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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

ZAFAR MOHSENZADEH, an  
individual,  
  
Plaintiff,  
  
v.  
  
JPMORGAN CHASE BANK, N.A.,  
SUCCESSOR BY MERGER TO  
Chase Home Finance, LLC, a New  
York Corporation; NDEX WEST  
LLC, a California limited liability  
company; and DOES 1 through 50,  
inclusive,  
  
Defendants.

Case No. 14cv2340 BTM-DHB  
**ORDER GRANTING MOTION  
TO DISMISS**

This Motion to Dismiss arises out of the foreclosure of Plaintiff Zafar Mohsenzadeh's mortgaged condominium and parcel located at 16907 New Rochelle Way, Unit. 86, San Diego CA 92127 ("the property") by Defendants JPMorgan Chase Bank, N.A. ("JPMC"), the mortgage servicer and beneficiary, and NDEX West LLC ("NDEX"), the foreclosure trustee. For the reasons set forth below, the motion is GRANTED.

**I. BACKGROUND**

According to the Complaint ("Compl."), Plaintiff executed a first

1 position mortgage and deed of trust with Defendant JPMC on October 22,  
2 2006 (Compl. ¶ 8). Having been adversely effected by the financial  
3 downturn in 2010, Plaintiff contacted JPMC and applied for a loan  
4 modification (Compl. ¶ 9). Due to JPMC's alleged mishandling of Plaintiff's  
5 paper work, the process was delayed and on June 23, 2011, JPMC and  
6 NDEX recorded a Notice of Default against the property (Compl. ¶¶ 11-12).  
7 On April 17, 2012, JPMC sent Plaintiff notice that he qualified for a loan  
8 modification if he complied with an accompanying Trial Period Plan ("TPP")  
9 setting out a 3-month payment schedule commencing on June 1, 2012 and  
10 ending August 1, 2012 (Compl. ¶¶ 14-15). Plaintiff notified JPMC that he  
11 accepted the TPP's terms and made timely payments accordingly, which  
12 JPMC accepted (Compl. ¶¶ 19-21). Plaintiff alleges that following his full  
13 performance under the TPP, JPMC evaded his inquiries regarding the next  
14 steps in securing the permanent loan modification and perpetually delayed  
15 its approval, thus failing to perform under the TPP. On August 28, 2013,  
16 NDEX filed a Notice of Trustee's Sale scheduling a September 19, 2013  
17 sale date, but JPMC then sent a notice dated September 23, 2013 informing  
18 Plaintiff that his loan modification application was still pending review  
19 (Compl. ¶¶ 29-31). A trustee's sale of the property was again scheduled for  
20 August 25, 2014, the same day the present action was filed in the Superior  
21 Court of California, County of San Diego ("state court") (Compl. ¶ 27).  
22 However, as of the action's removal to federal court, the parties' document  
23 filings do not confirm whether the property has in fact been foreclosed and  
24 sold through a trustee's sale.

## 25 26 **II. PROCEDURAL HISTORY**

27 On August 22, 2012, Plaintiff filed a voluntary petition for Chapter 7  
28 bankruptcy. On November 20, 2012, the Bankruptcy Court issued an order

1 discharging Plaintiff as a debtor and closed the case on March 26, 2013.  
2 Though Plaintiff disclosed his interest in the property on his bankruptcy  
3 schedule, he failed to disclose facts supporting his foreclosure related  
4 claims against the Defendants arising from the alleged breach of the TPP.  
5 On September 19, 2013, Plaintiff, acting pro per, filed a complaint in state  
6 court (“First Action”) raising six statutory claims arising out of Defendants’  
7 recording of a Notice of Default against the property on June 23, 2011,  
8 allegedly without complying with all of the requirements of California Civil  
9 Code (“Cal. Civ. Code”) sections 2923.5 and 2924 et seq. The state court  
10 dismissed the First Action with prejudice on June 10, 2014 as to JPMC and  
11 June 20, 2014 as to NDEX upon sustaining JPMC’s demurrer. On August  
12 25, 2014, Plaintiff, now represented by counsel, filed the present action,  
13 again in state court (“Second Action”). On October 3, 2014, Defendants  
14 removed to this Court.

