Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
August 18, 2022

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re: ARMIN DIRK VAN DAMME, Debtor.	Case No. 19-14142-mkn Chapter 13
ARMIN DIRK VAN DAMME, individual, Plaintiff, vs. WELLS FARGO BANK, N.A., Defendant.	Adv. Proc. No. 21-01067-mkn Date: May 12, 2022 Time: 10:00 a.m.

ORDER ON WELLS FARGO BANK, N.A.'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT[1]

On May 12, 2022, the court heard Well Fargo Bank, N.A.'s Motion to Dismiss Plaintiff's Amended Complaint ("Dismissal Motion"), brought in the above-captioned adversary

[1] In this Order, all references to "ECF No." are to the number assigned to the documents filed in the above-captioned bankruptcy case as they appear on the docket maintained by the clerk of court. All references of "AECF No." are to the number assigned to the documents filed in the above-captioned adversary proceeding as they appear on the docket maintained by the clerk of court. All references to "Section" or "§§ 101-1532" are to the provisions of the Bankruptcy Code. All references to "NRS" are to provisions of the Nevada Revised Statutes. All references to "Civil Rule" are to the Federal Rules of Civil Procedure. All references to "Bankruptcy Rule" are to the Federal Rules of Civil Procedure. All references to "FRE" are to the Federal Rules of Evidence.

proceeding ("Adversary Proceeding"). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BANKRUPTCY PROCEDURAL HISTORY[2]

On June 27, 2019, a voluntary "skeleton" Chapter 13 petition was filed by plaintiff Armin Dirk Van Damme ("Debtor"). (ECF No. 1). A Notice of Chapter 13 Bankruptcy Case was filed scheduling a meeting of creditors ("341 Meeting") for July 30, 2019. The case was assigned for administration to Chapter 13 panel trustee, Rick A. Yarnall.

On August 2, 2019, the 341 Meeting was continued to August 27, 2019. (ECF No. 11).

On August 12, 2019, Debtor filed his schedules of assets and liabilities ("Schedules") along with his statement of financial affairs and other information. (ECF No. 12). In his Schedule "A/B," Debtor listed a single-family residence located at 2727 Twin Palms Circle, Las Vegas, NV,[3] having a value of $844,000. In his Schedule "D," Debtor listed creditor "US Bank" as having a claim in the amount of $808,041 secured by the residence.

On August 28, 2019, the 341 Meeting was continued again to September 24, 2019. (ECF No. 14).

On August 30, 2019, a proof of claim ("POC") in the amount of $1,492,802.87, secured by the Residence, was filed on behalf of creditor U.S. Bank National Association with Wells Fargo Bank, N.A., as loan servicer.

On September 25, 2019, the 341 Meeting was concluded. (ECF No. 23).

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[2] Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the docket in the above-captioned adversary proceeding and the above-captioned Bankruptcy Case. See U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980). See also Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1364 (9th Cir. 1998) (taking judicial notice of court filings in a state court case where the same plaintiff asserted similar claims); In re Blas, 614 B.R. 334, 339 n.27 (Bankr. D. Alaska 2019) ("This court may take judicial notice of the docket of other courts."); Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015) ("The Court may consider the records in this case, the underlying bankruptcy case and public records.").

[3] Debtor's voluntary "skeleton" Chapter 13 petition reflects an address of 2775 Twin Palms Circle, Las Vegas, NV. On August 12, 2019, Debtor, through his counsel at the time, Carrie E. Hurtik, Esq., filed an amended voluntary Chapter 13 petition which also reflects an address of 2775 Twin Palms Circle, Las Vegas, NV.

On March 31, 2021, an order was entered denying Debtor's "Motion for Order That Federal Moratorium Applies to Debtor's Homestead – 2772 Twin Palms Circle, Las Vegas, NV 89117." (ECF No. 117).

On May 26, 2021, Debtor filed an adversary complaint against Wells Fargo Bank, N.A. ("Wells Fargo"), commencing the above-captioned Adversary Proceeding. (AECF No. 1). Debtor seeks to bar Wells Fargo's claim.

On May 27, 2022, an initial scheduling conference ("Scheduling Conference") was set for October 14, 2021. (AECF No. 3).

On October 13, 2021, Debtor filed an amended complaint ("Amended Adversary Complaint"), and the initial Scheduling Conference was continued from October 14, 2021, to December 23, 2021. (AECF Nos. 11 and 12).

On October 15, 2021, a stipulated order was entered granting Wells Fargo an extension of time to November 19, 2021, to respond to the Amended Adversary Complaint (First Request). (AECF No. 14).

On November 18, 2021, a stipulated order was entered granting Wells Fargo a further extension of time to December 17, 2021, to respond to the Amended Adversary Complaint (Second Request). (AECF No. 19).

On December 16, 2021, a stipulated order was entered granting Wells Fargo an extension of time of December 23, 2021, to respond to the Amended Adversary Complaint, a deadline of December 30, 2021, for Wells Fargo to file a motion to dismiss the Amended Adversary Complaint, setting a deadline of January 28, 2022, for Debtor to file an opposition to a motion to dismiss, and a deadline of February 18, 2022, for Wells Fargo to file a reply to any opposition filed. (AECF No. 23).

On December 23, 2021, a stipulation was filed to extend the deadline for Wells Fargo to respond to the Amended Adversary Complaint and to set a briefing schedule (Fourth Request). The stipulation also states that "Wells Fargo intends to respond to the Amended Adversary Complaint by filing a Motion to Dismiss . . . ." (AECF No. 26).

On December 28, 2021, a stipulated order was entered granting Wells Fargo a further extension of time of January 21, 2022, to respond to the Amended Adversary Complaint as well as to file a motion to dismiss the Amended Adversary Complaint, setting a deadline of February 18, 2022, for Plaintiff to file an opposition to a motion to dismiss, and a deadline of March 11, 2022, for Wells Fargo to file a reply to any opposition filed. (AECF No. 27).

On January 19, 2022, a stipulation was filed to extend the deadline for Wells Fargo to respond to the Amended Adversary Complaint and to set a briefing schedule (Fifth Request). The stipulation also states that "Wells Fargo intends to respond to the Amended Adversary Complaint by filing a Motion to Dismiss . . ." (AECF No. 31).

On January 20, 2022, a stipulated order was entered granting Wells Fargo a further extension of time of January 31, 2022, to respond to the Amended Adversary Complaint as well as to file a motion to dismiss the Amended Adversary Complaint, setting a deadline of February 28, 2022, for Plaintiff to file an opposition to a motion to dismiss, and a deadline of March 21, 2022, for Wells Fargo to file a reply to any opposition filed. (AECF No. 32).

On January 31, 2022, Wells Fargo filed the instant Dismissal Motion along with a Request for Judicial Notice ("RJN").[4] (AECF Nos. 35 and 36). The Dismissal Motion was noticed to be heard on March 30, 2022. (AECF No. 37).

[4] Judicial notice is authorized under FRE 201(b) of recorded documents as well as those filed in federal and state judicial proceedings. See note 2, supra. Wells Fargo requests judicial notice of numerous recorded and filed documents marked as Exhibits A through V. No objection to the request for judicial notice has been made and Wells Fargo's request is granted. For clarity in this Order, the most oft-cited exhibits will be referenced by their description. For example, Exhibit "D" will be referred to as "Third Amended USDC Complaint" that was filed on March 29, 2017 in the United States District Court for the District of Nevada ("USDC"), Exhibit "K" will be referred to as the "Loan Modification" that was recorded on April 25, 2008 in Clark County, Nevada, Exhibit "R" will be referred to as the "Original State Court Complaint" that was filed on August 28, 2015 in Eighth Judicial District Court for Clark County, Nevada ("Nevada State Court") and subsequently removed to the USDC, and Exhibit "S" will be referred to as the "USDC Order" entered on March 26, 2018 by the USDC. All other exhibits will be referenced by their assigned letters. The court also takes judicial notice of other documents filed in the legal proceedings raised by the parties in connection with the instant Dismissal Motion, including the documents filed in the Debtor's previous Chapter 7 bankruptcy commenced on March 6, 2009 in the United States Bankruptcy Court for the Northern District of California, denominated Case No. 09-41772 ("California Bankruptcy").

On February 25, 2022, a stipulation was filed by the Debtor through his counsel at the time, Corey B. Beck, Esq., to extend the deadline for Plaintiff to respond to the Dismissal Motion, revise the briefing schedule, and to continue the hearing (First Request). (AECF No. 40).

On February 28, 2022, a stipulated order was entered extending the deadline for Plaintiff to file an opposition to Wells Fargo's Dismissal Motion to March 21, 2022, a deadline of April 11, 2022, for Wells Fargo to file a reply in support of the Dismissal Motion, and continuing the hearing to April 28, 2022. (AECF No. 41).

On March 15, 2022, the hearing on the Dismissal Motion as well as the status hearing in this Adversary Proceeding were continued by the court from April 28, 2022, to May 12, 2022. (AECF Nos. 43-44).

