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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DONNA BERNARDI, an individual, and
SMITESH MAHENDRA PARMAR, and
individual,

Plaintiffs,

v.

DEUTSCHE BANK NATIONAL TRUST
COMPANY AMERICAS AS TRUSTEE;
AURORA LOAN SERVICES, LLC;
AURORA BANK FSB; and Does 1-10,
inclusive,

Defendants.

Case No. C-11-05453-RMW

**ORDER GRANTING-IN-PART AND
DENYING-IN-PART DEFENDANTS'
MOTION TO DISMISS PARMAR'S
FIFTH CLAIM FOR RELIEF**

[Re Docket No. 31]

On February 18, 2013, Deutsche Bank National Trust Company Americas as Trustee ("Deutsche Trustee"), Aurora Loan Services, LLC (purported assignee of plaintiffs' note and deed of trust) ("Aurora LLC"), and Aurora Bank FSB ("Aurora Bank") (purported servicer of the plaintiffs' mortgage loan) ("Aurora Bank") (collectively "defendants") moved to dismiss plaintiff Smitesh Mahendra Parmar's ("Parmar") fifth cause of action on the basis of claim preclusion. Dkt. No. 31. Having considered the papers submitted by the parties and the arguments of

1 counsel, and for the reasons set forth below, this court GRANTS-IN-PART and DENIES-IN-
2 PART defendants' motion to dismiss.

3 I. BACKGROUND

4 This case arises from plaintiffs Donna Bernardi ("Bernardi") and Parmar's mortgage loan
5 transaction with SCME Mortgage Bankers, Inc. ("SCME") to acquire residential property located
6 in Felton, California. A detailed description of the facts can be found in the court's January 15,
7 2013 order on defendants' first motion to dismiss ("January 15 Order"). Dkt. No. 29. Relevant to
8 the present motion, plaintiffs executed a promissory note in favor of SCME in the amount of
9 \$436,000, secured by a deed of trust naming plaintiffs as the borrowers, SCME as the lender, and
10 Mortgage Electronic Registration Systems Inc. ("MERS") as the nominee and beneficiary. In
11 2007, SCME ceased business operations. On October 13, 2009, a notice of default on plaintiffs'
12 loan was recorded in the Santa Cruz County Recorder's Office, signed by Quality Loan Service
13 Corporation. On November 5, 2009, a substitution of trustee ("2009 Substitution of Trustee")
14 was recorded, signed by Debra Dente as Vice President of MERS, purporting to substitute
15 Quality Loan Service Corporation as trustee under plaintiffs' deed of trust. On August 1, 2011, an
16 assignment of the deed of trust ("2011 Assignment of Deed of Trust") was recorded, executed by
17 Stacy Sandoz as Vice President of MERS. The 2011 Assignment of Deed of Trust purported to
18 assign and transfer all beneficial interest under the deed of trust to Aurora Loan Services.
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22 In the first amended complaint ("FAC"), plaintiffs asserted five causes of action,
23 including—as relevant here—an action for cancellation of the 2009 Substitution of Trustee and
24 2011 Assignment of Deed of Trust pursuant to California Civil Code § 3412. Plaintiffs argued
25 that these transactions were invalid and void because, at the time they occurred, SMCE had
26 ceased business operations, and the purported "Vice Presidents" signing on behalf of SMCE
27 (Stacy Sandoz for 2011 Assignment of Deed of Trust and Debra Dente for 2009 Substitution of
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1 Trustee) were never employees of MERS and thus lacked authority to sign on its behalf. *See*
2 FAC ¶¶ 25, 40.

