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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA

6 **ARKETHA MUNIR,**

7 Plaintiff,

8 v.

9 **THE BANK OF NEW YORK MELLON AS**
10 **TRUSTEE,**

11 Defendant.

Case No. 14-cv-05073-YGR

ORDER GRANTING MOTION TO DISMISS
WITHOUT LEAVE TO AMEND

Re: Dkt. No. 17

12 On March 11, 2015, defendant Bank of New York Mellon as Trustee filed a motion to
13 dismiss based on res judicata, arguing the claims asserted in this action are barred by a prior state
14 court judgment in a case involving the same parties. (Dkt. No. 17 (“Mot.”).)¹ Plaintiff Arketha
15 Munir opposed the motion. (Dkt. No. 22 (“Oppo.”).)²

16 Having carefully considered the papers submitted,³ the record in this case, and good cause
17 shown, the Court hereby **GRANTS** the motion to dismiss **WITHOUT LEAVE TO AMEND**.

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20 ¹ The Court notes that two former defendants initially joined in the motion, but the plaintiff
21 subsequently filed a notice of voluntary dismissal as to those entities. (Dkt. No. 35.) Having
22 failed to address, in opposing their motion to dismiss, why the complaint should not be dismissed
23 against those two entities, the plaintiff nevertheless did not move to dismiss them from the case
until the Court ordered supplemental briefing on the question. (Dkt. No. 30.) Similarly, three
other former defendants filed a separate motion to dismiss that was rendered moot by the plaintiff
thereafter filing a notice of voluntary dismissal. (Dkt. No. 34.)

24 ² Finding the motion suitable for decision without oral argument, the Court vacated the
25 hearing pursuant to Civil Local Rule 7-1(b) and Federal Rule of Civil Procedure 78. (Dkt. No.
37.)

26 ³ In connection with its motion, the defendant filed a request for judicial notice of certain
27 publicly recorded documents connected to the subject property and documents from the record in
the related state case. (Dkt. No. 18 (“RJN”).) The Court **GRANTS** the unopposed request pursuant
28 to Federal Rule of Evidence 201. “[A] court may take judicial notice of ‘matters of public
record.’” *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).

1 **I. FACTUAL AND PROCEDURAL BACKGROUND**

2 **A. The State Court Action**

3 On September 5, 2014, the plaintiff filed a complaint in the California Superior Court,
4 County of San Francisco, asserting causes of action for: (1) violations of California Civil Code
5 section 2934a; (2) violation of Civil Code section 2924(a)(6); (3) wrongful foreclosure; and (4)
6 breach of the covenant of good faith and fair dealing. (RJN, Ex. 17 (“State Court Complaint”).)⁴
7 Generally, the complaint centered on allegations of wrongful conduct in connection with events
8 leading up to a mortgage foreclosure, including purportedly inadequate notice of a substitution of
9 trustee in 2008.

10 Relevant to the instant motion, the State Court Complaint included the following
11 allegations:

- 12 • “. . . Plaintiff is informed and believes, and thereon alleges that Defendant THE
13 BANK OF NEW YORK MELON FKA THE BANK OF NEW YORK AS
14 TRUSTEE FOR THE CERTIFICATE HOLDERS OF CWMBS INC., CHL
15 MORTGAGE PASS-THROUGH TRUST 2003-58, MORTGAGE PASS-
16 THROUGH CERTIFICATES, SERIES 2003-58 purportedly received all beneficial
17 interest under the original Deed of Trust through an [*sic*] ‘Corporation Assignment
18 of Deed of Trust/Mortgage’ which was signed by Defendant BANK OF
19 AMERICA N.A. on November 20, 2013 [and] recorded November 27, 2013 as
20 instrument number 20139J79879500001 in the Official Records of San Francisco
21 County California.” (State Court Complaint ¶ 11.)
- 22 • “Plaintiff is informed and believes that when the Defendants securitized their note
23 into the Trust, they [*sic*] did not receive any notice, in direct violation of the Truth
24 in Lending Act.” (*Id.* ¶ 23.)
- 25 • “Defendants breached [the covenant of good faith and fair dealing] by breaching

26
27 ⁴ The state case was brought against the single defendant remaining in this case (Bank of
28 New York Mellon as Trustee), as well as other defendants who were originally named in the
instant action but have since been voluntarily dismissed.

1 TILA (see cause of action number one above) and not informing the Plaintiff that
2 the Loan was sold, thus depriving Plaintiff of the opportunity to negotiate with their
3 [sic] creditor.” (*Id.* ¶ 122.)

