

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA**

Brinich-Barnes v. Ocwen Loan Servicing, LLC

No. 1:24-cv-01414-KES-SKO (E.D. Cal. May 5, 2025) · No. 1:24-cv-01414-KES-SKO · Decided May 5, 2025

SUMMARY

This document is a United States District Court for the Eastern District of California findings and recommendation concerning Defendant PHH Mortgage Corporation’s Rule 12(b)(6) motion to dismiss. The magistrate judge recommends dismissal without leave to amend, concluding that the plaintiff’s claims arising from the foreclosure and mortgage-servicing conduct are barred by res judicata and, alternatively, applicable statutes of limitations. The recommendation also addresses requests for judicial notice and the alleged lack of a private right of action under the Consumer Financial Protection Act.

OPINION

1 UNITED STATES DISTRICT COURT 2 EASTERN DISTRICT OF CALIFORNIA 3 HELEN
BRINICH-BARNES, Administrator Case No. 1:24-cv-01414-KES-SKO 4 of the Estate of
Garland Barnes, FINDINGS AND RECOMMENDATION 5 Plaintiff, THAT DEFENDANT’S
MOTION TO DISMISS BE GRANTED WITHOUT 6 v. LEAVE TO AMEND 7 PHH
MORTGAGE CORPORATION, as (Doc. 9) successor via merger with Ocwen Loan 8 Servicing,
LLC, OBJECTIONS DUE: 21 DAYS 9 Defendant. _____/ 10

11 I. INTRODUCTION 12 On February 18, 2025, Defendant PHH Mortgage Corporation
(“Defendant”), as successor 13 by merger to Ocwen Loan Servicing, LLC (“Ocwen”), filed a
motion to dismiss pursuant to Rule 14 12(b)(6) of the Federal Rules of Civil Procedure.

(Doc. 9.) On April 4, 2025, Plaintiff Helen 15 Brinich-Barnes (“Plaintiff”), Administrator of the
Estate of Garland Barnes, proceeding pro se, 16 filed an opposition to the motion. 1 (Doc. 20.)
Defendant filed a reply on April 14, 2025. (Doc. 17 22.) 18 On February 19, 2025, the motion was
referred to the undersigned for findings and 19 recommendation pursuant to 28 U.S.C. § 636(b)
(Doc.

13), and a hearing was re-set for April 23, 20 2025 (Doc. 14). On April 16, 2025, the undersigned
reviewed the briefs and supporting material, 21 found the matter suitable for decision without oral
argument pursuant to Local Rule 230(g), and 22 vacated the hearing. (Doc. 24.) 23 For the reasons
set forth below, the undersigned RECOMMENDS that Defendant’s motion 24 to dismiss be
GRANTED without leave to amend.

25 26 27 1 In its reply brief, Defendant notes that Plaintiff’s opposition was filed one day late and urges the Court to disregard the untimely filing. (See Doc. 22 at 2–3.) In the absence of any apparent prejudice, which Defendant has not shown, 28 the Court shall permit the late filing. Plaintiff is cautioned that any future failures to comply with this Court’s 1 A. The Mortgage Loan 2 In 2007, Garland Barnes (“Barnes”) purchased property located at 117 E. 21st Street, 3 Merced, California, for \$640,000 with a mortgage loan of \$512,000 secured by a promissory 4 note.

(Doc. 6 ¶ 8.) In March 2015, Barnes “plead[ed] with Ocwen to refinance his loan due to 5 his terminal illness and congestive heart failure,” but it “refused to evaluate loss mitigation 6 options.” (Id. ¶ 9.) Barnes passed away in April 2015, and Plaintiff, his daughter, was appointed 7 administrator of his estate (the “Estate”). (Id. ¶¶ 10–11.)

As such, Plaintiff inherited the 8 property and the financial obligations on behalf of the Estate. (Id. ¶ 10.) 9 In August 2015 and June 2016, Ocwen issued statements “showing unapplied funds” and 10 “unresolved discrepancies” on Barnes’ mortgage account. (Doc. 6 ¶¶ 12–13.) According to 11 Plaintiff, payments made were “not properly allocated, leading to unjust penalties”, “procedural 12 delays”, and “additional financial strain on the [E]state.” (Id.)