3 **A. The January 15 Order**

4 In the January 15 Order, the court dismissed all of plaintiff Bernardi's claims with
5 prejudice because she failed to disclose them when she filed for bankruptcy and thus they were
6 barred. *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 783 (9th Cir. 2001). The
7 court dismissed plaintiff Parmar's first four causes of action, with 20 days leave to amend. Those
8 claims were for: (1) quasi-contract; (2) violation of section 1692e of the Fair Debt Collection
9 Practices Act, 15 U.S.C. § 1692e; (3) violation of section 1641(g) of the Truth in Lending Act, 15
10 U.S.C. § 1641(g); and (4) accounting. The court sustained plaintiffs' fifth cause of action in part
11 for cancellation of the 2009 Substitution of Trustee and 2011 Assignment of Deed of Trust, but
12 dismissed plaintiffs' action to cancel the notice of default, with leave to amend. Instead of
13 amending any claims, on February 4, 2103, Parmar filed a notice of intent to prosecute the
14 surviving claims for cancellation of instruments in the fifth cause of action. Dkt. No. 30. Instead
15 of answering, on February 18, 2013, defendants filed this second motion to dismiss on the basis
16 of claim preclusion following final judgment in *Bernardi v. SCME Mortg.*, No. CISCV170731 in
17 the Santa Cruz Superior Court ("State Court Action").
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20 **B. The State Court Action**

21 On April 4, 2011, Bernardi and Parmar filed an action against SCME, Deutsche Trustee,
22 Aurora Loan Services, and Quality Loan Service Corp. in state court, challenging their right to
23 collect the same mortgage loan that was originally at issue in this suit. Although Aurora Bank
24 was not named in the State Court Action, defendants assert and Parmar does not dispute in its
25 opposition papers that Aurora bank is privy to the other defendants for the purposes of claim
26 preclusion. *See* Defs.' Br. 5 (citing FAC ¶ 43).
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1 On November 17, 2011, the state court issued an order sustaining defendants' demurrer
2 without leave to amend as to the operative, second amended complaint ("State SAC"). On
3 December 22, 2011, the state court entered judgment against plaintiffs, stating: "Defendants'
4 Demurrer is sustained with no leave to amend given." Dkt. No. 32, Ex. 3. On March 9, 2012,
5 the state court served notice of entry of judgment to the parties. *Id.*¹
6

7 After the state court judgment and notice to the parties, on April 24, 2102, defendants
8 filed the first motion to dismiss in this federal action. Dkt. No. 19. Although the state court
9 entered judgment in favor of defendants on almost identical claims, defendants did not raise the
10 State Court Action as a basis for stay or dismissal of this action in the first motion to dismiss.
11 Defendants contend that the state court judgment did not became final until May 8, 2012 (after
12 the deadline to appeal had passed), *see* Cal. Court Rule 8.104 (appeal must be filed within sixty
13 days of the service of "Notice of Entry" of judgment), and thus the defense of claim preclusion
14 was not available when defendants filed the first motion to dismiss. Now that the judgment is
15 final, defendants contend that claim preclusion bars the present claims for cancellation of the
16 2009 Substitution of Trustee and the 2011 Assignment of Deed of Trust because the state court
17 judgment was a final decision against Parmar on those claims.
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21 ¹ At the hearing, plaintiff's counsel referenced a different date sometime in November 2011 for
22 notice of entry of judgment in the State Court Action with respect to the particular defendants in
23 this action. This date is not reflected in the state court docket that is part of the record before this
24 court. All that is reflected in November 2011 is an "order sustaining demurrer without leave to
25 amend," *see* Dkt. No. 31, Ex. 1, which is not a "Notice of Entry" of judgment sufficient to trigger
26 the period to appeal. *See* Cal. Court Rule 8.104. Thus, in determining finality of the state court
27 judgment, the court relies on the date reflected in the record, March 9, 2012. *See* Dkt. No. 31,
28 Exs. 1, 3 (reflecting that "Notice of Entry of Judgment Filed by Deutsche Bank National Trust
Co[]Americas, Aurora Loan Services" was sent on March 9, 2012 and entered into the state court
docket on March 12, 2012). This is also the date defendants appear to have reasonably relied on
in their decision not to assert res judicata in the original motion to dismiss. In any event, the
court's disposition ultimately does not depend on the issue of waiver, so the court's reliance on
this date does not affect the disposition in favor of plaintiff.