4 • “The gravamen of Plaintiffs’ [sic] complaint is that Defendants are attempting to
5 foreclose without any legal authority or standing to do so, and in violation of State
6 and Federal laws which were specifically enacted to protect consumers such as
7 Plaintiffs [sic] from the type of abusive, deceptive, and unfair conduct in which
8 Defendants engaged, which are detailed herein, by failing to follow the procedures
9 prescribed by such laws to foreclose.” (*Id.* ¶ 118.)

10 On January 29, 2015 judgment was entered in the state action in favor of the defendants.
11 (RJN, Ex. 19.)

12 **B. The Instant Case**

13 On November 17, 2014, the plaintiff initiated this action in federal court. (Dkt. No. 1.)
14 The First Amended Complaint, filed on February 26, 2015, asserts causes of action for violation
15 of: (1) the Truth in Lending Act (“TILA”), 15 U.S.C. § 1641(g), and (2) California’s Unfair
16 Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.* (“UCL”). (Dkt. No. 14 (“FAC”).)

17 The relevant allegations as to the remaining defendant in this case, The Bank of New York Mellon
18 as Trustee, are as follows:

19 • “Plaintiff is informed and believes, and thereon alleges that Defendant THE BANK
20 OF NEW YORK MELLON FKA THE BANK OF NEW YORK AS TRUSTEE
21 FOR THE CERTIFICATE HOLDERS OF CWMBBS INC., CHL MORTGAGE
22 PASS-THROUGH TRUST 2003-58, MORTGAGE PASS-THROUGH
23 CERTIFICATES, SERIES 2003-58 purportedly received all beneficial interest
24 under the original Deed of Trust through an [sic] ‘Corporation Assignment of Deed
25 of Trust/Mortgage’ which was executed by Defendant BANK OF AMERICA N.A
26 on November 20, 2013 [and] recorded November 27, 2013 as instrument number
27 20139J79879500001 in the Official Records of San Francisco County California.”
28 (FAC ¶ 6.)

- 1 • “[The defendant] had the responsibility of notifying the borrower of the acquisition
2 on or before December 20, 2013, within 30 days after transfer.” (*Id.* ¶ 17.)
- 3 • “Plaintiff never received any notices from [the defendant], let alone notices which
4 complied with the specific (a) through (g) requirements of [TILA] 15 U.S.C.
5 1641(g).” (*Id.* ¶ 19.)
- 6 • “In the instant matter, Plaintiff did not discover the violation of 15 U.S.C § 1641(g)
7 until she obtained legal counsel who discovered that the Loan had been assigned,
8 shortly prior to filing the Original Complaint on or about November 17, 2014.” (*Id.*
9 ¶ 20.)
- 10 • The defendant “violated 15 U.S.C. §1641(g) and is subject to statutory damages,
11 civil liability, penalties, attorneys’ fees and actual damages pursuant to 15 U.S.C.
12 §1640.” (*Id.* ¶ 23.)
- 13 • “Actual damages [for the TILA violation] include but are not limited to the over
14 calculation and overpayment of interest on the Loan, the cost of repairing
15 Plaintiff’s credit, costs associated with removing the cloud on property title, loss of
16 equity, and attorneys’ fees and costs, and any amount to be proven at trial.” (*Id.* ¶
17 24.)
- 18 • The defendants violated the UCL by engaging “in deceptive business practices by
19 attempting to collect on a debt without awaring Plaintiff of the true creditor such
20 that she could enact all remedies against the proper entity” and for failing to give
21 notice pursuant to the TILA. (*Id.* ¶¶ 27-29.)

22 II. LEGAL STANDARD

23 “Federal Rule of Civil Procedure 8(a)(2) requires only a ‘short and plain statement of the
24 claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of
25 what the claim is and the grounds upon which it rests.’” *Bell Atlantic Corp. v. Twombly*, 550 U.S.
26 544, 554 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). Even under the liberal pleading standard of
27 Rule 8(a)(2), “a plaintiff’s obligation to provide the grounds of his entitlement to relief requires
28 more than labels and conclusions, and a formulaic recitation of the elements of a cause of action

1 will not do.” *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)
2 (internal brackets and quotation marks omitted)). The Court will not assume facts not alleged, nor
3 will it draw unwarranted inferences. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (“Determining
4 whether a complaint states a plausible claim for relief [is] a context-specific task that requires the
5 reviewing court to draw on its judicial experience and common sense.”).