On March 21, 2022, a stipulation was filed by Debtor through his counsel at the time, Corey B. Beck, Esq., to extend the deadline for Debtor to respond to the Dismissal Motion and revise the briefing schedule in light of the continued hearing (Second Request). (AECF No. 45).

On March 22, 2022, a stipulated order was entered extending the deadline for Plaintiff to file an opposition to Wells Fargo's Dismissal Motion to April 4, 2022, and a deadline of April 28, 2022, for Wells Fargo to file a reply in support of the Dismissal Motion. (AECF No. 46).

On March 28, 2022, Debtor through his counsel at the time, Corey B. Beck, Esq., filed his written opposition ("Debtor Opposition") to Wells Fargo's Dismissal Motion. (AECF No. 47).

On March 28, 2022, a motion to withdraw as attorney of record was filed by Debtor's counsel ("Beck Withdrawal Motion") in both the main bankruptcy case as well as this Adversary Proceeding. (ECF No. 137; AECF No. 48).[5] The Beck Withdrawal Motion in this Adversary Proceeding was initially noticed to be heard on May 12, 2022 (AECF No. 49), alongside the Dismissal Motion and the status hearing in this Adversary Proceeding.

[5] Counsel sought to withdraw from further representation because the Debtor insisted on pursuing claims and arguments that counsel did not believe were remaining at issue. See Beck Withdrawal Motion at ¶¶ 7 and 8, and 3:13-23.

On March 31, 2022, a request to have the Beck Withdrawal Motion in this Adversary Proceeding heard on shortened time was filed.[6] (AECF No. 51).

On April 4, 2022, an order was entered allowing the Beck Withdrawal Motion to be heard on May 4, 2022, at 2:30 p.m. (AECF No. 54).

On April 4, 2022, Debtor filed his own document in the Adversary Proceeding, rather than through his counsel of record, entitled "Motion in Opposition for Attorney Corey Beck to Withdraw, Motion Under Rule R 201. Judicial Notice of Adjudicated Facts (b), (e), Concurrent Motion in Violation of the Discharge Injunction Under 11 U.S.C. § 524(a)(2), Motion in Violation of FDCPA 1692e Jennifer Mc Bee, and Josh Kolbe, Knowingly and Willfully Violating Armin Dirk Van Damme and Geraldine L. Van Damme's 2009 Discharge Injunction, Holding Corey Beck, Jennifer Mc Bee, Jason Kolbe, and Carrie Hurtik[7] in Contempt for Altering Plaintiff's 2009 Court Order Injunction to Gain a Favorable Outcome in the Current Proceedings and a Motion for Evidentiary Hearing." (AECF No. 55).[8]

On April 19, 2022, Debtor filed in the Adversary Proceeding another document on his own, rather than through his counsel of record, entitled: "Motion for Additional Information

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[6] No separate request was made in the main bankruptcy case to have the Beck Withdrawal Motion heard on shortened time. Even though, it was noticed on less than 28 days, i.e., six days-notice. The Beck Withdrawal Motion filed in the main bankruptcy case was noticed to be heard on May 4, 2022, and was filed after the Beck Withdrawal Motion filed in the Adversary Proceeding, which was noticed to be heard on May 12, 2022. Subsequently, counsel requested the Beck Withdrawal Motion filed in the adversary case be heard on shortened time, which then set the Beck Withdrawal Motion in the Adversary Proceeding on calendar for May 4, 2022.

[7] Corey Beck, Carrie Hurtik (sic), Jennifer McBee, Jason Kolbe, and Ace Van Patten are attorneys who represent or once represented the Debtor or Wells Fargo.

[8] Debtor's opposition to the Beck Withdrawal Motion consists of 366 pages, including materials recorded in Clark County, Nevada, documents filed in the Hammer State Court action, copies of emails, documents obtained online, a report from a handwriting expert as to documents signed in 2008, documents filed in a separate bankruptcy case commenced by the Debtor's spouse in the Northern District of California, documents filed in the California Bankruptcy proceeding, a report from another handwriting expert as to documents signed in 2008, documents from a separate lawsuit commenced by the Debtor in Nevada State Court against National Default Servicing Corporation, an affidavit signed in April 2012 from representatives of Bank of America and U.S. Bank, and other items.

Requested in Opposition of Attorney Corey Beck to Withdraw Motion Under 11 U.S.C. § 1302(b)(1) [and] U.S.C. § 704 Duties of Trustee, Examine Proof of Claims and 851. False Claims 18 U.S.C. § 152(4) a Person Who Files a Fraudulent Claim." (AECF No. 60).[9]

On April 26, 2022, an order was entered granting Wells Fargo until May 5, 2022, to file a reply in support of its Dismissal Motion. (AECF No. 67).

On April 27, 2022, Debtor filed in the Adversary Proceeding a further document on his own, rather than through his counsel of record, entitled "Submitting US Bank National Association August 30, 2019 Proof of Claim, Objection to the Proof of Claim, as Evidence to the Motion in Opposition of Attorney Corey Beck to Withdraw." (AECF No. 71).[10]

On May 2, 2022, Debtor filed in the Adversary Proceeding another document on his own, rather than through his counsel of record, entitled "IRS Property Tax Records as Evidence of Fraud Upon the Court Based on Rule 60 (b)(2)Through(6) by Wells Fargo Bank N.A. Attorenys[sic], Corey Beck, Carrie Hutik[sic], Jennifer McBee, Jason Kolbe and Ace Van Patten Rule Became Under 3.7 Lawyer as a Witness Filed in Opposition for Attorney Corey Beck to Withdraw." (AECF No. 75).[11]

On May 3, 2022, Debtor filed in the Adversary Proceeding another document on his own, rather than through his counsel of record, entitled "Evidence of US Bank National Association Fraud Upon the Court in Conspiracy with Attourney (sic) Corey Beck, Jennifer McBee, Ace Van

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[9] Debtor's submission consists of 24 pages, and includes photocopies of various documents to dispute the signatures on various other documents, documents filed in the separate bankruptcy of the Debtor's spouse, and another copy of a report from a handwriting expert regarding documents signed in 2008.

[10] Debtor's submission consists of 147 pages, and includes a copy of the POC filed in the instant bankruptcy case, a copy of Debtor's objection to that POC, a copy of a Clark County property tax payment record, and a copy of a homeowners policy declaration for the Twin Palms Property, and a copy of a letter from attorney Corey Beck requesting copies of various documents from counsel for Wells Fargo.

[11] Debtor's submission consists of 14 pages, and includes copies of print outs from the property tax records of Clark County, Nevada.

Patten, Jason Kolbe and Carrie Hurtik, in Oposition (sic) for Attorney Corey Beck to Withdraw." (AECF No. 74).[12]

On May 3, 2022, Wells Fargo filed a reply ("Reply") in support of the instant Dismissal Motion. (AECF No. 79)

On May 10, 2022, Debtor filed in the Adversary Proceeding another document on his own, rather than through his counsel of record, entitled "Violtation (sic) Warning, Denial Under the Color of Law 18 U.S.C. §242; 18 U.S.C. §245; 42 U.S.C. §1983 Warning Corey Beck, Jennifer McBee, Ace Van Patten, Jason Kolbe, Carrie Hurtik, and Rick A. Yarnall, Depriving Armin D. Van Damme and Geraldine from Their Constitunial (sic) Rights as Citizens Under the Color of Law and Motion Under Rule FRCP Rule 60(b) Fraud Upon the Court." (AECF No. 84).[13]

On May 12, 2022, orders were entered granting the Beck Withdrawal Motion in both the Chapter 13 case and in this Adversary Proceeding. (ECF No. 143; AECF No. 85).

On May 12, 2022, the court held a hearing on the Dismissal Motion. After arguments were presented the matter was taken under submission.[14]

APPLICABLE LEGAL STANDARDS

The Amended Adversary Complaint seeks an order stating that Wells Fargo is not a real party in interest with respect to the property commonly known as 2775 Twin Palms Circle, Las

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[12] Debtor's submission consists of 119 pages, and includes copies of various documents filed in a separate civil action in the Nevada State Court commenced by the Debtor and his spouse against U.S. Bank National Association, as well as Wells Fargo Bank and National Default Servicing Corporation. The submission also includes copies of documents filed in the Debtor's Chapter 13 bankruptcy proceeding, a copy of an appraisal of the Twin Palms Property, copies of documents in connection with a loan mediation, and copies of correspondence from counsel for Wells Fargo.

[13] Debtor's submission consists of 20 pages, and includes photocopies of various images to challenge the signatures on various documents, as well as copies of documents filed in the Debtor's Nevada State Court action against National Default Servicing Corporation.

[14] As previously mentioned, after the Debtor Opposition was filed by his then-counsel of record, Debtor filed in pro se a variety of additional materials in connection with both the Beck Withdrawal Motion and the Dismissal Motion. In considering the Dismissal Motion, the court considered the Debtor Opposition and has reviewed all of the Debtor's additional materials.

