants contend that the holding in *Bank of Seoul & Trust Co.* is narrow and distinguishable because that case involved an action brought by a junior lienholder based on allegations that the foreclosing trustee ignored its attempts to bid at the foreclosure sale. Reply (adv. dkt. 37), p. 4:12-20. Defendants instead rely on *Friery v. Sutter Buttes Sav. Bank,* 61 Cal.App.4th 869, 878 (1998), in support of their contention that Plaintiff assumed the risks inherent to a junior position, including a foreclosure sale, and must now accept the consequences.

This Court believes these two cases can be reconciled as follows. The usual rule under California law is that, absent a contractual relationship between a junior and senior lienholder, the former takes its interest subject to the risks that the latter might foreclose, and the latter has no contractual duty or tort duty to the former regarding the foreclosure, as held in *Friery*. If Plaintiff had alleged that he was *directly* injured by Defendants – *e.g.,* if he attempted to bid at the foreclosure sale and his bid was ignored

(as in *Bank of Seoul*) – that would give Plaintiff standing to sue. But the FAC does not include any such allegations, nor does the Opposition assert that he could add such allegations if he were given leave to further amend the FAC.

Theoretically, Plaintiff might even have standing to sue Defendants under some other "extraordinary" expansion of the usual rules (to quote *Friery*'s term) if there were any allegations in the FAC analogous to *Bank of Seoul* or any other authority establishing a contractual or tort duty running from a senior lienholder to a junior lienholder. But Plaintiff has not pointed to any such authority, nor is this Court aware of any.

Of course, this Court recognizes that as a practical matter junior lienholders sometimes have better resources and incentives than property owners to fight a wrongful foreclosure. For example, there might be enough equity above the senior lien to give the junior lienholder an incentive to oppose foreclosure, but not enough to give the property owner any net equity worth saving.

But the remedy in that situation is for the junior lienholder to bid at the foreclosure sale, or to pursue legal remedies under any *recognized* contractual or tort duties under all the facts and circumstances – *e.g.,* if there were an intercreditor agreement. But Plaintiff has not alleged any facts, or cited any laws or doctrines, that would establish any *duty* running from Defendants to him, in the circumstances of this case. Nor is this Court persuaded that the facts alleged in the FAC would convince the California Supreme Court to recognize an extraordinary contractual or tort duty running from a senior lienholder to a junior lienholder in these circumstances. *Cf., e.g., Jenkins v. JPMorgan Chase Bank, N.A.,* 216 Cal.App.4th 497, 503, 505 (2013) (rejecting borrower's claim, *inter alia,* to be third party beneficiary of pooling and servicing agreement between lienholder and its investors).

In sum, Plaintiff has not established that he has standing. Alternatively, this Court concludes below that his claims fail on the merits.

d. Plaintiff's Chain of Title allegations in the FAC are (i) conclusory, (ii) flatly contradicted by the documents on which it relies, and (iii) immaterial

Plaintiff alleges that (x) Patch did not have the power to authorize or prosecute the foreclosure sale because it previously transferred its lien to Invictus and (y) the various alleged transfers of the lien were improper because they lacked the correct endorsements or assignments. FAC (adv. dkt. 16), p. 7:6-10. These assertions are not sufficient for three alternative reasons.

First, this Court need not accept as true Plaintiff's bare, conclusory allegations that Patch lacked the authority to foreclose or that there were some undisclosed defects in the assignment. Plaintiff has failed to allege any facts to support these Chain of Title allegations and, despite the opportunity in the Opposition and at oral argument to suggest how the FAC might be further amended to include anything more than conclusory allegations, he has not done so.

Second, the FAC's allegations are flatly contradicted by the documents on which it relies. This Court can take judicial notice of the August 11, 2021 Notice of Default ("NOD"), which is a matter of public record, on which the FAC necessarily relies, whose authenticity has not been disputed. That NOD does not support the allegations in the FAC that the wrong entity foreclosed.