1 First, Parmar counters that defendants waived their res judicata defense by failing to raise
2 it in their first motion to dismiss, which they filed over four months *after* the state court entered
3 judgment and over one month after notice of entry of the judgment. Second, even if no waiver
4 occurred, Parmar argues that res judicata does not apply to his claim for cancellation of the 2011
5 Assignment of Deed of Trust² because that claim was not raised, and could not reasonably have
6 been raised, in the State Court Action. To support his argument that the claim could not
7 reasonably have been raised, Parmar relies on: (1) the fact that the 2011 Assignment of Deed of
8 Trust occurred nearly four months after he filed the State Court Action; and (2) the allegation that
9 he was unaware of the Assignment when he filed the State SAC, which he contends was
10 objectively reasonable given the proximity between the two events. Opp. Br. 7. The court
11 addresses waiver and claim preclusion in turn.

12 **B. Waiver of the Defense of Res Judicata**

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14 "Claim preclusion is an affirmative defense which may be deemed waived if not raised in
15 the pleadings." *Clements v. Airport Authority of Washoe Cnty.*, 69 F.3d 321, 328 (9th Cir. 1995).
16 Here, defendants have not filed an answer, but rather raised their claim preclusion defense in the
17 present motion to dismiss. Although res judicata is an affirmative defense that generally must be
18 raised in the pleadings, *see* Rule 8(c), "[a] motion to dismiss predicated on undisputed facts may
19 properly invoke res judicata as a ground for dismissal," *Moralez*, --- F. Supp. 2d. ---, 2012 WL
20 4369603, at *4 (citing *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984)). Plaintiffs argue
21 that, by failing to raise the defense in their first motion to dismiss, defendants waived the defense
22 under Rule 12(g)(2). *See* Rule 12(g)(2) ("[A] party that makes a motion under this rule may not
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26 ² Parmar does not oppose defendants' res judicata argument with respect to the claim for
27 cancellation of the 2009 Substitution of Trustee. The court considers any opposition to dismissal
28 of this claim to be waived, and GRANTS defendants' motion to dismiss this claim.

1 make another motion under this rule raising a defense or objection that was available to the party
2 but omitted from its earlier motion.").

3 **i. Finality for the Purposes of Claim Preclusion under California Law**

4 The general rule under the Restatement (Second) of Judgments is that a judgment
5 is "final" for the purpose of claim preclusion *before* the period to appeal has expired.
6 *Clements*, 69 F.3d at 329 n.7 ("In some jurisdictions, pendency of an appeal precludes a
7 judgment from being considered 'final' for purposes of [the] preclusion doctrine.
8 However, *the general rule is that a judgment may be treated as final for purposes of*
9 *preclusion notwithstanding the fact that it may be subject to reversal on appeal.*" (citing
10 Restatement (Second) of Judgments § 13 comment (f), § 16 comment (a) (1982))
11 (emphasis added)); *Kern Oil & Refining Co. v. Tenneco Oil Co.*, 840 F.2d 730, 735 n.2
12 (Cal. App. 1988) ("[T]wo years after the district court's decision in the [prior action] . . .
13 and immediately after we affirmed the [district court's decision in the prior action],
14 Tenneco moved the court to dismiss Kern's claims on res judicata grounds. *The court*
15 *pointed out that Tenneco had not needed to wait until the appeal of the price case was*
16 *decided to bring up the issue.*" (citing Restatement (Second) of Judgments § 13 comment
17 (f) (1982)) (emphasis added)); *Negrete v. Allianz Life Ins. Co. of North Am.*, 2010 WL
18 4116852, at *6 (C.D. Cal. Aug. 18, 2010) (finding waiver of res judicata where defendants
19 waited until the judgment became "final").