Plaintiff entered into a contract 13 with a construction contractor in April 2017 “for extensive property repairs totaling \$59,500,” 14 which she alleges “reflect[ed] her efforts to maintain and restore the property despite Ocwen’s 15 refusal to assist.” (Id. ¶ 14.) 16 B. Plaintiff Communicates with Ocwen Regarding the Loan 17 In August 2017, Ocwen sent a letter to the Estate requesting an appraisal or purchase 18 contract for a loan payoff quote, noting the loan’s status under the Shared Appreciation 19 Modification (“SAM”) Program.

(Doc. 6 ¶ 15.) According to Plaintiff, Ocwen “fail[ed] to 20 provide clear guidelines or timely action under SAM Program rules, constituting procedural 21 discrepancies.” (Id.) That next month, Ocwen provided a mortgage transfer packet to Plaintiff 22 that “outlin[ed] necessary documentation and proof of insurance.” (Id. ¶ 16.) 23 The property was listed for sale at \$450,000 in January 2018 but was “removed after three 24 days due to unresolved issues related to Ocwen’s procedural failures.” (Doc.

6 ¶ 17.) In April 25 2018, Ocwen cancelled a property valuation “without sufficient justification, showcasing 26 27 2 The following facts are drawn from Plaintiff’s First Amended Complaint (Doc. 6), which is the operative pleading. 28 All well-pleaded factual allegations—as opposed to legal conclusions—are assumed to be true for purposes of 1 procedural inconsistencies and its failure to meet obligations.” (Id. ¶ 18.)

In May 2018, 2 Altisource, an appraisal company hired by Ocwen, assessed the property at \$400,000, 3 “significantly below the initial purchase price.” (Id. ¶ 19.) 4 Plaintiff spoke with

Ocwen via telephone in July 2018 regarding foreclosure processes, 5 where Ocwen “admitted to withdrawing appraisal requests and mishandling short sale options.” 6 (Doc. 6 ¶ 20.)

During this phone call, Ocwen informed Plaintiff that the “foreclosure process is 7 ‘on hold,’” but, according to Plaintiff, “Ocwen’s internal records reveal that the foreclosure 8 auction is still being prepared.” (Id. ¶ 21.) 9 On August 1, 2018, Ocwen “cancel[ed] an appraisal order without notifying” Plaintiff, 10 which Plaintiff asserts “impact[ed] her efforts to pursue a short sale” and “disrupt[ed] her 11 attempts to mitigate foreclosure, as no alternative options [were] provided.” (Doc.

6 ¶ 22.) 12 Plaintiff contacted Ocwen on August 3, 2018, to “request clarification on the canceled 13 appraisal.” (Id. ¶ 23.) Plaintiff asserts “Ocwen representatives failed to provide a consistent 14 explanation, stating that the appraisal was unnecessary but failing to escalate the issue for 15 resolution.” (Id.) 16 Ocwen sent a letter to Plaintiff dated August 6, 2018, “acknowledging her recent contact 17 and providing steps to apply for mortgage assistance, including options such as lump-sum 18 payment plans, loan modifications, and deeds-in-lieu of foreclosure.” (Doc.

6 ¶ 24.) Plaintiff 19 contends that the communication came “after foreclosure preparation had already advanced, 20 rendering these options moot.” (Id.) 21 C. The Property is Sold at Auction 22 On August 22, 2018, the property was sold at auction for \$243,843.65, the amount of the 23 unpaid debt, which Plaintiff alleges “disregard[ed] over \$600,000 in equity contributed by [] 24 Barnes.” (Doc.

6 ¶ 25.) Plaintiff filed a complaint with Ocwen’s Office of the Consumer 25 Ombudsman stating that the Ocwen’s representatives “had assured her that the foreclosure was 26 on hold as they made arrangements for [Plaintiff] and another family member to assume the 27 loan.” (Id. ¶ 26.) Ocwen responded to Plaintiff’s complaint via email in December 2018, which 28 Plaintiff contends “acknowledge[ed] procedural errors, including the erroneous cancellation of 1 appraisals, mismanagement of short sale procedures, and failure to provide timely updates during 2 the foreclosure process.” (Id. ¶ 27.)