The FAC alleges:

> POL [aka Patch] did not have the power to authorize or prosecute the foreclosure sale because it no longer owned first lien. Instead, ownership of the lien, which was necessary to the foreclosure, was transferred to [subsequent lienholders]. [FAC (adv. dkt. 16), p. 7:6-9]

But, as Defendants state, Patch/POL never purported to prosecute any foreclosure after it transferred its DOT:

> Plaintiff advances a transparently disingenuous argument that *POL* did not have the authority to proceed with foreclosure of the Property. This argument appears to be based on the fact that POL (not [subsequent lienholder] VERUS) is listed as the original beneficiary on the Deed of Trust referenced in the NOS. However, a plain reading of the NOS shows

> that the reference to POL is merely a recitation of the original beneficiary on the Deed of Trust (POL). This is done to make it clear as to the document that is being foreclosed upon, specifically the POL Deed of Trust. Plaintiff is surely aware of this and is just grasping at straws or did not take the time to read the document itself.

This Court has reviewed the NOD, and it fully support's Defendants' argument. The NOD very clearly shows that Verus Securitization Trust 2020-NPL1, the holder of the lien at the time of foreclosure, was the foreclosing party – not Patch/POL. *See* MTD (adv. dkt. 26, RJN # 12, PDF p. 345 ("Wilmington Savings Fund Society, FSB, Not in its individual capacity but solely as owner Trustee for Verus Securitization Trust 2020-NPL1") (MTD, adv. dkt. 26, RJN # 12, PDF p. 345) (emphasis added).

Likewise, with respect to the FAC's other Chain of Title allegations, this Court can take judicial notice of the relevant deeds of trust and allonge (MTD, adv. dkt. 26, RJN # 1 (PDF pp. 34-97), RJN # 2 (PDF pp. 101-107), RJN # 3 (PDF pp. 109-111)), which are matters of public record, as well as documents on which the FAC necessarily relies and the authenticity of which is not in dispute. So far as this Court can tell there is nothing wrong with those documents.

In other words, even if the FAC's allegations were not conclusory (which they are) they are not plausible, because the very documents on which those allegations necessarily rely flatly contradict those allegations. Plaintiff's Opposition papers offer no explanation, and no suggestion how the FAC could be further amended to cure these defects.

Third, even if there were some defect in the Chain of Title (which is not supported in any way by the FAC or Plaintiff's Opposition), Plaintiff has failed to respond to Defendants' arguments and citations (MTD, adv. dkt. 26, pp. 2:27-28 & 11:20-21) that Plaintiff has not suffered any prejudice by any such defect (beyond his conclusory allegation that he was prejudiced). Opp (adv. dkt. 36), p. 4:4-21. In other words, supposing for the sake of discussion that there were some technical deficiency in the foreclosure process – *e.g.,* if the NOD were off by a few dollars – Defendants have cited authority that this is insufficient to make the foreclosure void (*e.g.,* if Debtor had no hope

of curing the defaults anyway, then a purported error in the dollar amounts would be irrelevant, under the authority cited by Defendants). Plaintiff's failure to respond to that argument constitutes a waiver and forfeiture of any contrary arguments. *See Hamer,* 138 S. Ct. 13, 17 n.1.

In sum, the FAC's assertions of some sort of Chain of Title defects are conclusory; alternatively they are flatly contradicted by the documents on which the FAC necessarily relies; and alternatively any supposed defects (were they to exist) would have to be shown to have caused some prejudice, which Plaintiff has not addressed at all. Given Plaintiff's lack of even colorable support for these allegations in his Opposition papers, these Chain of Title allegations appear to be nothing more than frivolous and blatant attempts to sow confusion where there is none.

e. The FAC's Payoff Amount claims were resolved by confirmation of Debtor's chapter 11 plan

The FAC alleges that Defendants' June 15, 2020 notice of default ("NOD") was "false and fraudulent" because the "amount owed is overstated by hundreds of thousands of dollars in fees, interest and late charges that should not have been calculated based on the February 15, 2019 payment of $73,200.00." *Id.* p. 8:21-26.

First, any alleged fraud must be pled with particularity. As noted above, complaint alleging fraud must "identify the who, what when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false. *Davidson,* 889 F.3d 956, 964 (citation and internal quotations marks omitted, emphasis added). None of this is provided in the FAC. For example, how is the amount overstated? Precisely how much is it overstated by? How is the Final Settlement's resolution of the $73,200.00 dispute not binding? How are the Plan, this Court's Confirmation Order, and § 1141(a) (binding effect of plan) not applicable? Plaintiff offers no hint, let alone a proposed amendment to his FAC that would address these issues.