20 The cited cases, however, applied Nevada law (*Clements*), federal law (*Kern Oil*),
21 and Minnesota law (*Negrete*). Here "[w]e [must] look to California law to determine the
22 *res judicata* effect of a California judgment." *Robi v. Five Platters, Inc.*, 838 F.2d 318,
23 323 (9th Cir. 1988). "Unlike the federal rule and that of several states, in California the
24 rule is that the finality required to invoke the preclusive bar of res judicata is not achieved
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1 until an appeal from the trial court judgment has been exhausted or the time to appeal has
2 expired." *Franklin & Franklin v. 7-Eleven Owners for Fair Franchising*, 85 Cal. App. 4th
3 1168, 1174 (2000); *see Clements*, 69 F.3d at 329 n.7 ("Nevada appears to follow the
4 general view—according finality to judgments notwithstanding opportunities to appeal.
5 *See Baker v. Leary*, 70 Nev. 152 (1953) (*contrasting the Nevada and California rules*)."
6 (emphasis added)). Accordingly, defendants are correct that, applying California law, the
7 defense of res judicata was not available until the period for appeal had passed in the State
8 Court Action. Nevertheless, defendants could have waived the defense under federal law
9 if they acquiesced to dual proceedings.³

11 **ii. Waiver Based on Acquiescence to Dual Proceedings**

12 In *Clements*, the Ninth Circuit held that "the failure of the defendant to object to the
13 prosecution of dual proceedings while both proceedings are pending also constitutes waiver [of
14 the claim preclusion defense]." *Id.* (following the Third Circuit, the First Circuit, and the
15 Restatement (Second) of Judgments § 26(1)(a) (1982)). Comment a to Restatement (Second) of
16 Judgments § 26 provides:

18 Where the plaintiff is simultaneously maintaining separate actions based upon
19 parts of the same claim and in neither action does the defendant make the
20 objection that another action is pending based on the same claim, judgment in one
21 of the actions does not preclude the plaintiff from proceeding and obtaining
22 judgment in the other action. The failure of the defendant to object to the splitting
23 of the plaintiff's claim is effective as an acquiescence in the splitting of the claim.

24 In *Clements*, plaintiffs filed dual proceedings in Nevada state court and federal district
25 court for judicial review of their employment terminations (originally reviewed through the

26 ³ The issue of waiver, unlike the issue of the preclusive effect of a judgment, is governed by
27 federal law. *McGinest v. GTE Serv. Corp.*, 247 Fed. Appx. 72, 74 (9th Cir. Aug. 30, 2007) (citing
28 *Clements*, 69 F.3d at 328).

1 Airport Authority's administrative grievance process). *Id.* at 327. The Nevada court first, and
2 then the federal court both entered judgment in favor of defendants. *Id.* In neither case did the
3 defendants assert the other action as a basis for dismissal or stay. *Id.* The plaintiffs appealed both
4 decisions. On appeal, the Ninth Circuit requested briefing on the preclusive effect of the Nevada
5 state judgment. *Id.* The defendants filed supplemental briefs on issue preclusion, but did not
6 raise claim preclusion. *Id.* After oral argument on appeal in the federal forum, the Nevada
7 Supreme Court affirmed the Nevada state decision, and the Ninth Circuit again requested
8 supplemental briefing on the preclusive effect of the Nevada judgment. *Id.* It wasn't until the
9 second round of supplemental briefing that the defendants argued that the entire federal action
10 was barred under the doctrine of claim preclusion. *Id.* In these circumstances, the Ninth Circuit
11 held:
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14 Allowing the defendants to assert claim preclusion at this late stage would work a
15 substantial injustice on the plaintiffs. At the time this federal action commenced,
16 the petition for judicial review was still pending in the state district court. If the
17 defendants had asserted their defense at that time, either by formally objecting to
18 the dual proceedings through a motion to dismiss or by asserting the defense in
19 their responsive pleadings, the plaintiffs would have timely notice of the
20 defendants claim and would have been able to take appropriate action in the state
21 court proceedings Rather than asserting the defense when timely, defendants
22 have waited until *several years* after the original federal complaint was filed.
23 Under *any* generous standard of judicial discretion, this is far too late; and thus, we
24 decline to recognize the defendants' belated assertion of this defense.