Vegas, Nevada 89117 ("Twin Palms Property"); an order of extinguishment of Wells Fargo's deed of trust on the Twin Palm Property; damages in excess of $10,000.00; reasonable attorneys' fees and costs; and any other relief this court deems appropriate.[15] See Amended Adversary Complaint at 6:3-10.

Instead of answering the Amended Adversary Complaint, Wells Fargo filed this instant Dismissal Motion under Civil Rule 12(b)(6). Under Civil Rule 12(b)(6), a complaint may be dismissed for "failure to state a claim for which relief may be granted." FED. R. CIV. P. 12(b)(6). The standard for dismissing a claim under this rule is whether the complaint alleges sufficient factual matter to 'state a claim to relief that is plausible on its face.' Curb Mobility, LLC v. Kaptyn, Inc., 434 F. Supp. 3d 854, 858 (D. Nev. 2020) quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In considering a motion under Civil Rule 12(b)(6), the court accepts as true all factual allegations made by, and draws all reasonable inferences in favor of, the nonmoving party. See Heimrich v. Dep't of the Army, 947 F.3d 574, 577 (9th Cir. 2020) (external citation omitted); see also In re QDOS, Inc., 607 B.R. 338, 345 (B.A.P. 9th Cir. 2019), appeal dismissed, 830 Fed. Appx. 248 (9th Cir. 2020). Dismissal is appropriate if there is "a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Taylor v. Bosco Credit LLC, 2020 WL 7663436, at *1 (9th Cir. Dec. 24, 2020) (external citation omitted) (internal quotations omitted). This pleading standard applies to "'all civil actions.'" Petersen v. Nevada ex rel. Nevada Dep't of Corr., 2021 WL 278048, at *3 (D. Nev. Jan. 26, 2021) quoting Ashcroft v. Iqbal, 556 U.S. at 684. This rule, which is incorporated by Bankruptcy Rule 7012, applies in bankruptcy proceedings. Where an amendment to a complaint would be futile, dismissal without leave to amend may be appropriate. See Ramachandran v. Best & Krieger, 2021 WL 428654, at *4 (N.D. Cal. Feb. 8, 2021). Amendment is futile when it is clear that amendment would not remedy the complaint's fatal deficiencies. Id.

[15] These requests differ from the original complaint in this Adversary Proceeding as it did not seek an order of extinguishment of Wells Fargo's deed of trust against the Twin Palms Property.

DISCUSSION

Having considered the allegations of the Amended Adversary Complaint, and the written and oral arguments presented, the court concludes that the Dismissal Motion must be granted, without leave to amend. Several reasons require this conclusion. This court will first address the loan and litigation history between these parties as it is vital to understanding the arguments set forth by each party. The court then addresses the legal issues that determine the outcome of the instant Dismissal Motion.

I. Loan and Litigation History.

A. Twin Palms Property Loan History.

In September of 2004, Debtor and his wife obtained a mortgage from BNC Mortgage, Inc. ("BNC Mortgage") in the principal amount of $740,000.00 to re-finance the Twin Palms Property. See Dismissal Motion at 3:19-23, citing RJN at Exhibit A; see also Amended Adversary Complaint at Exhibit 1. T.D. Service Company was listed as the trustee, and Mortgage Electronic Registration Systems, Inc. ("MERS") was listed as a beneficiary on the deed of trust. Id.

A substitution of trustee was recorded on December 3, 2004. See Dismissal Motion at 3 n.2, citing RJN at Exhibit B. On July 8, 2008, MERS as nominee for BNC Mortgage, assigned the loan from BNC Mortgage to LaSalle Bank National Association ("LaSalle Bank") as trustee under the trust agreement for the structured asset investment loan trust series number 2004-11 ("Trust"). See Dismissal Motion at 3:25 to 26:4-1, citing RJN at Exhibit C. The Trust allegedly was governed by a Securitization Subservicing Agreement ("SSA") dated December 1, 2004, pursuant to which Wells Fargo was designated as the loan servicer. See Dismissal Motion at 4:2-4, citing Third Amended USDC Complaint at ¶ 46.

Between June and July of 2009, LaSalle Bank as trustee under the Trust, executed and recorded an assignment stating its interest in the deed of trust was transferred to Bank of America, N.A. ("BOA"), as successor by merger to LaSalle Bank. See Dismissal Motion at 4:5-7, citing RJN at Exhibit E; see also Amended Adversary Complaint at Exhibit 2. In 2008, Debtor entered into a loan modification agreement ("Loan Modification") with Wells Fargo,

which was recorded on April 25, 2008. See Amended Adversary Complaint at Exhibit 3. At this point, the parties diverge in their conclusions to the events surrounding the deed of trust and the Loan Modification for the Twin Palms Property.

B. Prior Litigation History.

According to Wells Fargo, less than three years after the loan origination, Debtor defaulted on his payment obligations. See Dismissal Motion at 4:14-15. On October 10, 2007, a notice of default was recorded by National Default Servicing Corporation ("NDSC").[16] See Dismissal Motion at 4:15-17, citing RJN at Exhibit I. On January 9, 2008, NSDC recorded a rescission of the notice of default. See RJN at Exhibit I. On January 10, 2008, NDSC recorded a second notice of default. See Dismissal Motion at 4:18-21, citing RJN at Exhibit J.

On April 25, 2008, the Loan Modification Agreement between the Debtor and Wells Fargo was recorded. See Dismissal Motion at 4:23-28; see also Amended Adversary Complaint at ¶ 5. Wells Fargo alleges that Debtor never made any payments following the Loan Modification. See Dismissal Motion at 5:1.

On October 15, 2008, NDSC recorded a third notice of default. See Dismissal Motion at 5:2-5, citing RJN at Exhibit L.

On March 6, 2009, Debtor commenced the California Bankruptcy by filing a voluntary Chapter 7 bankruptcy petition. See Dismissal Motion at 5:7-8, citing RJN at Exhibit M. Attached to the Chapter 7 bankruptcy petition were the Debtor's schedules of assets and liabilities ("California Schedules") as well as his statement of financial affairs ("California SOFA"). Debtor scheduled the Twin Palms Property in his California Bankruptcy case and included a statement of his intention to surrender the property. Id. On his personal property California Schedule B, Debtor did not schedule any claims or counterclaims of any nature

[16] Wells Fargo alleges that NDSC was substituted as trustee for T.D. Service Company on the December 3, 2004, substitution of trustee document. See Dismissal Motion at 3 n.2, citing RJN at Exhibit B. Confusingly, Exhibit B does not mention either NDSC or T.D. Service Company.

against any party or the value of such claims.[17] On his SOFA, Debtor disclosed various lawsuits to which he was a party during the year prior to his commencement of the California Bankruptcy proceeding, including a civil action entitled William C. Hammer v. Van Damme filed in the Nevada State Court, denominated Case #A49320 ("Hammer State Court Action").[18] Debtor received his Chapter 7 discharge on June 9, 2009, except as to any pending nondischargeability claims.[19] See RJN at Exhibit N. On December 22, 2010, an order was entered terminating the

[17] A Chapter 7 debtor's failure to schedule a claim has an important effect: when the assigned Chapter 7 bankruptcy trustee closes the bankruptcy case, the unscheduled claim is not administratively abandoned under Section 554(c) and remains property of the Chapter 7 bankruptcy estate. As a result, a closed Chapter 7 case can be reopened to permit a Chapter 7 trustee to administer the unscheduled claim, including, settling the claim with the defendant. See Stevens v. Whitmore (In re Stevens), 617 B.R. 328, 333-34 (B.A.P. 9th Cir. 2020).

[18] The Hammer State Court Action was disclosed in the California SOFA, but if the Debtor had any counterclaims, third party claims, or other claims arising from that case, they were not scheduled as property of the Chapter 7 estate. Any claims, counterclaims, or causes of action that the Debtor had against the instant Defendant or any other parties arising out of the loan secured by the Twin Palms Property, including the Loan Modification Agreement, likely existed at the time the Debtor commenced his California Bankruptcy. If such claims, if any, were never scheduled by the Debtor, then they arguably were never abandoned when the California Bankruptcy was closed. See discussion at note 17, supra. In the USDC Action, it is not clear whether the defendants ever asserted that the Debtor was judicially estopped from pursuing the claims due to his failure to schedule the claims in his California Bankruptcy. See Ah Quin v. County of Kauai Dept. of Transp., 733 F.3d 267, 271 (9th Cir. 2013).