Second, Defendants highlight that the June 15, 2020 NOD referenced in the FAC was rescinded (MTD, adv. dkt. 26, p. 14:1-36 & RJN, # 11, PDF pp. 339-340). Plaintiff's only response is that, in the context of a motion to dismiss, his allegations must be taken as true and, alternatively, that he should be granted leave to amend the FAC to reference the correct NOD. Opposition (adv. dkt. 36), p. 5:6-8.

As to the first argument, this Court is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *See, e.g., In re Gilead Scis. Sec. Litig.,* 536 F.3d 1049, 1056-57 (9th Cir. 2008); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Additionally, as a matter of public record, this Court may take judicial notice of Defendants' Notice of Recission of June 15, 2020 Notice of Default. MTD, RJN # 11 (PDF pp. 339-340). Based on such review, it is clear Plaintiff's arguments concerning any alleged deficiencies with that rescinded NOD are moot.

As to the second argument, there is also no basis to grant leave to amend because even if Plaintiff were given leave to amend the FAC to reference the correct NOD that Defendants issued on August 11, 2021 (RJN, # 12, PDF pp. 342-345), which this Court takes judicial notice of, Plaintiff has not suggested any amendment that would state a plausible claim for relief in view of this Court's approval of the Final Settlement and confirmation of the Plan. *See* dkt. 383 & dkt. 390, p. 5, n. 3. Those documents, the authenticity of which Plaintiff does not dispute and of which this Court also takes judicial notice, had the effect of resolving all pre-confirmation disputes relating to Debtor's default.

Plaintiff vaguely argues in his opposition papers that the amounts set forth in the Final Settlement, and approved by the Confirmation Order, are not binding because the chapter 11 plan was never fully consummated and therefore does not constitute a settlement. Opp. (adv. dkt. 36), p. 5:9-27. But the cases on which Plaintiff relies are entirely different. In both cases, defendants who were being sued by a chapter 7 trustee for recovery of preferential payments asserted that claims against them had

been settled by confirmation of a chapter 11 plan, and the courts rejected that broad an interpretation of the plan and the law under the specific language of the plans in those cases. *In re RJW Lumber Co.,* 262 B.R. 91, 92-93 (Bankr. N.D. Cal. 2001); *In re Silver Mill Frozen Foods, Inc.,* 23 B.R. 179, 182-83 (Bankr. W.D. Mich. 1982).

Plaintiff cites no authority that Debtor's own breach of her Plan could revive claims that Debtor released in that Plan. Such a conclusion would make all settlements meaningless because they would be terminable at will by the settling party, by choosing not to perform.

In other words, Plaintiff's argument is frivolous. He has failed to explain how he could plausibly assert that the Plan is not an enforceable settlement despite Debtor's own declaration that the Plan had become effective, this Court's Confirmation Order, and the binding effect of the confirmed Plan on Debtor and all creditors, including Plaintiff, under § 1141(a). Aarons Decl. (dkt. 402), p. 2:10-11.

Alternatively, Plaintiff is judicially estopped from challenging the binding nature of the Plan. As Defendants highlight (Reply, adv. dkt. 37, pp. 7:9-8:7), Plaintiff is bound by the positions taken by its predecessor in interest which successfully argued in separate litigation before this Court that the Plan was *res judicata* and cannot be collaterally attacked. *Id.* & RJN # 2 (PDF pp. 28-33), RJN # 3 (PDF pp. 35-40).

f. The FAC does not state a plausible claim for relief under HBOR section 2924.11

Effectively as part of the Payoff Allegations, Plaintiff alleges that Defendants violated the Homeowner's Bill of Rights ("HBOR") by failing to cancel the foreclosure sale after receiving Debtor's "unconditional offer to tender the full payoff" of the first lien by providing "written proof of funds of $5,000,000 from Simon Mundy." *Id.,* pp. 7:11-8:18.

