

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

CIVIL MINUTES – GENERAL

Case No. SACV 17-0337-DOC (JEM)

Date: April 7, 2017

Title: AMANY SIMMONDS V. WELLS FARGO BANK, N.A. ET AL.

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Dwayne Roberts
Courtroom Clerk

Not Present
Court Reporter

ATTORNEYS PRESENT FOR
PLAINTIFF:
None Present

ATTORNEYS PRESENT FOR
DEFENDANT:
None Present

**PROCEEDINGS (IN CHAMBERS): ORDER GRANTING
DEFENDANT’S MOTION TO
DISMISS [7]; DENYING
PLAINTIFF’S MOTION TO
REMAND [12]**

Before the Court are Defendant’s Motion to Dismiss (“MTD”) (Dkt. 7), and Plaintiff’s Motion to Remand (“MTR”) (Dkt. 12). The Court finds these matters appropriate for resolution without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. After reviewing the moving papers and considering the parties arguments, the Court GRANTS Defendant’s Motion to Dismiss TD and DENIES Plaintiff’s Motion to Remand.

I. Background

A. Facts

The Court adopts the facts as set out in Plaintiff’s Complaint (“Complaint”) (Dkt. 1-1) and the documents attached to Defendant’s Request for Judicial Notice (“RJN”) (Dkt. 8).

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On March 16, 2007, Plaintiff Amany Simmonds (“Plaintiff”) took out a \$626,400.00 loan (the “Loan”) from an investor through World Savings Bank, FSB (“WSB”) for her residence located at 11 Style Drive, Aliso Viejo, California (the “Property”). Compl. ¶¶ 1, 3. A promissory note (“Note”) and Deed of Trust were executed the same day. *Id.* ¶ 3.

On December 31, 2007, WSB was acquired by Wachovia Mortgage, FSB (“Wachovia”). *Id.* ¶ 8. In August 2009, Plaintiff attempted to obtain a modification or forbearance on her Loan. *Id.* ¶ 9.

On November 1, 2009, Wachovia was acquired by Defendant Wells Fargo Bank, N.A. (“Wells Fargo” or “Defendant”). *Id.*

On April 29, 2010, Plaintiff fell behind on her payments, and Wells Fargo recorded a Notice of Default on Plaintiff’s Property. *Id.* ¶ 10. On September 14, 2010 and December 30, 2011, Wells Fargo recorded Notices of Trustee Sale, but both sales was subsequently cancelled. *Id.* From August 2009 to December 2011, Plaintiff allegedly asked Wells Fargo to show her the original Note on her Loan several times, but Wells Fargo failed to produce it. *Id.* ¶ 11.

At the time Plaintiff borrowed the loan, Plaintiff was on disability and earned approximately \$700 per week, but on the loan application WSB stated that Plaintiff earned about \$150,000 per year. *Id.* ¶ 4. Plaintiff’s Loan was a “pick-a-payment” loan, which meant she would be able to pick which payment she wanted to make each month. *Id.* However, Plaintiff allegedly was not told that as a result of the payment plan she selected, her balance was negatively amortized—meaning the total amount due on the loan increased. *Id.* ¶ 5.

Plaintiff filed an action against Wells Fargo on August 22, 2012 in the Superior Court of California for the County of Orange. *See* RJN Ex. E. It was subsequently removed to the Central District of California, *see Amany Simmonds v. Wells Fargo Bank, NA*, No. 13-00294-JVS (RNBx) (C.D. Cal. Apr. 2, 2013), and the court dismissed the case on April 2, 2013. *See id.* Ex. F.

In December 2016, Plaintiff became aware of a Settlement Agreement between Wells Fargo and the State of California that required Wells Fargo to grant loan modifications to home owners who received a “pick-a-payment” loan from WSB. Compl. ¶ 5. Wells Fargo never offered this loan modification to Plaintiff. *Id.*

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B. Procedural History

Plaintiff filed this suit in the California Superior Court for the County of Orange on January 30, 2017 (“Notice of Removal”) (Dkt. 1). Wells Fargo removed the action to the Central District of California on February 27, 2017. Plaintiff brings the following claims: (1) fraud, (2) breach of settlement agreement, (3) cancellation of foreclosure instruments, (4) wrongful foreclosure, and (5) declaratory relief. *See* Compl.

On March 3, 2017, Wells Fargo filed the instant Motion to Dismiss and a Request for Judicial Notice (“RJN”) (Dkt. 8). Plaintiff opposed on March 16, 2017 (“MTD Opposition”) (Dkt. 11). No reply brief was filed.

On March 16, 2017, Plaintiff filed the instant Motion to Remand. Wells Fargo opposed on March 24, 2017 (“MTR Opposition”) (Dkt. 14). No reply brief was filed.