### 15 III. ANALYSIS

16 Defendants move to dismiss the Second Action on grounds of: (1) res  
17 judicata; (2) the Rooker-Feldman doctrine; (3) judicial estoppel; and (4) Rule  
18 12(b)(6) for failure to state claims of breach of contract, promissory estoppel,  
19 fraud under Cal. Civ. Code § 1572, and violations of §§ 2923.6(c), 2924.12,  
20 and California Business & Professions Code (“Cal. Bus. & Prof. Code”) §  
21 17200, et seq. The Court finds that Plaintiff’s present claims are precluded  
22 by the state court’s dispositive ruling on the merits in the First Action and  
23 judicial estoppel as to the Bankruptcy Court’s discharge order. Therefore,  
24 the Court need not reach Defendants’ remaining arguments.

25 The doctrine of res judicata, also known as claim preclusion, bars  
26 claims for relief where there is (1) an identity of claims, (2) a final judgment  
27 on the merits, and (3) privity between parties. TahoeSierra Pres. Council,  
28 Inc. v. Tahoe Reg’l Planning Agency, 322 F.3d 1064, 1077 (9th Cir. 2003).

1 It also applies to those claims which could have been litigated as part of the  
2 prior cause of action. See Clark v. Yosemite Cmty. Coll. Dist., 785 F.2d 781,  
3 786 (9th Cir. 1986). A plaintiff “cannot avoid the bar of res judicata merely  
4 by alleging conduct by the defendant not alleged in his prior action or by  
5 pleading a new legal theory.” McClain v. Apodaca, 793 F.2d 1031, 1034 (9th  
6 Cir. 1986).

7 **A. Identity of Claims**

8 Under The Full Faith and Credit Clause, codified in 28 U.S.C. § 1738,  
9 federal courts are required to give state court judgments the preclusive  
10 effect they would be given by another court of that state. See Migra v.  
11 Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 84 (1984); Maldonado v.  
12 Harris, 370 F.3d 945, 951 (9th Cir. 2004). California law holds that claims  
13 are identical if they deal with the same “primary right,” and differ from the  
14 federal courts, which apply a “transactional nucleus of facts” test to  
15 determine what constitutes the same cause of action for claim preclusion  
16 purposes. Boeken v. Philip Morris USA, Inc., 48 Cal. 4th 788, 798 (2010);  
17 Brodheim v. Cry, 584 F.3d 1262, 1268 (9th Cir. 2009).

18 Under the primary rights theory, “a cause of action is (1) a primary  
19 right possessed by the plaintiff, (2) a corresponding primary duty devolving  
20 upon the defendant, and (3) a harm done by the defendant which consists in  
21 a breach of such primary right and duty.” City of Martinez v. Texaco Trading  
22 & Transp., Inc., 353 F.3d 758, 762 (9th Cir. 2003), citing Citizens for Open  
23 Access to Sand and Tide, Inc. v. Seadrift Ass’n, 71 Cal. Rptr. 2d 77, 86  
24 (1998). “[I]f two actions involve the same injury to the plaintiff and the same  
25 wrong by the defendant, then the same primary right is at stake even if in the  
26 second suit the plaintiff pleads different theories of recovery, seeks

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1 different forms of relief and/or adds new facts supporting recovery.” San  
2 Diego Police Officers’ Ass’n v. San Diego City Employees’ Ret. Sys., 568  
3 F.3d 725, 734 (9th Cir. 2009) (quoting Eichman v. Fotomat Corp., 147 Cal.  
4 App. 3d 1170, 1174 (Ct. Appl. 1983)).

5 The claims raised in the First Action were brought under: (1) Cal. Civ.  
6 Code § 2923.5, et seq; (2) Cal Civ. Code § 2924 et seq; (3) Uniform  
7 Commercial Code §§ 3-309, 3-301, et seq; (4) Cal. Bus. & Prof. Code §  
8 17200, et seq; (5) fraudulent deceit under Cal Civ. Code. § 1709, and; (6)  
9 Real Party Standing (Dkt. Nos. 4-3, 5 at p. 4). The Second Action pleads:  
10 (1) breach of contract; (2) promissory estoppel; (3) actual fraud under Cal.  
11 Civ. Code § 1572; (4) violation of Cal. Civ. Code § 2923.6, et seq; (5)  
12 violation of Cal. Bus. & Prof. Code § 17200, et seq, and; (6) injunctive relief  
13 under Cal. Civ. Code § 2924.12. The Court finds that the primary right  
14 implicated in the First and Second Actions is the same, which is the right to  
15 challenge a wrongful foreclosure. Plaintiff is therefore barred from bringing  
16 the current complaint because it states a cause of action that was resolved  
17 in the First Action.