[19] According to the docket in the California Bankruptcy, the only dischargeability claim had been commenced on March 31, 2099, by the Hammer 1994 Trust and Bill Hammer, denominated Adversary Proceeding No. 09-4161. On or about April 20, 2009, an order was entered granting relief from the automatic stay in the Debtor's California Bankruptcy to allow the Hammer State Court Action to proceed in Nevada. According to the docket in the Hammer State Court Action, on or about September 22, 2011, the Nevada State Court entered detailed findings of fact and conclusions of law and a judgment in favor of the Hammer plaintiffs against the Debtor and his spouse. Those findings and conclusions were entered after seven days of trial. Thereafter, the Hammer plaintiffs went forward with their nondischargeability proceeding against the Debtor in the California Bankruptcy. On October 30, 2012, after a one-day trial, a judgment was entered against the Debtor by the California Bankruptcy concluding that he could not discharge the debt to the Hammer plaintiffs based on willful and malicious injury under Section 523(a)(6). Debtor appealed the California Bankruptcy judgment to the Bankruptcy Appellate Panel to the Ninth Circuit ("BAP") which affirmed the bankruptcy court judgment on or about October 11, 2013. According to the docket in the Hammer State Court Action, numerous additional steps were taken thereafter to amend and enforce the judgment entered in the proceeding.

automatic stay with respect to the Twin Palms Property because the Debtor had received his discharge. See Dismissal Motion at 5:9-10, citing RJN at Exhibit N.

Following the recission of the third notice of default on May 6, 2015, see RJN at Exhibit O, NDSC recorded a fourth notice of default on July 20, 2015, which listed Wells Fargo Home Mortgage as the point of contact for the Debtor with respect to any questions about payment. See Dismissal Motion at 5:12-15, citing RJN at Exhibit P. In December of 2015, Debtor and Defendant participated in foreclosure mediation, which proved unsuccessful. See Dismissal Motion at 5:16-17, citing RJN at Exhibit Q.

On August 28, 2015, Debtor filed a complaint in the Nevada State Court against Wells Fargo, along with several other defendants who are not parties to the instant Adversary Proceeding. See Dismissal Motion at 5:19-20, citing Original State Court Complaint.[20] On October 8, 2015, the case was removed to the USDC where it was assigned Case No. 15-cv-01951-GMN-PAL ("USDC Action"). See Dismissal Motion at 5:20-22. After the civil action was removed to the USDC, Debtor amended his complaint, including a third amendment that was filed on March 29, 2017.[21] Debtor's final amended complaint alleged causes of action for quiet title, fraud, breach of contract, and breach of the implied covenant of good faith and fair dealing, based on allegations: that certain documents recorded against the Twin Palms Property were defective; that the Debtor signed the Loan Modification; and, that Wells Fargo did not have authority to enter into the Loan Modification or foreclose on the Twin Palms Property. See Dismissal Motion at 5:22-27, citing Third Amended USDC Complaint.

Wells Fargo filed a motion to dismiss Debtor's claims in the USDC Action. See Dismissal Motion at 6:1-2, citing RJN at Exhibit F. In March of 2018, the USDC granted Wells

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[20] Debtor separately named Wells Fargo Home Mortgage, Inc. and Wells Fargo Bank, NA, as defendants. See Original State Complaint at ¶¶ 3 and 7.

[21] In the USDC Action, Wells Fargo was identified as a single defendant, Wells Fargo Bank, N.A. f/k/a Wells Fargo Home Mortgage, Inc. See Third Amended USDC Complaint at ¶¶ 2 and 3.

Fargo's motion to dismiss, and entered an order dismissing all of Debtor's asserted claims[22] with prejudice.[23] See Dismissal Motion at 6:2-5, citing USDC Order.[24] The USDC, among other reasons, cited substantial deficiencies[25] and timeliness issues with Debtor's claims.

Following the dismissal of the USDC Action and the recission of the fourth notice of default, NDSC recorded a fifth notice of default and election to sell under deed of trust. See Dismissal Motion at 6:7-11, citing RJN at Exhibits T and G. Following the recordation of this notice of default, Debtor elected to participate in the Nevada Foreclosure Mediation Program which ultimately failed. See Dismissal Motion at 6:12-13, citing RJN at Exhibit U. On May 14,

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[22] In dismissing Debtor's breach of contract claim without leave to amend, the USDC observed: "To the extent Plaintiff is suing under his loan modification agreement with Wells Fargo, Plaintiff fails to state a claim. According to Plaintiff, Wells Fargo breached the loan modification agreement because it did not have the authority to enter into the agreement. (Am. Compl. ¶¶ 182–187). This argument, however, is circular and necessarily precludes Plaintiff from establishing the first element that there be a valid contract. Notwithstanding this contradiction, Plaintiff also fails to identify any particular part of the loan agreement that was allegedly breached and what conduct constituted that breach. Further, while it is not explicit in Plaintiff's pleadings, it also seems apparent that Plaintiff cannot allege performance on his part; he has not disputed that he is in default on the loan. Lastly, Plaintiff fails to allege any damages arising from the breach aside from broad 'litigation costs.'" USDC Order at 7:17 to 8:2.

[23] It is well established that a dismissal with prejudice constitutes a determination on the merits. See Leon v. IDX Systems Corp., 464 F.3d 951, 962 (9th Cir. 2006). See also Sussman v. San Diego Police Dept., 2022 WL 961559, at * 8 (S.D. Cal. Mar. 30, 2022); Lull v. County of Sacramento, 2021 WL 5054392, at *4 (E.D. Cal. Nov. 1, 2021); Dare v. Nam, 2021 WL 4428932, at *5 (S.D. Cal. Sep. 27, 2021).

[24] In dismissing Debtor's quiet title claim without leave to amend, the USDC observed: "While Plaintiff raises a number of allegations concerning the impropriety of the instruments filed against the Property, nowhere in the Complaint does Plaintiff allege that he is not in breach of the loan agreement. Rather, Plaintiff challenges the validity of the procedures by which his mortgage was securitized and assigned. In fact, although Plaintiff does not expressly admit to being in default on the loan, the Amended Complaint read as a whole does not contain even the barest hint of a dispute over whether Plaintiff was in default. Accordingly, the Court grants dismissal of the quiet title claim." USDC Order at 6:2-9.

[25] In dismissing Debtor's fraud claims without leave to amend, the USDC observed: "Furthermore, beyond conclusory assertions, Plaintiff fails to provide any allegations as to how the loan modification, or any of the preceding "misrepresentations," intentionally induced Plaintiff's reliance. Plaintiff's bare allegations of inconsistencies in the publicly recorded loan documents are insufficient to establish a claim for fraud." USDC Order at 7:5-8.

2019, the mediator issued a certificate allowing foreclosure to proceed. See Dismissal Motion at 6:14-15, citing RJN at Exhibit U.

On June 5, 2019, NDSC recorded a notice of trustee's sale, setting the trustee's sale of the Twin Palms Property for July 1, 2019. See Dismissal Motion at 6:16-17, citing RJN at Exhibit V.

On June 27, 2019, four days prior to the scheduled trustee's sale, Debtor commenced the current Chapter 13 proceeding. See Dismissal Motion at 6:19-21.

On May 26, 2021, Debtor commenced the instant Adversary Proceeding. See Dismissal Motion at 7:18. As previously mentioned, Debtor again asserts claims against Wells Fargo with respect to the Twin Palms Property.

II. Legal conclusions.

1. Real party in interest and loan modification.

"Standing and the real-party-in-interest requirement are related, but not identical, concepts." In re Wilhelm, 407 B.R. 392, 398 (Bankr. D. Idaho 2009). To have standing, a litigant must allege an "injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." Id.

The idea that an injured party must assert his own claims rather than another's, is called prudential standing. See In re Wilhelm, 407 B.R.at 398. The real party in interest doctrine generally falls within the prudential standing doctrine which means as "a prudential matter, a plaintiff must assert his own legal interests as the real party in interest, [] as found in Fed.R.Civ.P.17." Id. However, in some cases, "statutory or common law recognizes relationships in which parties may sue in their own name for the benefit of others." In re Veal, 450 B.R. 897, 908 (B.A.P. 9th Cir. 2011). Thus, the real party in interest doctrine "ensures that the party bringing the action owns or has rights that can be vindicated by proving the elements of the claim for relief asserted." Id.

In the instant case, Debtor argues that Wells Fargo is not a real party in interest for the following reasons: there is no assignment from LaSalle Bank to Wells Fargo providing Wells

Fargo with valid authority to enforce the note/deed of trust; the 2008 Loan Modification date predates the date of the 2009 assignment, which is with BOA, an entity not affiliated with Wells Fargo; the loan was sold without proper securitization requirements to Wells Fargo;[26] and, there are inconsistencies with documents filed in the current bankruptcy by Wells Fargo when compared to filings by Wells Fargo in the California Bankruptcy and the USDC Action. See Amended Adversary Complaint at ¶¶ 6-7, 11-13.

Debtor additionally alleges that the Loan Modification agreement evidences a Fannie Mae loan number in the records for Clark County, Nevada. See Amended Adversary Complaint at ¶ 23. Debtor alleges that the Loan Modification agreement filed as part of the POC appears to have a Fannie Mae loan number whited out. See Amended Adversary Complaint at ¶ 24. Debtor reasons that these allegations support his argument that Wells Fargo does not have proper documentation to support its claim as a secured party. See Amended Adversary Complaint at ¶ 25.