II. Legal Standard

A. Motion to Remand

“If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” 28 U.S.C. § 1447(c). Removal of a case from state court to federal court is governed by 28 U.S.C. § 1441, which provides in pertinent part that “any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . . to the district court of the United States for the district and division embracing the place where such action is pending.” The removing defendant must file a notice of removal in the appropriate United States District Court, together with all process, pleadings, and orders served upon the defendant. 28 U.S.C. § 1446(a). Notice of removal must be filed within thirty days of receiving a copy of the original complaint, or “within 30 days after the service of summons upon the defendant, if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.” 28 U.S.C. § 1446(b). Remand may be ordered for lack of subject matter jurisdiction or any defect in the removal procedure. 28 U.S.C. § 1447(c).

To protect the jurisdiction of state courts, removal jurisdiction should be strictly construed in favor of remand. *Harris v. Bankers Life and Cas. Co.*, 425 F.3d 689, 698 (9th Cir. 2005) (citing *Shamrock Oil & Gas Corp. v. Sheet*, 313 U.S. 100, 108–09 (1941)). If there is any doubt as to the right of removal in the first instance, remand must be ordered. *See Ethridge v. Harbor House Rest.*, 861 F.2d 1389, 1393 (9th Cir. 1988).

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B. Motion to Dismiss

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a plaintiff's allegations fail to set forth a set of facts which, if true, would entitle the complainant to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (holding that a claim must be facially plausible in order to survive a motion to dismiss). The pleadings must raise the right to relief beyond the speculative level; a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 268 (1986)). On a motion to dismiss, a court accepts as true a plaintiff's well-pleaded factual allegations and construes all factual inferences in the light most favorable to the plaintiff. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). The court is not required to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678.

Dismissal with leave to amend should be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2). This policy is applied with "extreme liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (holding that dismissal with leave to amend should be granted even if no request to amend was made). Courts consider four factors in determining whether to grant leave to amend: (1) undue delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposing party. *Webb*, 655 F.2d at 980 (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

III. Request for Judicial Notice

Courts may "properly consider exhibits attached to the complaint and documents whose contents are alleged in the complaint but not attached, if their authenticity is not questioned." *Okla. Firefighters Pension & Ret. Sys. v. IXIA*, 50 F. Supp. 3d 1328, 1348 (C.D. Cal. 2014) (citing *Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001)). Under Federal Rule of Evidence 201, a court may also take judicial notice of matters of public record. *Lee*, 250 F.3d at 689. In addition, judicial notice is appropriate for information obtained from government websites, *see Paralyzed Victims of Am. v. McPherson*, No. C 06-4670, 2008 WL 4183981, at *5 (N.D. Cal. Sept. 8, 2008), as well as copies of official acts or records of departments of the United States. *See Hite v. Wachovia Mortg.*, No. 2:09-cv-02884-GEB-GGH, 2010 U.S. Dist. LEXIS 57732, at *6 (E.D. Cal. June 10, 2010) (collecting cases).

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Because all of the documents attached to Wells Fargo's RJN fall into the above categories, the Court GRANTS Wells Fargo's Request for Judicial Notice.

IV. Analysis

A. Motion to Remand

Plaintiff moves to remand back this case state court, arguing that it was improperly removed. MTR at 2.

Wells Fargo removed this action from the California Superior Court based on diversity jurisdiction because "the citizenship of the parties is entirely diverse and the amount in controversy exceeds \$75,000." Removal at 2. Plaintiff is a citizen of California. *Id.* at 3. "[A] national bank, for § 1348 purposes, is a citizen of the State in which its main office, as set forth in its articles of incorporation, is located." *Wachovia Bank v. Schmidt*, 546 U.S. 303, 306–07 (2006). Thus, Wells Fargo is a citizen of South Dakota because that is where its main office is located. *Id.* at 4.

Plaintiff moves to remand this case on the basis that none of her claims contain a federal question. MTR at 5. However, as noted above, Wells Fargo removed this action based on diversity, not on the basis of federal question jurisdiction. Because diversity jurisdiction is proper, the Court DENIES Plaintiff's Motion to Remand.

B. Motion to Dismiss

Wells Fargo moves to dismiss all of Plaintiff's causes of action.

1. *Res Judicata*

Wells Fargo first moves to dismiss Plaintiff's claims on the basis of *res judicata*. MTD at 3. "*Res judicata* applies when the earlier suit: (1) reached a final judgment on the merits; (2) involved the same cause of action or claim; and (3) involved identical parties or privies." *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 962 (9th Cir. 2006) (quoting *Sidhu v. Flecto Co., Inc.*, 279 F.3d 896, 900 (9th Cir. 2002)).

a. Final Judgment on the Merits

Plaintiff filed a lawsuit against Wells Fargo in August 2013. RJN Ex. E. After the lawsuit was removed to the Central District of California, the court dismissed it with prejudice. RJN Ex. F. "A dismissal with prejudice has *res judicata* effect" and "bars any further action between the parties on the issues subtended by the case." *In re Marino*, 181

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F.3d 1142, 1144 (9th Cir. 1999). Therefore, Plaintiff’s prior action against Wells Fargo ended with a final judgment on the merits.

b. Same Cause of Action

For *res judicata* to apply, the issues in the prior adjudication must be identical to the issues raised in the present action. Whether there is an identity of claims depends on four factors, the last of which is the most important:

- (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action;
- (2) whether substantially the same evidence is present in the two actions;
- (3) whether the two suits involve infringement of the same right; and
- (4) whether the two suits arise out of the same transactional nucleus of facts.