18 To illustrate, this case is distinct from Brodheim v. Cry, 584 F.3d 1262,  
19 1268-69 (9th Cir. 2009), where the Ninth Circuit Court of Appeals overturned  
20 the district court’s res judicata ruling on grounds that the federal action was  
21 not barred by a preceding state court decision since the claims in each  
22 involved different causes of action under the primary rights theory. The  
23 state court first denied the prisoner-plaintiff’s habeas petition challenging the  
24 warden’s practice of allowing the prison appeals coordinator to review  
25 complaints against himself. The plaintiff then filed a federal action against  
26 the appeals coordinator on First Amendment grounds. The court found the  
27 two causes of action to be different because the initial state action pled a  
28 lack of meaningful review of grievances while the federal action alleged

1 retaliatory chilling of speech rights. The harms in each action were distinct,  
2 caused at different times, by different acts and by different actors. Id. at  
3 1269.

4 Plaintiff refutes the application of res judicata by relying on the  
5 California Supreme Court's decision in City of Los Angeles v. City of San  
6 Fernando, which states:

7 "[w]here a *question of law* essential to the judgment is actually  
8 litigated and determined by a valid and final personal judgment,  
9 the determination is not conclusive between the parties in a  
10 subsequent action on a different cause of action, except where  
11 both causes of action arose out of the same subject matter or  
12 transaction; and in any event it is not conclusive if injustice would  
13 result."  
14 Cal. 3d 199, 230 (1975) (citing Restatement of Judgments § 70)(italics in  
15 original), disapproved on other grounds by City of Barstow v. Mojave Water  
16 Agency, 23 Cal. 4th 1224 (2000).

17 It is undisputed that the First and Second Actions arose out of the  
18 same subject matter or transaction, specifically the mortgage of the property  
19 and its foreclosure by Defendants. However, Plaintiff claims that it would be  
20 unjust to estop him from bringing his contractual claims against Defendants  
21 because JPMC intentionally delayed performing its obligation to approve  
22 Plaintiff's permanent loan modification and strung Plaintiff along to later avail  
23 itself of res judicata (Dkt. No. 5, at p. 5). Plaintiff also argues that the First  
24 Action was resolved on questions of law on unrelated causes of action and  
25 that the current claims could not have been previously raised (Dkt. No. 5, at  
26 p. 5). The Court finds these arguments unpersuasive. First, the timeline  
27 supports the conclusion that even if Plaintiff did not consider JPMC in  
28 breach of the TPP until after filing the First Action on September 19, 2013,  
and receiving JPMC's September 23, 2013 notification that Plaintiff's loan  
modification application remained pending review, Plaintiff was not  
precluded from later adding the new contractual claims in the First Action.  
After September 23, 2013, Plaintiff could still have petitioned the state court

1 to amend his complaint before it issued a tentative ruling on Defendants'  
2 demurrer on May 8, 2014, and a later order sustaining the demurrer and  
3 dismissing the matter with prejudice on June 10 and June 20, 2014.

4       Additionally, Plaintiff's assertion that his breach of contract and  
5 associated promissory estoppel and fraud claims ripened only after he filed  
6 the First Action is mistaken. Any breach of contract and related claims  
7 arising out the TPP had accrued prior to June 10, 2014, since JPMC had  
8 failed to effectuate a permanent loan modification within a month of the end  
9 of Plaintiff's successful completion of the trial period on August 1, 2012.

10 See West v. JPMorgan Chase Bank, N.A., 214 Cal. App 4th 780, 797 (2013)  
11 (discussing U.S. Department of the Treasury Home Affordable Mortgage  
12 Program Supplemental Directive 09-01 (Apr. 6, 2009) establishing a time  
13 line for loan modification agreement implementation following a trial period).  
14 Therefore, Plaintiff could have raised all six of his current contract-based  
15 claims during the pendency of his bankruptcy and in the First Action.