25 *Id.* at 329 (emphases in original).

26 Unlike in *Clements*, where the defendants waited "*several years* after the original federal
27 complaint was filed," *Clements*, 69 F.3d at 329, here, defendants asserted their claim preclusion
28 defense in their first filing after the state court judgment became final under California law. *See*
supra Part II.B.i (explaining that, unlike the majority of states and federal law, a California state
court judgment does not have a preclusive affect until after the period to appeal has elapsed);
Clements, 69 F.3d at 329 n.7. Although the court is not clear as to why the defendants did not

1 raise the state court judgment earlier, at least as a basis to stay this case, the defendants did not
2 clearly acquiesce to the splitting of Parmar's claims in dual proceedings in the same way as in
3 *Clements*. Relying on California law, defendants could have believed that it was improper to
4 raise the defense of claim preclusion until after the period to appeal in the State Court Action had
5 elapsed.

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7 Moreover, in *Clements*, plaintiffs would have suffered substantial prejudice if claim
8 preclusion applied. *Id.* at 329 (explaining that, had defendants objected to the dual proceedings at
9 the time the federal action was filed, plaintiffs could have amended their state court action to
10 include the federal claims). In *McGinest*, the Ninth Circuit interpreted *Clements* as requiring
11 prejudice to apply waiver. 247 Fed. Appx. at 75 ("While the *Restatement* indicates that waiver
12 can be founded simply on a defendant's failure to raise any sort of objection to there being two
13 pending lawsuits, *Clements* supports that the plaintiff must also have suffered some prejudice in
14 order to apply waiver."). In contrast to *Clements*, here, Parmar suffers no additional prejudice
15 based on this later assertion of claim preclusion than if defendants had asserted the defense in
16 their first motion to dismiss. At the time defendants filed the first motion to dismiss, the state
17 court had already entered judgment, and although it had not yet become final, Parmar could not
18 have amended the state court pleadings at that late stage to raise a claim for cancellation of the
19 2011 Assignment of Deed of Trust in the state forum. Thus, under either timeframe, Parmar
20 would not have been able to litigate the issue in the state court, and necessarily must argue that
21 his new cancellation claim is not barred.

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24 For these reasons, the court holds that defendants did not waive the defense of claim
25 preclusion and turns to the merits of the defense.

26 **C. Claim Preclusion**

1 "Claim preclusion 'applies when there is (1) an identity of claims; (2) a final judgment on
2 the merits; and (3) identity or privity between the parties.'" *Cell Therapeutics, Inc. v. Lash Grp.*
3 *Inc.*, 586 F.3d 1204, 1212 (9th Cir. 2010) (quoting *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956
4 (9th Cir. 2002)). To determine whether there is an identity of the claims, courts "look at four
5 criteria, which we do not apply mechanistically: (1) whether the two suits arise out of the same
6 transactional nucleus of facts; (2) whether rights or interests established in the prior judgment
7 would be destroyed or impaired by prosecution of the second action; (3) whether the two suits
8 involve infringement of the same right; and (4) whether substantially the same evidence is
9 presented in the two actions." *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 987 (9th Cir.
10 2005). As a prerequisite to the application of the doctrine, the parties must have had a "'full and
11 fair opportunity' to litigate the claim" in the prior action. *Commc'ns Telesys. Int'l v. Cal. Pub.*
12 *Util. Comm'n*, 196 F.3d 1011, 1018 (9th Cir.1999) (quoting *Kremer v. Chem. Const. Corp.*, 456
13 U.S. 461, 480-81 (1982)).