3 D. Plaintiff Files Ocwen I in State Court 4 In March 2019, Plaintiff, represented by attorney Mike Chappars (“Attorney Chappars”), 5 filed a civil suit against Ocwen in Merced County Superior Court, for “wrongful foreclosure and 6 other violations,” styled Brinich-Barnes v. Ocwen Loan Servicing, LLC, et al., Case No. 19CV- 7 1168 (“Ocwen I”). (Doc. 6 ¶ 28.)

According to Plaintiff, the proceedings in Ocwen I were 8 “drastically delayed due COVID-19 and in early 2024 due to Attorney Chappars’ heath [sic] 9 deterioration.” (Id. ¶ 29.) Plaintiff alleges she was told by Attorney Chappars that Ocwen was 10 “willing to allow [Plaintiff] to submit an offer in order to end litigation.” (Id.) According to 11 Plaintiff, “Despite this false

negotiation attempt, Ocwen filed a motion for summary judgment in 12 [Ocwen I] in March 2024, to which Attorney Chappars did not file an opposition on behalf of 13 [Plaintiff].”³ (Id. ¶ 30.)

14 In July 2024, Attorney Chappars notified Plaintiff of his hospitalization due to epilepsy. 15 (Doc. 6 ¶ 31.) Plaintiff asserts that the hospitalization resulted in Attorney Chappars’ “inability 16 to file an opposition to the defense’s motion for summary judgment” in Ocwen I, and that 17 Attorney Chappars informed Plaintiff of his intention to transition her case to another attorney.

18 (Id.) 19 E. Plaintiff Offers to Settle the Dispute 20 Plaintiff alleges that she spoke with Ocwen’s attorney in October 2024 and informed him 21 that Attorney Chappars “was ill and that she was seeking other counsel and that she was willing 22 to buy the property.” (Id. ¶ 32.) According to Plaintiff, “Ocwen’s representative stated that 23 Ocwen would only accept cash for the purchase.” (Id.)

That same day, Plaintiff communicated 24 with a mortgage lender “about discussions with Ocwen’s attorney and how she was instructed by 25 Ocwen’s counsel to submit a written offer.” (Id. ¶ 33.) 26 Plaintiff emailed “a formal settlement offer” to Ocwen’s counsel on October 21, 2024, 27 3 As set forth more fully below, the Court will take judicial notice of certain filings in Ocwen I, which, contrary to 28 Plaintiff’s allegations, include an opposition to Ocwen’s motion for summary judgment that was filed by Attorney 1 proposing a lump sum payment of \$243,843.65 to resolve the dispute.

(Id. ¶ 34.) Plaintiff 2 alleges that Ocwen “fail[ed] to acknowledge this offer and proceed[ed] with actions that 3 disregard[ed] [Plaintiff’s] equity rights and list[ed] the property for \$699,600.” (Id. ¶ 35.) On 4 November 10, 2024, Ocwen placed the property up for action “despite unresolved legal claims 5 and in disregard to [Plaintiff’s] substantial equity interest.” (Id. ¶ 36.)

6 F. Plaintiff Files the Present Case in This Court 7 On November 19, 2024, Plaintiff filed the complaint in this case naming as the defendant 8 Ocwen “as succeeded by merger by PHH Mortgage Corporation.” (Doc. 1.) Plaintiff amended 9 the complaint on January 23, 2025, to name as defendant “PHH Mortgage Corporation as 10 successor via merger with Ocwen.” (Doc.

6.) 11 Plaintiff’s First Amended Complaint, the operative pleading, seeks relief for Ocwen’s 12 “systemic failures in servicing the mortgage loan secured by the property,” and asserts claims for 13 violation of the Real Estate Settlement Procedures Act, violation of the Consumer Financial 14 Protection Act, violation of the Truth in Lending Act, violation of California’s Homeowners Bill 15 of Rights statutes, and violation of California’s Unfair Competition Law.

(See Doc. 6.) Plaintiff 16 seeks “an emergency injunction preventing Ocwen from conducting any sale or auction activities 17 on the [p]roperty during this litigation,” damages, and attorney’s fees. (Id. at p. 12.) 18 III. MOTION TO DISMISS STANDARD 19 A motion to dismiss brought pursuant to Rule 12(b)(6) tests the legal sufficiency of a 20 claim, and dismissal is proper if there

is a lack of a cognizable legal theory, or the absence of 21 sufficient facts alleged under a cognizable legal theory.