HBOR requires lenders to give defaulting borrowers "a meaningful opportunity to obtain … available loss mitigation options, if any, offered through the borrower's

mortgage servicer, such as loan modification or other alternatives to foreclosure." Cal. Civ. Code § 2923.4. Section 2924.11(b)(2) of the HBOR provides:

> (b) If a foreclosure prevention alternative is approved in writing after the recordation of a notice of default, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of sale or conduct a trustee's sale under either of the following circumstances:
>
> …
>
> (2) A foreclosure prevention alternative has been approved in writing by all parties, including, for example, the first lien investor, junior lienholder, and mortgage insurer, as applicable, and proof of funds or financing has been provided to the servicer. [Cal. Civ. Code § 2924.11(b)(2) (emphasis added)]

First, as Defendants correctly point out, Plaintiff does not meet the statutory definition of a borrower with standing to assert a claim under the HBOR. *See* MTD (adv. dkt. 26), pp. 12:15-13:2. A "borrower" is "any natural person who is a mortgagor or trustor and who is potentially eligible for any federal, state, or proprietary foreclosure prevention alternative program offered by, or through, his or her mortgage servicer." Cal. Civ. Code § 2920.5(c)(1). Plaintiff was not the mortgagor or trustor under the subject deed of trust, so he lacks standing to assert claims for violation of HBOR. *See e.g., Lindberg v. Wells Fargo Bank, N.A.,* 2015 U.S. Dist. LEXIS 32120, at * 17 (N.D. Cal. Mar. 13, 2015) ("[O]nly 'borrowers' have HBOR standing"); *Austin v. Ocwen Loan Servicing, Ltd., Liab. Co.,* 2014 U.S. Dist. LEXIS 105885, at *5 (E.D. Cal. July 31, 2014) ("because Plaintiff is not the borrower, she is not the real party in interest for her HBOR claim [under Cal. Civ. Code § 2924.11] and this cause of action is dismissed on standing grounds"). Plaintiff has failed to cite this Court to any authority to the contrary.

Second, on the merits, Plaintiff has failed to state a plausible claim for relief under section 2924.11(b)(2) because he has failed to allege that Defendants provided the necessary written approval of Debtor's alleged offer to cure. (In fact, according to Defendants' uncontroverted assertions, there was no such approval.)

Third, Plaintiff's FAC necessarily relies on an email from Simon Mundy ("Mundy Email") that provided "written proof of funds" establishing Debtor's ability to pay

Defendants' claim in full. FAC, p. 7:11-13. Neither party has contested the authenticity of those documents, so this Court may consider those documents in connection with this MTD. *See Lee*, 250 F.3d at 688 (court may consider documents not attached to the complain if the documents' authenticity is not contested and plaintiff's complaint necessarily relies on them). Alternatively, Plaintiff has waived and forfeited any objection to this Court's consideration of these documents.

These documents directly contradict Plaintiff's conclusory allegation that Debtor provided an "unconditional offer to tender the full payoff." FAC, p. 7:11-13. The offer was neither "unconditional" nor enough for a "full" payoff.

The prospective refinance was subject to several conditions, including the "release [of] all claims against lienholders," the "release [of] all claims against trustee," and the requirement that Debtor "obtain court approval for the assignment of debt." MTD, (adv. dkt. 26), Ex. 1, PDF pp. 24-25. The FAC does not allege that these other conditions were met.

Similarly, those documents contradict Plaintiff's conclusory allegation that Debtor's offer to tender was for the "full" payoff amount. The estimated refinance statement shows an estimated "Payoff of First Mortgage Loan" of $3,500,000.00. *Id.* PDF p. 27. But this Court takes judicial notice that this $3.5 million dollar amount is the approximate total under the Final Settlement ***if*** Debtor had made timely monthly payments and refinanced on the schedule set forth in that Final Settlement, and it is undisputed that Debtor failed to do those things. Therefore, Debtor's "offer" to tender $3.5 million was not a sufficient dollar amount to stop the foreclosure sale, unless this Court were to assume that the debt did not increase ***at all*** over the many months of delays before the foreclosure sale, which is not plausible given the accruing interest, default interest, attorney fees, the addition of the $60,000.00 amount that was only to be waived if Debtor met her settlement obligations, and other charges under the Final Settlement.

g. The FAC does not plausibly allege any violations of the unfair competition law

The FAC's second claim alleges unspecified violations of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq*., on the basis that Defendants engaged in "unfair business practice" because Defendants "did not have the right to foreclose as alleged above." FAC, p. 9:8-14. The UCL prohibits any "unlawful, unfair or fraudulent business act or practice." UCL § 17200. Defendants argue that Plaintiff has failed to plead a cognizable UCL claim. MTD (adv. dkt. 26), p. 15:1-19 (PDF p. 18).