6 Pursuant to Rule 12(b)(6), a complaint may be dismissed for failure to state a claim upon
7 which relief may be granted. Dismissal for failure to state a claim under Federal Rule of Civil
8 Procedure 12(b)(6) is proper if there is a “lack of a cognizable legal theory or the absence of
9 sufficient facts alleged under a cognizable legal theory.” *Conservation Force v. Salazar*, 646 F.3d
10 1240, 1242 (9th Cir. 2011) (citing *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
11 1988)). The complaint must plead “enough facts to state a claim [for] relief that is plausible on its
12 face.” *Twombly*, 550 U.S. at 570. A claim is plausible on its face “when the plaintiff pleads
13 factual content that allows the court to draw the reasonable inference that the defendant is liable
14 for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. If the facts alleged do not support a
15 reasonable inference of liability, stronger than a mere possibility, the claim must be dismissed. *Id.*
16 at 678-79; *see also In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (the court is
17 not required to accept as true “allegations that are merely conclusory, unwarranted deductions of
18 fact, or unreasonable inferences”). The Court also “need not . . . accept as true allegations that
19 contradict matters properly subject to judicial notice or by exhibit” attached to the complaint.
20 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (citation omitted).

21 **III. DISCUSSION**

22 **A. Legal Framework**

23 Res judicata, or claim preclusion, operates to bar subsequent litigation “whenever there is
24 (1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between
25 parties.” *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (internal
26 quotations omitted). “California, as most states, recognizes that the doctrine of res judicata will
27 bar not only those claims actually litigated in a prior proceeding, but also claims that *could have*
28 *been litigated.*” *Castle v. Mortgage Elec. Registration Sys., Inc.*, CV 11-00538, 2011 WL

1 3626560 (C.D. Cal. Aug. 16, 2011) (citing *Palomar Mobilehome Park Ass'n v. City of San*
2 *Marcos*, 989 F.2d 362, 364 (9th Cir. 1993)) (emphasis supplied); *see also Pey v. Wachovia Mortg.*
3 *Corp.*, CV 11-2922, 2011 WL 5573894, * 8 (N.D. Cal. Nov. 15, 2011) (res judicata bars “any
4 subsequent suit on claims that . . . could have been raised in a prior action.”) (citing *Cell*
5 *Therapeutics, Inc. v. Lash Group, Inc.*, 586 F.3d 1204, 1212 (9th Cir. 2010)). If the claims arise
6 out of the “same transactional nucleus of fact” as litigated in the prior matter res judicata precludes
7 re-litigating those claims. *Int'l Union v. Karr*, 994 F.2d 1426, 1430 (9th Cir. 1993). Pursuing new
8 legal theories does not create a new cause of action sufficient to avoid res judicata. *Boateng v.*
9 *Interamerican Univ., Inc.*, 210 F.3d 56, 62 (1st Cir. 2000). Res judicata “has the dual purpose of
10 protecting litigants from the burden of relitigating an identical issue with the same party or his
11 privy and of promoting judicial economy by preventing needless litigation.” *Parklane Hosiery*
12 *Co. v. Shore*, 439 U.S. 322, 326 (1979). Because “[r]es judicata prevents litigation of all grounds
13 for, or defenses to, recovery that were previously available to the parties, regardless of whether
14 they were asserted or determined in the prior proceeding[, it] thus encourages reliance on judicial
15 decisions, bars vexatious litigation, and frees the courts to resolve other disputes.” *Brown v.*
16 *Felsen*, 442 U.S. 127, 131 (1979).

17 **B. Analysis**

18 The Court addresses the three prongs—(1) identity of claims, (2) final judgment on the
19 merits, and (3) identity of the parties—in turn to determine whether res judicata precludes the
20 instant action.

21 **1. Identity of Claims**

22 First, the plaintiff argues that the adjudicated state claims are not “identical” to the claims
23 at issue here, and therefore that the first prong necessary for application of res judicata does not
24 apply. However, as noted above, the claims themselves need not be “identical,” so long as they
25 arise out of the same transactional nucleus of fact and are claims that could have been raised in the
26 prior action. *See also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d
27 1064, 1078 (9th Cir. 2003) (“Newly articulated claims based on the same nucleus of facts may still
28 be subject to a res judicata finding if the claims could have been brought in the earlier action.”);

1 *Rodriguez v. Bank of New York Mellon*, No. 13CV1830, 2014 WL 229274, at *6 (S.D. Cal. Jan.
2 17, 2014) (applying res judicata under the “primary rights” theory where both suits alleged
3 wrongful conduct in connection with a foreclosure, including “defects in the loan documents and
4 securitization process”).

5 **a. Count One: TILA**

6 As to the TILA claim, the plaintiff correctly notes that the present suit is focused on “the
7 fact that Plaintiff’s Loan was sold/transferred on November 20, 2013” to the defendant and that
8 the defendant failed to provide the statutorily required written notice within 30 days. (Oppo. at 2-
9 3.)