In response, Wells Fargo argues the doctrine of claim preclusion bars Debtor's argument that Wells Fargo is not a real party in interest as well as his assertation that Wells Fargo was not the proper party to have modified the loan. See Dismissal Motion at 9:10-11. Wells Fargo maintains that Debtor's arguments are actually "inartfully pled quiet title claims." See Dismissal Motion at 10:1-2. Wells Fargo argues that since a quiet title claim was already raised and subsequently dismissed with prejudice in the USDC Action, Debtor is precluded from re-litigating these claims in this Adversary Proceeding. See Dismissal Motion at 10:7-9.

Wells Fargo alternatively argues that issue preclusion prevents the Debtor from alleging claims that Wells Fargo is not a real party in interest and was not the proper party to have modified the loan because these issues were decided in the USDC Action. See Dismissal Motion

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[26] Debtor mentions inconsistencies with the POC filed in the Chapter 13 proceeding when compared to filings in the USDC Action. See Amended Adversary Complaint at ¶ 12. While Debtor includes this in his real party in interest argument, it is more of an allegation that Wells Fargo does not have authority to file the POC, something Debtor argues later in his Amended Adversary Complaint. As discussed in note 27, infra, the POC constitutes prima facie evidence of its validity and amount.

at 10 n.5. Wells Fargo argues that in the USDC Action, the Debtor's "claims were 'premised on Defendant's improper securitization and assignment of instruments, which culminated in an allegedly unauthorized loan modification agreement between Plaintiff and Wells Fargo in March 2008.'" See Dismissal Motion at 11:8-11, citing USDC Order at 9:11-13. Wells Fargo argues these same issues underly Debtor's real party in interest claim and assertation that Wells Fargo was not the proper party to modify the loan. See Dismissal Motion at 11:11. Because these issues were already raised in the USDC Action, Wells Fargo maintains that the Debtor is precluded from re-raising the same issues in this Adversary Proceeding. See Dismissal Motion at 11:12-14.

Wells Fargo additionally maintains that Debtor's real party in interest argument and the claims regarding the Loan Modification agreement are time barred. See Dismissal Motion at 12:6-8. Wells Fargo asserts that the USDC found that Debtor's claims were time barred at the time he commenced the USDC Action on August 28, 2015, and yet the Debtor is asserting those same claims again six years later. See Dismissal Motion at 12:9-10. Wells Fargo references NRS 11.190(1)(b), which provides that "An action upon a contract, obligation or liability founded upon an instrument in writing must be commenced within six years." See Dismissal Motion at 12:11-12.

Wells Fargo also argues that Debtor's assertion that Wells Fargo is not a real party in interest nor the proper party to have modified the loan fail on the merits. See Dismissal Motion at 14:1. Wells Fargo maintains that because the Debtor admittedly has not paid the loan in full, and he cannot establish that he has good title. See Dismissal Motion at 14:8-18. Wells Fargo cites to applicable Nevada case law providing that a plaintiff seeking to quiet title in his name must do more than challenge the interest of another party, but must establish that he has good title. See Dismissal Motion at 14:11-17.

Wells Fargo next argues that Debtor's claims that Wells Fargo is not a real party in interest nor the proper party to have modified the loan fail because they are based on "demonstratively inaccurate statements." See Dismissal Motion at 14:23-24. Wells Fargo first addresses Debtor's argument there is no assignment from LaSalle Bank to Wells Fargo. See

Dismissal Motion at 15:1-2. Wells Fargo explains that Nevada's recording statutes only require the recording of a conveyance (a deed of trust or an assignment of a deed of trust to a new record beneficiary), whereas Wells Fargo is the loan servicer for the loan. See Dismissal Motion at 15:3-11. Wells Fargo refers to NRS 111.010(1) and NRS 106.210, which indicate that as the loan servicer, Wells Fargo was not required to record the assignment from LaSalle Bank. Id.

Wells Fargo then addresses Debtor's assertation that the Loan Modification date precedes the date of the assignment and that the Loan Modification is with BOA, not Wells Fargo. See Dismissal Motion at 15:21-24. Wells Fargo references NRS 92A.250(1)(2) indicating that a recorded assignment is not required when a party becomes beneficiary of a deed of trust through merger. See Dismissal Motion at 15:25-28. Wells Fargo maintains that because BOA was a successor by merger to LaSalle Bank, this eliminated the requirement for an assignment of the deed of trust to be recorded, and that even though such assignment was eventually recorded, it was not required under Nevada law. See Dismissal Motion at 15:28-16:1-3.

Finally, Wells Fargo addresses Debtor's assertion that the subject loan was sold to Wells Fargo without proper securitization requirements. See Dismissal Motion at 16:4-5. Wells Fargo argues that the Debtor, as a borrower, lacks standing to challenge whether the loan was securitized in compliance with the SSA entered in December 2004. See Dismissal Motion at 16:6-11. Wells Fargo supports this argument with Nevada case law indicating that a nonparty to a contract has standing to enforce a contract only when the nonparty is an intended third-party beneficiary, and that a borrower is not a third-party beneficiary to an SSA. See Dismissal Motion at 16:7-19, citing Wood v. Germann, 331 P.3d 859, 861 (Nev. 2014) (external citation omitted); see also In re Rivera, WL 6675693, at *8 (B.A.P. 9th Cir. 2014).

This court agrees with Wells Fargo that numerous grounds support the conclusion that Wells Faro is the real party in interest. Several reasons require this conclusion.

a. Issue preclusion

Issue preclusion, also known as collateral estoppel, applies in bankruptcy proceedings. See Black v. Bonnie Springs Family Ltd. P'ship (In re Black), 487 B.R. 202, 211 (B.A.P. 9th Cir. 2013) ("As required under 28 U.S.C. § 1738, the Full Faith and Credit Act, we apply

Nevada's issue preclusion law to determine the issue preclusive effect of the final state court judgment."). Issue preclusion prevents re-litigation of an issue of fact or law that was decided in a prior proceeding. See Villamar v. Hersh, 37 Fed. Appx. 919, 920 (9th Cir. 2002); see also Taylor v. Sturgell, 553 U.S. 880, 892 (2008) ("Issue preclusion [. . .] bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim.") (internal quotations omitted) (external citation omitted).

"The preclusive effect of a federal-court judgment is determined by federal common law." See Taylor v. Sturgell, 553 U.S. at 891. Further, "[w]ith regard to federal-question cases, federal common law endeavors to develop a uniform rule of preclusion." Garcia v. Prudential Ins. Co. of Am., 129 Nev. 15, 20, 293 P.3d 869, 872 (Nev. 2013). Because the USDC Action was removed from state court to federal court on a federal question, federal common law applies to determine the possible preclusive effect of the USDC judgment. Under federal common law, the elements of issue preclusion are:

> (1) there was a full and fair opportunity to litigate the issue in the previous action;
>
> (2) the issue was actually litigated in that action;
>
> (3) the issue was lost as a result of a final judgment in that action; and
>
> (4) the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action.

See Bryant v. The Bank of New York Mellon (In re Bryant), 2016 WL 4247001, at *10 (B.A.P. 9th Cir. Aug. 3, 2016) (external citation omitted).

When determining whether a party had a "full and fair opportunity to litigate," courts in the Ninth Circuit are instructed to make a "practical judgment" based on at least two considerations: First, if the procedures used in the first and second actions vary enough to raise the potential for a different result, then issue preclusion is inappropriate; and, second, if the party's motivation differed in the two actions, through which an issue in the first action did not need to be contested as significant, issue preclusion should not prevent the litigation of that issue in a subsequent action. See In re Yu, 545 B.R. 633, 639 (Bankr. C.D. Cal. 2016), aff'd sub nom.

In re Chunchai Yu, 2016 WL 4261655 (B.A.P. 9th Cir. Aug. 11, 2016), aff'd, 694 Fed. Appx. 542 (9th Cir. 2017).

In the instant case, Debtor argues this Adversary Proceeding is distinguishable from the USDC Action. In particular, Debtor maintains that Wells Fargo must have "proper basis to file Proof of Claim and/or basis for foreclosure." See Amended Adversary Complaint at ¶ 29. Debtor asserts that Wells Fargo does not have proper authority to file a proof of claim in his bankruptcy case or to seek foreclosure of the Twin Palms Property.[27] See Amended Adversary Complaint at ¶ 30. Debtor argues that the legal standards for filing a proof of claim or seeking foreclosure on real property is separate and distinct from the basis for the USDC Action. See Amended Adversary Complaint at ¶ 31. Debtor asserts that the "application of documents/standing is different with respect to" the filing of a proof of claim or seeking foreclosure compared to the matters alleged in the USDC Action. See Amended Adversary Complaint at ¶ 32. Debtor further assert that the purpose of filing a proof of claim or seeking foreclosure in the bankruptcy case are different from the USDC Action. See Amended Adversary Complaint at ¶ 33. Debtor, therefore, concludes that the *res judicata* principles underlying issue preclusion do not apply. See Amended Adversary Complaint at ¶ 34.