16       Lastly, the "injustice" exception mentioned in Los Angeles v. San  
17 Fernando does not apply to the facts of this case because it has been  
18 limited to matters of public interest. See 14 Cal. 3d at 230. For instance,  
19 issue preclusion was found unjust where it would result in the inequitable  
20 administration of the laws by a governmental body upon third-parties  
21 similarly situated to the litigant, see Rutherford v. State of California, 188  
22 Cal. App. 3d 1267, 1284 (1987), and where patently erroneous conclusions  
23 of law would be given estoppel effect, see Cochran v. Union Lumber  
24 Company, 26 Cal. App. 3d 423, 427 (1972). Such issues are absent here.

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1 In this case, the same plaintiff, Mr. Mohsenzadeh, is seeking redress  
2 for the same primary right as in the First Action, which is to avoid a wrongful  
3 or procedurally deficient foreclosure. The fact that the First Action did not  
4 mention the pending loan modification does not change the finding that  
5 Plaintiff's claims in both actions are grounded in the same alleged injury of  
6 wrongful foreclosure and economic harm caused by the same defendants'  
7 wrongful acts in improperly foreclosing on the property, thus implicating the  
8 same primary right. See Eichman v. Fotomat Corp., 147 Cal. App. 3d at  
9 1175. Indeed, Plaintiff's prayer for relief in the Second Action includes an  
10 injunction against foreclosure of the property, and therefore requests a  
11 remedy for the same primary right previously litigated (Dkt. No. 1-1, at p.  
12 28). Furthermore, the fact that Plaintiff raises new theories of recovery  
13 based on breach of contract, promissory estoppel, fraud and statutory  
14 violations in the Second Action is irrelevant for purposes of claim preclusion.  
15 See Rodriguez v. Bank of New York Mellon, 2014 WL 229274, at \*6 (S.D.  
16 Cal. Jan. 17, 2014). Plaintiff's aim in bringing both actions is to obtain relief  
17 for the allegedly wrongful foreclosure of the same property. The Court finds  
18 that Plaintiff's new claims arise from the same foreclosure process as the  
19 First Action and therefore arise out of the same primary right as the  
20 previously litigated claims.

## 21 **B. Final Judgment on the Merits**

22 The state court dismissed the First Action with prejudice upon  
23 sustaining Defendants' demurrer to Plaintiff's first amended complaint. A  
24 general demurrer has been held to be a judgment on the merits for purposes  
25 of res judicata and collateral estoppel in California state and federal courts.  
26 See Edmonson v. City of Martinez, 2000 WL 1639492, at \*4 (N.D. Cal. Oct.  
27 27, 2000) aff'd, 17 Fed. Appx. 678 (9th Cir. 2001); McKinney v. County of  
28 Santa Clara, 110 Cal. App. 3d 787, 794 (1980). Therefore, a final judgment



1 on the merits was already rendered on the claims Plaintiff seeks to bring in  
2 the Second Action.

3 **C. Identity of Parties**

4 Plaintiff and Defendants do not dispute that the parties are identical in  
5 both proceedings. Thus, the third element of res judicata is satisfied.

6 To the extent Plaintiff's claims are based on the foreclosure of the  
7 property, Plaintiff's claims are barred by the doctrine of res judicata.

8 **D. Judicial Estoppel**


9 Plaintiff's bankruptcy proceeding lasted between August 22, 2012 and  
10 March 26, 2013 (Dkt. No. 4-3). Meanwhile, the alleged breach of contract  
11 and related claims had ripened within a month of August 1, 2012. Thus,  
12 Plaintiff was on notice of a potential claim against Defendants arising from  
13 his interest in the property and the TPP prior to the close of his bankruptcy.  
14 Because he failed to disclose these potential claims as an asset on his  
15 Chapter 7 bankruptcy schedules, or otherwise disclose them to the  
16 Bankruptcy Court, Plaintiff is judicially estopped from bringing this action.  
17 See Hay v. First Interstate Bank of Kalispell, N.A., 978 F. 2d 555, 557 (9th  
18 Cir. 1992).

19  
20 **IV. CONCLUSION**

21 For the reasons discussed above, Defendants' motion to dismiss is  
22 **GRANTED**. For the reasons stated above, Plaintiff's complaint is  
23 **DISMISSED** as to both Defendants with prejudice. The Clerk shall enter  
24 judgment accordingly.

25 **IT IS SO ORDERED.**

26 DATED: March 25, 2015

27   
28 BARRY TED MOSKOWITZ, Chief Judge  
United States District Court