Conservation Force v. Salazar, 646 F.3d 22 1240, 1241-42 (9th Cir. 2011) (quotation marks and citations omitted). In resolving a 12(b)(6) 23 motion, a court's review is generally limited to the operative pleading. Daniels-Hall v. National 24 Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010); Sanders v. Brown, 504 F.3d 903, 910 (9th Cir. 25 2007); Huynh v. Chase Manhattan Bank, 465 F.3d 992, 1003-04 (9th Cir.

2006); Schneider v. 26 California Dept. of Corr., 151 F.3d 1194, 1197 n.1 (9th Cir. 1998). Courts may not supply 27 essential elements not initially pleaded, Litmon v. Harris, 768 F.3d 1237, 1241 (9th Cir. 2014), 28 and “conclusory allegations of law and unwarranted inferences are insufficient to defeat a 1 motion to dismiss for failure to state a claim,” Caviness v. Horizon Cmty.

Learning Ctr., Inc., 2 590 F.3d 806, 812 (9th Cir. 2010) (quoting Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 3 (9th Cir. 1996)). 4 To survive a motion to dismiss, a complaint must contain sufficient factual matter, 5 accepted as true, to state a claim that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 6 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)) (quotation marks 7 omitted); Conservation Force, 646 F.3d at 1242; Moss v. U.S. Secret Service, 572 F.3d 962, 969 8 (9th Cir.

2009). The Court must accept the well-pleaded factual allegations as true and draw all 9 reasonable inferences in favor of the non-moving party. Daniels-Hall, 629 F.3d at 998; Sanders, 10 504 F.3d at 910; Huynh, 465 F.3d at 996-97; Morales v. City of Los Angeles, 214 F.3d 1151, 11 1153 (9th Cir. 2000). Further, 12 If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a 13 motion to dismiss under Rule 12(b)(6).

Plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that 14 plaintiff's explanation is implausible. The standard at this stage of the litigation is 15 not that plaintiff's explanation must be true or even probable.

The factual allegations of the complaint need only “plausibly suggest an entitlement to relief.” 16... Rule 8(a) “does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will 17 reveal evidence” to support the allegations. 18 Starr v. Baca, 652 F.3d 1202, 1216-17 (9th Cir.

2011) (internal citations omitted) (emphases in 19 original). 20 In practice, “a complaint... must contain either direct or inferential allegations respecting 21 all the material elements necessary to sustain recovery under some viable legal theory.” 22 Twombly, 550 U.S. at 562.

To the extent that the pleadings can be cured by the allegation of 23 additional facts, the plaintiff should be afforded leave to amend. *Cook, Perkiss and Liehe, Inc. v. 24 Northern California Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990) (citations omitted). 25 IV. DISCUSSION 26 Defendant contends the claims in this case are barred by res judicata based on the 27 litigation of Ocwen I, or, alternatively, they are barred by the applicable statutes of limitations.

28 (Doc. 9 at 11–17.) The undersigned agrees. 1 A. Requests for Judicial Notice 2 As an initial matter, Defendant requests the Court take judicial notice of deeds, Trustee’s 3 notices, and certain filings and orders from Ocwen I.⁴ (See Docs. 10, 23.)

In general, “a district 4 court may not consider any material beyond the pleadings, in ruling on a Rule 12(b)(6) motion.” 5 *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994). “A court may, however, consider certain 6 materials—documents attached to the complaint, documents incorporated by reference in the 7 complaint, or matters of judicial notice—without converting the motion to dismiss into a motion 8 for summary judgment.” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir.

2003). 9 Under Rule 201 of the Federal Rules of Evidence, a court “may judicially notice a fact that 10 is not subject to reasonable dispute because it: (1) is generally known within the trial court’s 11 territorial jurisdiction; or (2) can be accurately and readily determined from sources whose 12 accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b).