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16 **i. Identity of Claims**

17 Here, contrary to defendants' assertion, plaintiff did not actually raise a claim for
18 cancellation of the 2011 Assignment of Deed of Trust in the State Court Action. The state court
19 allegations that defendants rely on to support their position relate to any future assignments of
20 plaintiffs' *note* and *mortgage* (or *lien*), which is distinct from the 2011 Assignment of *Deed of*
21 *Trust*. Compare State SAC, ¶¶ 35-36, 80, 129 with FAC ¶¶ 24-27. Although the allegations do
22 relate to the same series of events involving the same mortgage, the surviving cancellation claim
23 here involves a determination of the validity of a specific transaction that was never decided in
24 the state action. Thus, under prong two of the test for identity of claims, "the rights or interests
25 established in the prior judgment would [not] be destroyed or impaired by prosecution of the
26 second action." *Mpoyo*, 430 F.3d at 987. Further, under prong four of the test, the evidence to
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1 support Parmar's claim for cancellation of the 2011 Assignment of Deed of Trust is different than
2 that to support her claim for cancellation of the 2009 Substitution of Trustee. *Compare* FAC ¶ 35
3 (b)-(e); FAC Exs. B, D, and E (where Parmar specifically alleges that Stacy Sandoz is not a "Vice
4 President" of MERS, but rather an employee of Aurora Bank, and attach as evidence Stacy
5 Sandoz's linked in profile and the recorded assignment) *with* State SAC ¶¶ 49-58 (alleging that a
6 different person, Debra Dente, is not authorized to sign on behalf of MERS, and alleging that a
7 different document is fraudulent). Thus, the court finds that the surviving claim here was not
8 sufficiently raised in the state court to support a direct bar.

9
10 **ii. Whether the Claim Could Have Been Raised and *Western Systems***

11 Generally, however, claim preclusion bars courts from hearing claims that were already
12 raised or *could have been* raised in a prior action. *See, e.g., Cell Therapeutics, Inc. v. Lash Grp.*
13 *Inc.*, 586 F.3d 1204, 1212 (9th Cir. 2010). Thus, the court considers whether plaintiffs *could* have
14 raised the claim for cancellation of the 2011 Assignment of Deed of Trust in the State Court
15 Action, such that claim preclusion would nevertheless apply. Defendants argue that plaintiff
16 should have been aware of the 2011 Assignment of Deed of Trust before he filed the State SAC
17 (it was recorded 19 days prior to that filing), and thus he could have raised the claim in the State
18 SAC, but failed to do so.

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20 Defendants rely on *Western Systems. v. Ulloa*, 958 F.2d 864, 871-72 (9th Cir. 1992) for the
21 proposition that the "ignorance of a party does not . . . avoid the bar or res judicata unless the
22 ignorance was caused by the misrepresentation or concealment of the opposing party." In
23 *Western Systems*, however, the plaintiff was attempting to assert a different theory of recovery in
24 a later action supporting the same *claim* for relief. *Id.* at 871 ("The Ulloas' claim in [the first
25 action] was for the right to repurchase *all* shares of MCS Richard Ulloa's right to repurchase
26 *some* shares of MCS asserted in [the second action] seems part of the same recovery sought in
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1 [the first action]. Different theories supporting the same claim for relief must be brought in the
2 initial action." (emphases in original)). In contrast, here, Parmar is asserting a *distinct claim* for
3 relief, the cancellation of the 2011 Assignment of Deed of Trust, not a new theory in support of a
4 claim that was already raised.

5
6 In *Western Systems*, there was also objective evidence that the plaintiff *was* aware of the
7 facts giving rise to the new theory for relief:

8 Richard Ulloa contends that he did not know until 'recently' that the rights of first
9 refusal had not been exercised by the other shareholders, and that he therefore
10 could not have asserted those rights in the 1972 proceeding. . . . Even if ignorance
11 were sufficient to avoid the bar, that fact would not aid the Ulloas. Evidence was
12 presented during the federal litigation concerning which stockholders had
13 exercised their rights to purchase MCS stock under ¶ 2. It therefore appears that
14 *the Ulloas were on notice of their potential claim* for rights of first refusal.