The only "unlawful," "unfair," or "fraudulent" conduct on which the FAC appears to rely is the allegedly wrongful foreclosure or purported violation of the HBOR that this Court has already rejected (above). Nor does the FAC point to any other laws or public policy expressed by the California legislature that would make Defendants' acts or omissions "unfair," and "Courts may not simply impose their own notions of the day as to what is fair or unfair." *Scripps Clinic v. Superior Court*, 108 Cal.App.4th 917, 938 (Cal. Ct. App. 2003). Therefore, the FAC has not stated a plausible claim for relief under the UCL, nor does Plaintiff's Opposition suggest any amendment to the FAC that would cure this defect.

h. It is inappropriate to grant leave to amend

Plaintiff requests leave to amend his FAC to "add more facts to the existing causes of action" and "plead additional claims, including alleging a cause of action for Cancellation of Instrument." Reply (adv. dkt. 36), p. 6:10-15. But his Opposition papers fail to suggest any facts or causes of action that would cure the defects in the FAC.

Although leave to amend should be "freely" granted "when justice so requires," (Rule 15(a)(2). Fed. R. Civ. P., incorporated by Rule 7012), denying leave to amend is appropriate where amendment would be futile. *See, e.g., Gompper v. VISX, Inc.,* 298 F.3d 893, 898 (9th Cir. 2002) (citation omitted). Plaintiff has not even hinted at any

actual allegations he could make to support his vague assertions of "fraud" or "wrongful" foreclosure, nor has he pointed to any claims that might be viable.

It would be particularly inappropriate to impose more delay and expense on Defendants in the circumstances of this case: *i.e.,* to require them to respond to some unknown future allegations and claims that might be asserted by Plaintiff but that he cannot or will not disclose now. As noted above, Plaintiff has made specious factual assertions – *e.g.,* that Patch was the entity foreclosing, when simply reading the NOD would show that Patch was not – and disingenuous arguments – *e.g.,* that a claim for cancellation of instrument need not plead fraud with particularity. Leave to amend is only appropriate "when justice so requires" (Rule 15(a)(2)), and justice does not require leave to continue abusive litigation.

5. CONCLUSION

Inordinate amounts of time and money have been spent in this case litigating and re-litigating specious allegations and disingenuous arguments. Debtor's former bankruptcy counsel was able, against all odds, to delay the foreclosure of her home by many, many months and negotiate the Final Settlement, obtain creditors' support for the Plan incorporating that settlement, and obtain this Court's Confirmation Order making that settlement binding on all of Debtor's creditors (and on Debtor herself). Debtor persuaded creditors and this Court that her Plan was feasible (§ 1129(a)(11)), and that she realistically could and would refinance the Property, pay Patch's reduced claim in accordance with the Final Settlement. When she failed to do that, she had additional extensions of time to accomplish it. She was unable or unwilling to do so, and eventually the Property was foreclosed.

Now Debtor and her father (the Plaintiff in this adversary proceeding) have brought multiple actions in State Court, which have been removed to this Bankruptcy Court, that seek yet more bites at the apple. Through their lawyers, they have made specious factual allegations and disingenuous arguments.

They allege "fraud" without explaining anything about the purported fraud, and when challenged they disingenuously argue that no particularity is needed – *i.e.,* they can simply say "fraud" and the litigation must go forward, no matter what delay and expense to Defendants. This Court does not interpret the law to permit such abuse.

This Court is gravely concerned that Debtor and her father are either litigating these matters for improper purposes, such as needlessly increasing the litigation expense of Defendants, or else they have been deluded into believing that they have claims when none have been shown to exist, or both. But those are issues that might be addressed another day. For now, the motion before this Court is the MTD.

This Court will issue a separate order implementing this Memorandum Decision by granting Defendants' MTD, and dismissing the FAC. Such dismissal will be without leave to file any further amended complaint.

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Date: August 17, 2022

Neil W. Bason
United States Bankruptcy Judge