10 Allegations regarding the November 20 transfer and failure of notice in violation of TILA
11 were also included in the state complaint. (*See, e.g.*, State Court Complaint at ¶¶ 11, 23.)
12 Additionally, while the state complaint’s first count for a failure of notice (under state law, but
13 also referred to in the state complaint as a violation of TILA) specifically references a different
14 defendant’s conduct, it also incorporates by reference its allegations regarding the sole remaining
15 defendant in the instant action. The state complaint also generally alleged wrongful foreclosure
16 based on a number of procedural issues, including in connection with the transfer of the loan to the
17 defendant. (*See, e.g.*, State Court Complaint at ¶¶ 118.)

18 Moreover, the FAC alleges the damages at issue in connection with the TILA violation go
19 beyond the statutory damages available under that statute to also include “the over calculation and
20 overpayment of interest on the Loan, the cost of repairing Plaintiff’s credit, costs associated with
21 removing the cloud on property title, [and] loss of equity” (FAC ¶ 24.) This theory of
22 damages ties directly to the ramifications of the purported actions of the defendants as alleged in
23 the state action.

24 “Even though different legal claims were raised in the state court case, [the plaintiff] seeks
25 a remedy for the same injury in both cases—in essence, a wrongful foreclosure.” *See Prado v.*
26 *Quality Loan Serv. Corp.*, No. C-13-4536, 2014 WL 46634, at *1 (N.D. Cal. Jan. 6, 2014) (“[A]
27 judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury
28 to the same right, *even though he presents a different legal ground for relief.*”). The Court finds

1 that the allegations that support the TILA claim were generally present in the state complaint; the
2 TILA claim arises out of the “same transactional nucleus of fact” as the state court action; and the
3 TILA claim “could have been raised in [the] prior action.”

4 **b. Count Two: UCL**

5 As to the UCL claim, it is premised upon the purported TILA violation and unspecific
6 allegations of “deceptive business practices” (FAC ¶ 26) similar to the allegations of “abusive,
7 deceptive, and unfair conduct” alleged in the state court complaint (State Court Complaint ¶ 118).
8 Thus, the UCL claim also arises from the same nucleus of facts and could have been raised in the
9 prior action.

10 In opposing the motion, the plaintiff does not explain why both of these claims could not
11 have been brought in the earlier case.⁵ Instead, the plaintiff mistakenly suggests the standard for
12 identity of claims requires that the claims previously decided be “identical” to those in the pending
13 case. As noted above, this is not so. As pled, the operative complaint in this case seeks largely
14 the same relief sought in the prior action. Consequently, this case is barred by the judgment in
15 that case if the remaining prongs necessary for the application of res judicata are satisfied.

16 **2. Final Judgment on the Merits and Identity of the Parties**

17 The plaintiff apparently does not contest the second (final judgment on the merits) and
18 third (identity of the parties) prongs. The Court finds that a final judgment issued in the state case.
19 (RJN, Ex. 19.) Finally, the state case involved the same plaintiff and the same defendant (among
20 others). Thus, res judicata applies to bar the present suit.⁶

21 **C. Leave to Amend**

22 Leave to amend is liberally granted. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Chodos v.*

23
24 ⁵ The FAC states that plaintiff “did not discover the violation of 15 U.S.C § 1641(g) until
25 she obtained legal counsel who discovered” the assignment. (FAC ¶ 20.) This does not create an
26 exception to the application of res judicata. *See Janson v. Deutsche Bank Nat’l Trust Co.*, No. 14-
27 CV-05639, 2015 WL 1250092, at *9 (N.D. Cal. Mar. 18, 2015) (“[T]he test is not whether
28 Plaintiff actually knew of the claims while the state case was pending; it is whether he could have
known of the claims.”).

⁶ In light of this finding, the Court need not reach the defendant’s alternative arguments for
dismissal of Count II (UCL Violation).

1 *West Pub. Co.*, 292 F.3d 992, 1003 (9th Cir. 2002). One exception to this general rule of
2 permissiveness, however, is where amendment would be futile. *Foman*, 371 U.S. at 182; *Smith v.*
3 *Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1101 (9th Cir. 2004). The plaintiff has failed to
4 identify other facts or theories that would avoid application of res judicata and justify granting
5 leave to amend. It would be futile to grant leave to amend under these circumstances.

6 **IV. CONCLUSION**

7 For the foregoing reasons, the Court **GRANTS** the defendant's motion to dismiss **WITHOUT**
8 **LEAVE TO AMEND**. The defendant shall submit a proposed form of judgment, approved as to form
9 by the plaintiff, within five (5) business days of the date of this Order.

10 This Order terminates Docket Number 17.

11 **IT IS SO ORDERED.**

12 Dated: May 22, 2015

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14 YVONNE GONZALEZ ROGERS
15 UNITED STATES DISTRICT COURT JUDGE
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