Debtor's conclusion is misguided. Debtor voluntarily commenced the USDC Action through his chosen legal counsel. In the USDC Action, Debtor amended his complaint numerous times through his counsel and could have asserted all issues and claims before the USDC. He had an opportunity to appeal the judgment of the USDC and to challenge the procedures applied by the USDC. Debtor, however, never appealed the USDC judgment.

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[27] The POC was timely filed on August 30, 2019. It is signed under penalty of perjury. Under Section 502(a), a proof of claim is deemed allowed unless a party in interest objects. See 11 U.S.C. § 502(a). A proof claim constitutes prima facie evidence of the validity and amount of the claim. See FED.R.BANK.P. 3001(f). On September 30, 2019, Debtor filed an objection to the POC. (ECF No. 25). On January 5, 2021, an order was entered approving a stipulation to withdraw the objection to the POC. (ECF No. 100). Because the proof of claim constitutes prima facie evidence of its validity, it also constitutes prima facie evidence that claimant has standing to assert the claim as the real party in interest. Debtor has offered no proof to overcome the prima facie validity of the proof of claim. Thus, Debtor's attempt to distinguish the USDC Action based on the filing of the POC in this bankruptcy proceeding is misguided because both reflect the same conclusion: Wells Fargo has standing.

In the USDC Action, Debtor's third amended complaint asserted multiple issues with respect to the 2008 Loan Modification, including that Defendant was not the proper party nor authorized to enter into the Loan Modification. See Third Amended USDC Complaint at ¶¶ 60-62, 68-69, 83, 107, 109-110, 112, 115, 117, 123, 128-129, 131, 139, 147-148, 150-152, 153-155, 158, 164-166, 178-1, and 187. Debtor also took issue with not only the Loan Modification being performed with Defendant instead of the beneficiary under the deed of trust and promissory note, but further questioned BOA's merger with LaSalle Bank prior to the date of the Loan Modification. Id. at ¶¶ 7, 60-62, 68-69, 83, 107, 109-110, 112, 115, 117, 123, 128-129, 131, 139, 147-148, 150-152, 153-155, 158, 164-166, 178-179, and 187.

In this Adversary Proceeding, Debtor similarly alleges that Wells Fargo is not a real party in interest because: the 2008 Loan Modification date predates the date of the 2009 assignment, which is with BOA, not Wells Fargo; the loan was sold without proper securitization requirements to Wells Fargo; and there are inconsistencies with documents filed by the Defendant in the current bankruptcy compared to the documents filed in the California Bankruptcy and in the USDC Action. See Amended Adversary Complaint at ¶¶ 6-7, 11-13.

Debtor sought a determination in the USDC Action that the documents on which Wells Fargo relies are defective, that the Loan Modification was unauthorized, and that Wells Fargo cannot foreclose on the Twin Palms Property. In the instant Adversary Proceeding, Debtor seeks a determination that Wells Fargo is not the real party in interest to enforce any rights against the Twin Palms Property and that Wells Fargo's deed of trust against the Twin Palms Property be extinguished. Debtor's motivation in the instant Adversary Proceeding mirrors that in the USDC Action: to retain the Twin Palms Property by essentially quieting title in his favor. Debtor had a full and fair opportunity to litigate the issues and his claims.

The next element for federal issue preclusion requires the issue(s) to have been actually litigated. See In re Yu, 545 B.R. at 639. Generally, this means in the prior case there was a final decision decided on the merits. See id. at 643; see also Wabakken v. California Dept. of Corr. & Rehab., 801 F.3d 1143, 1148 (9th Cir. 2015). Here, the USDC Action resulted in a final decision

on the merits, as the USDC dismissed the Debtor's complaint with prejudice. See Third Amended USDC Complaint.

Debtor argues the issues raised by the Adversary Proceeding are distinguishable from the USDC Action. See Debtor Opposition at 3:12-16. As explained, however, the issues are identical, and Debtor attempts to apply them in the context of different claims. "'Issue preclusion, in contrast, bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim.'" See White v. City of Pasadena, 671 F.3d 918, 926 (9th Cir. 2012), quoting New Hampshire v. Maine, 532 U.S. 742, 748 (2001) (emphasis added). See also Taylor v. Sturgell, 553 U.S. at 892.

For the third element, the issues were lost as a result of a final judgment in the prior action: the USDC dismissed the Debtor's third amended complaint with prejudice as to all of the Debtor's claims. See generally USDC Order. The issues and allegations surrounding the claims were summarized by the USDC and were dismissed for several reasons. Those reasons included that several of the claims were time barred and that the USDC rejected Debtor's assertions that the Loan Modification was unauthorized and involved the improper securitization of certain instruments. See USDC Order at 9:3-19. The assignments of the loan were considered as well throughout the USDC's dismissal order. See generally USDC Order.

The final element requires the parties in the previous and current actions be the same or in privity with one another. See In re Bryant, 2016 WL 4247001, at *10 ("the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action"). Here, the Debtor was the plaintiff in the USDC Action and Wells Fargo was a named defendant in the USDC Action. See generally Third Amended USDC Complaint. The same status exists in the Adversary Proceeding.

Under these circumstances, the issue preclusive effect of the order entered in the USDC Action bars the Debtor from relitigating its dispute over Wells Fargo's authorization to enter into the Loan Modification, Wells Fargo's securitization of certain documents, and alleged problems

with the assignment of the loan. Debtor's attempt to frame the identical issues in a different context does not alter this result.

b. Statute of limitations

NRS 11.190(1)(b) provides that "An action upon a contract, obligation or liability founded upon an instrument in writing must be commenced within six years." Nev.Rev.Stat. 11.190(1)(b). NRS 106.330 defines an "instrument" as "a mortgage, deed of trust or other instrument encumbering real property as security for the repayment of a debt." Nev.Rev.Stat. 106.330. The Loan Modification meets this definition. Because the Loan Modification occurred in 2008, and it is now 2022, Debtor's claims with respect to the Loan Modification are time barred. See Petersen v. Bruen, 792 P.2d 18, 20 (Nev. 1990) ("the statutory period of limitations is tolled until the injured party discovers or reasonably should have discovered facts supporting a cause of action."). As the USDC explained, Debtor's claims regarding the Loan Modification were time barred when the USDC Action was commenced, and they remain time barred now. See RJN at Exhibit S at 10:11-24.[28]

c. Failure to state a claim

Debtor's "claim" that Wells Fargo is not a real party in interest also fails because it is not properly raised before the court. See ZSR Patlayici Sanayi A.S. v. Sarac Distributors LLC, 2020 WL 3895709, at *4 (M.D. Fla. July 10, 2020) (Lack of standing is a matter implicating a court's subject matter jurisdiction over an action.). Debtor cites on the BAP's decision in Veal for his argument that Wells Fargo is not a real party in interest and must prove as such. See Debtor Opposition at 2:18 to 4:1. The Veal case, however, is distinguishable for several reasons. First,

[28] In rejecting Debtor's assertion that he did not discover any deficiencies in the Loan Modification until notices of default were filed, the USDC observed: "The issue in this case, however, is not at what point Plaintiff 'realized' the alleged injuries, but rather when Plaintiff reasonably should have discovered the alleged injuries. Aside from conclusory assertions, Plaintiff fails to provide any explanation as to why NDSC's latest default notice is the date Plaintiff reasonably became aware of the alleged deficiencies. Per the Complaint, the contested assignments were predominantly recorded before Plaintiff entered into the loan modification agreement. Moreover, Plaintiff already was made aware of the threat of default after NDSC filed the two prior notices of default against Plaintiff in 2008. The Court, therefore, finds that Plaintiff has failed to plead facts sufficient to warrant the application of the discovery rule and dismissal is warranted on this alternative basis." USDC Order at 10:4-12.

in Veal, lack of standing was initially raised by the debtors in their objection to a proof of claim filed by a creditor. 450 B.R. at 903. Here, Debtor has commenced an adversary proceeding as a means of demonstrating that Wells Fargo is not a real party in interest as a claim. See generally Amended Adversary Complaint at 2:22 to 3:15. Second, the lenders in Veal responded to the debtor's claim objection with no legal argument and virtually no evidence. 450 B.R. at 903. Third, the lenders in Veal sought relief from stay without providing any evidence that they held an interest in the underlying promissory note by transfer or otherwise. Id. at 904-905. In contrast, Wells Fargo in this Adversary Proceeding has presented both legal argument and admissible evidence establishing that it is indeed the servicer of the Twin Palms Property loan. More important, unlike the situation in Veal, Debtor attempted in the USDC Action to establish that Wells Fargo lacked an interest in the Twin Palms Property, see Third Amended USDC Complaint, and failed on the merits. See USDC Order.