Costantini v. Trans World Airlines, 681 F.2d 1199, 1201–02 (9th Cir. 1982), *cert. denied*, 459 U.S. 1087 (1982).

“Whether two suits arise out of the same transactional nucleus depends on whether they are related to the same set of facts and whether they could conveniently be tried together.” *ProShipLine Inc. v. Aspen Infrastructures Ltd.*, 609 F.3d 960, 968 (9th Cir. 2010). In most cases, “the inquiry into the ‘same transactional nucleus of facts’ is essentially the same as whether the claim could have been brought in the first action.” *United States v. Liquidators of European Fed. Credit Bank*, 630 F.3d 1138, 1151 (9th Cir. 2011). A plaintiff need not bring every possible claim. *Turtle Island Restoration Network v. U.S. Dept. of State*, 673 F.3d 914, 918 (9th Cir. 2012). But where claims arise from the same factual circumstances, a plaintiff must bring all related claims together or forfeit the opportunity to bring any omitted claim in a subsequent proceeding. *Id.*

Wells Fargo argues that the claims in Plaintiff’s Complaint could have been raised in the prior action because they are based on the same facts. Mot. at 3. A claim arises from a different transactional nucleus of facts where the later claim alleges “new injuries caused by new acts” of the defendant. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1076 (9th Cir. 2003). Plaintiff alleges she was not aware until December 2016 that Wells Fargo entered into a settlement agreement with the State of California or that WSB had overstated her income to qualify her for the Loan. Compl. ¶ 5. The prior case was dismissed on April 1, 2013, which is more than three years before Plaintiff allegedly became aware of these facts. *See* RJN Ex. F. Thus, Plaintiff has alleged new facts.

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Further, Plaintiff alleges new injuries. In Plaintiff's prior action, she requested injunctive relief, a temporary restraining order against a foreclosure sale, and damages of \$626,400 plus interest. RJN Ex. E at 22. Here, based on the new facts, Plaintiff requests the Court to quiet title and to cancel all Notices of Default and Notices of Trustees Sales. Compl. at 12. Therefore, the Court finds that Plaintiff's claims arise from a different transactional nucleus of facts.

Accordingly, the Court finds that *res judicata* does not bar the instant action.

2. Judicial Estoppel

Next, Wells Fargo argues that Plaintiff is judicially estopped from asserting her claims because she failed to disclose them in her bankruptcy proceeding. Mot. at 4.

Judicial estoppel works to bar the assertion of inconsistent positions. *See Hamilton State Farm Fire & Cas. Co.*, 270 F.3d 778, 783 (9th Cir. 2001). "In the bankruptcy context, a party is judicially estopped from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure statements." *Id.* (citing *Hay v. First Interstate Bank of Kalispell, N.A.*, 978 F.2d 555, 557 (9th Cir. 1992) (failure to give notice of a potential cause of action in bankruptcy schedules and disclosure statements estops the debtor from prosecuting that cause of action)). Judicial estoppel will be imposed when the debtor "has knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy, but fails to amend his schedules or disclose statements to identify the cause of action as a contingent asset." *Hamilton State Farm Fire*, 270 F.3d at 784.

Here, Plaintiff most recently filed for bankruptcy on January 7, 2015. RJN Ex. G. Plaintiff did not list any of these claims in her bankruptcy schedule. *See id.* Ex. G. "[A] debtor has no duty to schedule a cause of action that did not accrue prior to bankruptcy." *Cusano v. Klein*, 264 F.3d 936, 947 (9th Cir. 2001). However, the claims Plaintiff brings in this action accrued before January 7, 2015, which is when Plaintiff filed for bankruptcy. Further, in regards to the information she discovered in 2016, Plaintiff could have amended her bankruptcy schedule to disclose her newly discovered cause of action when she filed this case because her bankruptcy is still pending. *See In re Amany Simmonds*, No. 8:15-bk-10083 (C.D. Cal. Mar. 16, 2017); *see also Hamilton State Farm Fire*, 270 F.3d at 784. Therefore, the Court finds that Plaintiff's claims are barred by judicial estoppel.

Accordingly, the Court GRANTS Wells Fargo's Motion to Dismiss and DISMISSES WITHOUT PREJUDICE the entirety of Plaintiff's claims.

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V. Disposition

For the foregoing reasons, the Court DENIES Plaintiff's Motion to Remand and GRANTS Defendant's Motion to Dismiss.

Plaintiff may file an amended complaint **on or before May 1, 2017**.

The Clerk shall serve this minute order on the parties.

MINUTES FORM 11
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Initials of Deputy Clerk