15 *Id.* at 871-82 (emphasis added). In contrast, here, the trial court record presently before this court
16 indicates that Parmar was *not* aware of his claim for cancellation of the 2011 Assignment of Deed
17 of Trust when he filed the State SAC. *See* State SAC ¶ 38 ("There is no duly acknowledged
18 Assignment [of the deed of trust] recorded with the County of Santa Cruz that transferred an
19 interest in Plaintiff's Note and Mortgage to Deutsche."); ¶ 27 ("There was no 'Assignment of
20 Deed of Trust' . . ."). Given that the 2011 Assignment of Deed of Trust was recorded just two
21 weeks before Parmar filed the State SAC, and the fact that Parmar alleges difficulty obtaining
22 information regarding the holders of her mortgage leading up to and throughout the State Court
23 Action, it seems objectively reasonable that Parmar was not aware of that particular claim for
24 relief at the time he filed the State SAC.

25 In *Mpoyo v. Litton Electro-Optical Systems*, the Ninth Circuit's application of the
26 "ignorance" rule from *Western Systems* indicates that the "ignorance" must be something more
27 than an objectively reasonable unawareness of the claim. In *Mpoyo*, the Ninth Circuit relied on
28 *Western Systems* to preclude the plaintiff's claim based on plaintiff's "dilatatoriness" in attempting

1 to assert allegedly later "discovered" claims. 430 F.3d at 989. In *Mpoyo*, plaintiff originally sued
2 his former employer for workplace discrimination and retaliation in violation of Title VII. *Id.* at
3 986. Two years later, plaintiff sought to amend the complaint to add claims under the Fair Labor
4 Standards Act ("FLSA") and Family and Medical Leave Act ("FMLA"). *Id.* The court denied
5 leave to amend due to plaintiff's "dilatatoriness" in seeking to add these new claims, and plaintiff
6 then filed a separate, second district court action asserting the FLSA and FMLA claims. *Id.* In
7 the second action, the court held that the FLSA and FMLA claims were barred by claim
8 preclusion. *Id.* at 987. The Ninth Circuit affirmed, holding that "[p]ermitting these later-filed
9 claims to proceed would create incentive for plaintiffs to hold back claims and have a second
10 adjudication. Denial of leave to amend in a prior action based on dilatatoriness does not prevent
11 application of res judicata in a subsequent action." *Id.* at 989. In *Mpoyo*, the plaintiff simply
12 failed to realize two alternative possible bases for relief until two years too late, and then tried to
13 assert these new claims as an alternative basis for recovery for the same allegedly wrongful
14 actions. *Id.* at 987-89. In contrast, here, no claim for cancellation of the 2011 Assignment of
15 Deed of Trust existed when plaintiffs filed the State Court Action, and Parmar could not have
16 asserted a claim for cancellation of an assignment of which he was reasonably not aware of.

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19 In sum, claim preclusion does not apply here because: (1) Parmar's claim for cancellation
20 of the 2011 Assignment of Deed of Trust relates to a separate transaction that was never
21 presented or litigated in the State Court Action; and (2) Parmar's failure to raise the claim was not
22 due to unjustified ignorance or dilatatoriness.

23 24 **III. CONCLUSION**

25 For the foregoing reasons, the court DENIES defendants' motion to dismiss Parmar's fifth
26 cause of action for cancellation of the 2011 Assignment of Deed of Trust. Because Parmar does
27 not oppose defendants' motion to dismiss his claim for cancellation of the 2009 Substitution of
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1 Trustee and because the state court already decided that issue, the court GRANTS defendants'
2 motion to dismiss that claim with prejudice.

3 To expedite the ultimate resolution of this case, the court orders the parties to submit, on
4 or before April 15, 2013 a proposed schedule setting a deadline for the filing of cross-motions for
5 summary judgment with respect to the sole remaining claim in this case. The schedule should
6 allow plaintiff sufficient time to conduct necessary discovery with respect to the authority of the
7 signatory on the 2011 Assignment of the Deed of Trust to make the purported assignment. The
8 schedule should take into account the court's belief that only limited discovery is necessary.
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12 Dated: March 29, 2013


Ronald M. Whyte

United States District Court Judge