For the reasons explained, Debtor's assertion that Wells Fargo is not a real party in interest does not allege sufficient facts to establish a plausible claim. See Curb Mobility, LLC v. Kaptyn, Inc., 434 F.Supp.3d 854, 858 (D. Nev. 2020) quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (An adversary complaint can survive a dismissal motion if the complaint alleges sufficient factual matter to 'state a claim to relief that is plausible on its face.'). Debtor does not plead sufficient facts to show liability by Wells Fargo, or entitlement to any relief. The plausibility standard when reviewing a motion to dismiss requires more than the mere possibility that the defendant is liable to the plaintiff. See Nationstar Mortgage, LLC v. Maplewood Springs Homeowners Ass'n, 238 F.Supp.3d 1257, 1265 (D. Nev. 2017) ("When a complaint pleads facts that are merely consistent with a defendant's liability, and shows only a mere possibility of entitlement, the complaint does not meet the requirements to show plausibility of entitlement to relief.") (external citation omitted).

Finally, Debtor simply does not plead a cognizable legal theory. "To be cognizable in federal courts, ... [the suit] must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of fact." Willow Creek Ecology v. U.S. Forest Serv., 225

F. Supp. 2d 1312, 1315–16 (D. Utah 2002) (internal quotations omitted) (external citations omitted).

2. Fraud.

Debtor further argues that Wells Fargo committed acts of fraud. Specifically, Debtor alleges that the 2008 Loan Modification was not signed by the Debtor's wife, Geraldine Van Damme ("Geraldine"). See Amended Adversary Complaint at ¶¶ 17-20. Both Geraldine and the Debtor were parties to the original loan agreement, and both signed the original loan documents for the Twin Palms Property. See Amended Adversary Complaint at Exhibit 1; see also RJN at Exhibit A. Debtor also alleges the 2008 Loan Modification was not signed by him, but instead his signature was cut and pasted to the Loan Modification by "the Bank."[29] See Amended Adversary Complaint at ¶ 17. Debtor alleges that this constitutes a different basis for asserting that Wells Fargo is not a real party in interest. See Amended Adversary Complaint at ¶ 21.

Wells Fargo maintains that Debtor already asserted a fraud claim against Defendant in the USDC Action, which was dismissed on all counts with prejudice. See Dismissal Motion at 10:12-17; see also USDC Order. Wells Fargo argues that in both actions the Debtor's fraud claim is premised on the Loan Modification. See Dismissal Motion at 10:14-15. As such, Wells Fargo argues that Debtor's fraud claim is barred by res judicata, including both issue preclusion and claim preclusion. See Dismissal Motion at 2:8-9. Wells Fargo further argues that the Debtor's fraud claim is barred by the applicable statute of limitations, citing NRS 11.190(3)(d). See Dismissal Motion at 2:18. Wells Fargo also argues that Debtor is judicially estopped from asserting his fraud claim because "key factual assertion underpinning this claim – that Plaintiff did not sign the Loan Modification – is in direct contravention of the facts he alleged in the District Court Action – that he did, in fact, sign the Loan Modification – which fact was adopted by that Court." See Dismissal Motion at 2:23-26.

This court finds Wells Fargo's arguments to be persuasive. For reasons discussed below, Debtor's fraud claim is barred by claim preclusion and also is time barred. Because the court

[29] This court is assuming "the Bank" is a reference to Wells Fargo.

finds Debtor's fraud claim is precluded and time barred, it is unnecessary to address the additional defenses raised by Defendant.

a. Claim Preclusion

Claim preclusion is a broader concept than issue preclusion. See In re Antonie, 432 B.R. 843, 849 (Bankr. D. Idaho 2010), aff'd, 447 B.R. 610 (D. Idaho 2011). Claim preclusion, unlike issue preclusion, "prevents parties from raising issues that could have been raised and decided in a prior action—even if they were not actually litigated." Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc., 140 S. Ct. 1589, 1594 (2020). See also Christ v. Trump, 2022 WL 1446820, at *3 (N.D. Cal. Apr. 20, 2022). Under claim preclusion, if a later action advances the same claim as an earlier action between the parties, the earlier action's judgment "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." Id. at 1594–95 (internal quotations omitted) (external citations omitted).

When considering the preclusive effect of a federal court judgment, we apply the federal law of claim preclusion." See First Pac. Bancorp, Inc. v. Helfer, 224 F.3d 1117, 1128 (9th Cir. 2000); see also Garcia v. Prudential Ins. Co. of Am., 129 Nev. 15, 20, 293 P.3d 869, 872 (2013) (external citation omitted) ("With regard to federal-question cases, federal common law endeavors to develop a uniform rule of preclusion."). When determining whether claim preclusion should apply, a three-part test is used:

> (1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case. (Emphasis added.)

Five Star Capital Corp. v. Ruby, 194 P.3d 709, 713 (Nev. 2008), holding modified by Weddell v. Sharp, 350 P.3d 80 (Nev. 2015).

In the instant matter, there is no doubt that the relevant parties to the USDC Action and this Adversary Proceeding are the same. Both the USDC Action and the Adversary Proceeding involve the Debtor and Wells Fargo. Additionally, the dismissal order in the USDC Action was a valid final judgment on the merits that resolved all claims between the parties. It was never appealed.

The third element of the three-part test is met. In both actions, Debtor asserts that Wells Fargo committed fraud involving the Loan Modification. See Third Amended USDC Complaint at ¶¶ 133, 139, 148-152, 155, 158, and 164-166; see also Amended Adversary Complaint at ¶¶ 16-21. The context of the fraud is different: Debtor asserted in the USDC Action that he was forced into the Loan Modification by other defendants, but that Wells Fargo made false representations, misrepresentations and acted outside its scope as loan servicer, while in the instant Adversary Proceeding he alleges that his signature was cut and pasted to the Loan Modification and that his wife Geraldine did not sign the Loan Modification. Id. These differences, however, are not enough to survive the broad effects of claim preclusion. See Five Star Capital Corp. v. Ruby, 194 P.3d at 713–14 (2008) (explaining that claim preclusion applies to prevent an entire second action based on the same set of facts and circumstances as the first suit, and as such claim preclusion encompasses not just claims that were raised in the initial action, but also claims that could have been raised.).

These allegations sounding in fraud could have been asserted in the USDC Action. Debtor's allegation that he did not actually sign the Loan Modification while also alleging that he was forced to sign the Loan Modification are conflicting, but either or both could have been asserted in the USDC Action. See Third Amended USDC Complaint at ¶¶ 57-58, 65, 107, 139, 147-148, 155, and 178-179.[30] If the Debtor did not actually sign the Loan Modification, this court is unsure why he would have stated multiple times he did in fact sign the Loan Modification and not include such information in his original fraud claim against Wells Fargo.[31] Moreover, any issue of whether the Debtor's wife Geraldine signed the Loan Modification could have been raised in the USDC Action. For these reasons, assertion of Debtor's alleged fraud claim in this Adversary Proceeding is barred by claim preclusion.

[30] Each of these paragraphs in the Third Amended USDC Complaint include Debtor's representation that he entered into negotiations for the Loan Modification with Wells Fargo and that he signed the Loan Modification.

[31] Wells Fargo states that the Debtor is judicially estopped from arguing he did not sign the Loan Modification after taking the position he did sign such document in the USDC Action. See Dismissal Motion at 13:2. Since the Debtor's fraud claim is defective for other reasons, this court does not need to reach the judicial estoppel argument.

b. Statute of Limitations

Wells Fargo also argues that Debtor's fraud claim is severely time barred pursuant to NRS 11.190(3)(d). See Dismissal Motion at 12:16-21. While this court has already found that the Debtor's fraud claim is prevented by claim preclusion, it is important to also address the applicable statute of limitations with respect to the fraud claim. Under NRS 11.190(3)(d), claims arising from fraud or mistake have a three-year statute of limitations: "an action for relief on the ground of fraud or mistake, but the cause of action in such a case shall be deemed to accrue upon the discovery by the aggrieved party of the facts constituting the fraud or mistake." The Loan Modification took place in 2008. See generally Amended Adversary Complaint. Debtor had at his disposal during 2008, and particularly during his USDC Action in which he alleged fraud already involving the Loan Modification, all of the information necessary to demonstrate if there was fraud related to the signing of the Loan Modification. Since the Debtor did not commence the instant Adversary Proceeding until 2021, even if Debtor's alleged fraud claim was not already prevented by claim preclusion, it is also time barred under the applicable statute of limitations.

3. Nevada's Ancient Lien Statute.

NRS 106.240, often referred to as Nevada's "Ancient Lien Statute," states the following:

> The lien heretofore or hereafter created of any mortgage or deed of trust upon any real property, appearing of record, and not otherwise satisfied and discharged of record, shall at the expiration of 10 years after the debt secured by the mortgage or deed of trust according to the terms thereof or any recorded written extension thereof become wholly due, terminate, and it shall be conclusively presumed that the debt has been regularly satisfied and the lien discharged.

See Nev.Rev.Stat. 106.240. The effect of the statute is to extinguish liens created by mortgages or deeds of trust ten years after the underlying debt becomes wholly due. See TRP Fund VIII, LLC v. NewRez LLC, 2021 WL 5823701, at *1 (9th Cir. Dec. 8, 2021).

In the instant case, Debtor maintains that the January 10, 2008, notice of default (the "Second Notice of Default") filed by NDSC accelerated the loan and made all sums due and payable. See Amended Adversary Complaint at ¶¶ 36-37. Debtor alleges that the Second Notice

of Default was not rescinded to reverse the acceleration of the loan. See Amended Adversary Complaint at ¶ 38. For this reason, Debtor asserts that he has a valid basis to seek extinguishment of Wells Fargo's deed of trust on the Twin Palms Property. See Amended Adversary Complaint at ¶ 39.[32]

Wells Fargo maintains that U.S. Bank, N.A. ("U.S. Bank") remains as the note holder as well as the deed of trust beneficiary, and that Wells Fargo remains as the loan servicer. See Dismissal Motion at 4:11-12.[33] Wells Fargo argues that the Debtor's demand for extinguishment of the deed of trust is not supported by Nevada's Ancient Lien Statute. See Dismissal Motion at 3:4-6. Specifically, Wells Fargo maintains that a clause in a notice of default stating that the loan balance is accelerated does not trigger the ten-year clock under the Ancient Loan Statute. See Dismissal Motion at 17:2-3. Moreover, Wells Fargo argues "even if a statement of acceleration could trigger the Ancient Lien Statute (it cannot), such statement in the Second Notice of Default was not sufficiently definite to accelerate the loan." See Dismissal Motion at 17:3-5. Additionally, Wells Fargo maintains that even if the notice of default did trigger acceleration under the statute, the Loan Modification rescinded the notice of default and reinstated the loan. See Dismissal Motion at 17:5-7. Finally, Wells Fargo argues "equitable principles prevent lien extinguishment due to Plaintiff's multiplied litigation seeking only to delay foreclosure." See Dismissal Motion 3:11-12.

"The Supreme Court of Nevada has not directly addressed what triggers acceleration of debt under NRS 106.240." Daisy Tr. v. Fed. Nat'l Mortgage Ass'n, 2021 WL 1226536, at *3 (D. Nev. Mar. 31, 2021), aff'd, 2022 WL 874634 (9th Cir. Mar. 24, 2022). The Nevada Supreme Court has recognized "the activation of an acceleration clause requires some affirmative conduct on the part of the lender." Id. (internal quotations omitted) (external citation

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[32] At the time the USDC Action was commenced on August 28, 2015, ten years had not elapsed after the Second Notice of Default was recorded on January 10, 2008. Debtor's current claim based on the Ancient Lien Statute could not have been asserted in the USDC Action. The court, therefore, examines whether the Debtor has stated a claim for which relief may be granted in this Adversary Proceeding.

[33] The POC identifies U.S. Bank as the secured creditor with Wells Fargo, as loan servicer, to be the recipient of notices in the Chapter 13 case.

omitted). A plain reading of the Ancient Lien Statute suggests two documents can trigger an acceleration under the statute—a deed of trust and a recorded written extension. Id., citing NRS 106.240.[34] Several cases in the Ninth Circuit suggest that a recorded notice of default can accelerate a loan for the purposes of Nevada's Ancient Lien Statute. See Daisy Tr. v. Fed. Nat'l Mortgage Ass'n, 2021 WL 1226536, at *4 ("Other courts in this district generally agree, finding that a recorded Notice of Default triggers acceleration under the statute."); see also Glass v. Select Portfolio Servicing, Inc., 466 P.3d 939 (Nev. 2020) (the parties in Glass did not dispute the notice of default accelerated the loan). The effect of an acceleration is that the balance secured by the recorded deed of trust becomes wholly due. Likewise, the effect of a recorded written extension is that the balance secured by the recorded deed of trust is not wholly due until expiration of the extension period.

In the instant case, the Second Notice of Default was recorded on January 10, 2008, and a recission was not recorded. See Amended Adversary Complaint at ¶¶ 36-39; see also Dismissal Motion at 17:1-8. Instead, both parties entered into the 2008 Loan Modification, which was recorded on April 25, 2008, several months after recordation of the Second Notice of Default. See RJN at Exhibits J and K. The recording of the Loan Modification after the Second Notice of Default makes the instant case distinguishable from Glass and other Ninth Circuit cases which based their reasoning on recorded recissions of a notice of default.

The most relevant case addressing such facts is Rizvi v. U.S. Bank Nat. Ass'n, 2020 WL 12787989, at *2 (8th Jud. Dist., Nev. Sep. 25, 2020), aff'd, 498 P.3d 1277 (Nev. Nov. 10, 2021). As observed by the trial court in Rizvi, the Nevada Supreme Court's decision in Glass did not need to decide whether a notice of default can trigger the Ancient Lien Statute because a rescission of a notice of default effectively rescinds any acceleration that would result from a notice of default. 2020 WL 12787989, at *3. Similarly, other cases do not set a bright line rule that a notice of default necessarily triggers the Ancient Lien Statute. See Nationstar Mortgage,

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[34] "[T]he Nevada Supreme Court in [Pro-Max Corp. v. Feenstra, 117 Nev. 90, 16 P.3d 1074 (2001), opinion reinstated on reh'g (Jan. 31, 2001)] concluded that NRS 106.240 is clear and unambiguous in which no further interpretation is required or permissible." Daisy Tr. v. Fed. Nat'l Mortgage Ass'n, 2021 WL 1226536, at *3.

LLC v. Torrey Pines Ranch Estates Homeowners Ass'n, 2021 WL 682056, at *6 (D. Nev. Feb. 19, 2021), appeal dismissed, 2021 WL 4783801 (9th Cir. Sept. 20, 2021) (the court assumed without deciding, among other things, the notice of default triggered the Ancient Lien Statute).

In Rizvi, the plaintiffs filed for Chapter 13 protection and converted their case to Chapter 11. Their proposed Chapter 11 plan included renegotiating the terms of the subject loan in dispute. 2020 WL 12787989, at *1. Eventually, the bankruptcy court approved the plaintiffs' Chapter 11 plan, which had altered the loan terms, and resulted in a reinstatement of the plaintiffs' loan. Due to the reinstatement of the loan, the court in Rizvi considered the notice of default to be rescinded. Id. at *4. The court found that "Plaintiffs' court-approved [reorganization] plan effectively reinstated the loan under Section 19 of the deed of trust, which reinstatement undermines their argument that nothing rescinded the acceleration in the 2009 notice of default." Id.

Similarly, this court concludes that the 2008 Loan Modification, recorded shortly after the Second Notice of Default, effectively rescinded the Second Notice of Default. This conclusion is confirmed by the subsequent conduct of the parties. There is no dispute that after the 2008 Loan Modification was recorded on April 25, 2008, a third notice of default was recorded on October 15, 2008, and a rescission of that notice was recorded on May 6, 2015. Additionally, there is no dispute that a fourth notice of default was recorded on July 20, 2015, and a rescission of that notice was recorded on May 23, 2018. It is clear that any acceleration resulting from the Second Notice of Default recorded on January 10, 2008, was no longer effective and that the underlying debt did not become wholly due under the Ancient Lien Statute for more than ten years. As a result, no basis exists to extinguish the subject deed of trust, and no claim for relief under the Nevada Ancient Lien Statute can be stated.

CONCLUSION

The order entered in the USDC Action dismissed all of the Debtor's claims against Wells Fargo with prejudice. Dismissal with prejudice resolved all of the Debtor's claims on the merits. The USDC Order was not appealed and is final. Dismissal of the USDC Action on the merits included all of the claims alleged before the USDC as well as all claims that could

have been brought. Those claims include all of the theories Debtor now asserts in this Adversary Proceeding, except for the claim based on the Nevada Ancient Lien Statute. As to the latter claim, the threshold requirement for its application does not exist.

The order entered in the USDC Action dismissing all of the Debtor's claims with prejudice also determined on the merits all of the issues raised by the Debtor. Those issues included the factual and legal basis for Wells Fargo's standing and status as the real party in interest, the expiration of the applicable statute of limitations, and the assertions of fraud in connection with the Loan Modification. The USDC Order was not appealed and is final.

In its order dismissing the prior action, the USDC determined that leave to amend the complaint would be futile because, among other things, the Debtor had amended his complaint multiple times. In this Adversary Proceeding, Debtor has amended his complaint one time, except for the claim based on the Nevada Ancient Lien Statute, but all of his claims are barred by the prior USDC judgment. As to the latter claim, any amendment would be futile because the most recent notice of default was recorded and rescinded well before expiration of the time frame permitting extinguishment of Wells Fargo's deed of trust under the Ancient Lien Statute.

I**T IS THEREFORE ORDERED** that Well Fargo Bank, N.A.'s Motion to Dismiss Plaintiff's Amended Complaint, Adversary Docket No. 35, be, and the same hereby is, **GRANTED WITHOUT LEAVE TO AMEND**.

IT IS FURTHER ORDERED that all matters currently scheduled in the above-captioned adversary proceeding are **VACATED**.

Copies sent via CM/ECF ELECTRONIC FILING

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