The Court may take judicial 13 notice of its own records and the records of other courts. See *United States v. Howard*, 381 F.3d 14 873, 876 n.1 (9th Cir. 2004); *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980); see also 15 Fed R. Evid. 201. It may also take judicial notice of “matters of public record.” *Lee v. City of 16 Los Angeles*, 250 F.3d 668, 689 (9th Cir.

2001). 17 The documents at issue are public records, the accuracy of the documents is not questioned 18 by either party⁵, and the documents’ accuracy is not subject to reasonable dispute. See 19 *Thompson v. Well Fargo Bank, N.A.*, No. 1:17-CV-1200 AWI SKO, 2018 WL 1453212, at *2 20 (E.D. Cal. Mar. 23, 2018).

Accordingly, Defendant’s requests for judicial notice are granted and, 21 pursuant to Rule 201 of the Federal Rules of Evidence, the Court takes judicial notice of the 22 deeds, Trustee’s notices, and certain filings and orders from Ocwen I. (Docs. 10, 23.)

Moreover, 23 because no disputed issues of fact appear, res judicata is properly raised in Defendant’s motion 24 to dismiss based upon the Court taking judicial notice of the record in Ocwen I. See *Silva v. 25 26 4 Plaintiff* also requests that the Court take judicial notice of a “new legal action that has been filed against Defendant PHH before this Honorable Court.

See Case# 1 25-cv-000457 (E.D. CA, 2025).” (Doc. 25.) The Court notes that 27 Plaintiff filed another lawsuit against Defendant in this Court on April 21, 2025, but expresses no opinion on its merits. 28 5 In fact, one of the documents at issue, the Trustee’s Deed Upon Sale, is attached to Plaintiff’s First Amended 1 Yosemite Community College District, 1:19-cv-00795-LJO-EPG, 2019 WL 6878237, at *5 (E.D.

2 Cal. Dec. 17, 2019) (“Res judicata may properly be raised in a Rule 12(b)(6) motion to dismiss 3 based upon the court taking judicial notice of the record in the prior case where no disputed 4 issues of fact appear”) (citing *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984)); *Stokes v. 5 City of Visalia*, No. 1:17-cv-01350-SAB, 2018 WL 2979765, at *5 (E.D.

Cal. June 8, 2018) 6 (Although res judicata is an affirmative defense, a court may properly dismiss an action as 7 barred by res judicata “based upon the facts alleged in the complaint and any facts that are 8 properly subject to judicial notice.”) (citation omitted). 9 B. Plaintiff’s Claims Are Barred by Res Judicata 10 1. Legal Standard 11 In determining the preclusive effect of a prior state court judgment, federal courts are 12 required to apply the preclusion law of the state in which the judgment was rendered, here 13 California.

See *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *White v. 14 City of Pasadena*, 671 F.3d 918, 926 (9th Cir. 2012). See also *Holcombe v. Hosmer*, 477 F.3d 15 1094, 1097 (9th Cir. 2007). 16 Under California law, “[t]he doctrine of res judicata precludes the relitigation of certain 17 matters which have been resolved in a prior proceeding under certain circumstances.” *Brinton v. 18 Bankers Pension Servs., Inc.*, 76 Cal. App.

4th 550, 556 (1999); accord *Rippon v. Bowen*, 160 19 Cal. App. 4th 1308, 1318 (2008). The rule is “is intended to preserve the integrity of the judicial 20 system, promote judicial economy, and protect litigants from harassment by vexatious 21 litigation.” *Vandenberg v. Superior Court*, 21 Cal. 4th 815, 829 (1999); see also *Bernhard v. 22 Bank of Am. Nat. Tr. & Sav.*

Ass’n, 19 Cal. 2d 807, 811 (1942) (“The rule is based upon the 23 sound public policy of limiting litigation by preventing a party who has had one fair trial on an 24 issue from again drawing it into controversy. The doctrine also serves to protect persons from 25 being twice vexed for the same cause.”). 26 The elements of res judicata are “(1) A claim or issue raised in the present action is 27 identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a 28 final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a 1 party or in privity with a party to the prior proceeding.” *Boeken v. Philip Morris USA, Inc.*, 48 2 Cal. 4th 788, 797 (2010).

3 2. Analysis a. Privity Between the Parties 4 5 The Court begins by discussing the third element of res judicata because the parties do not 6 dispute this element. The same plaintiff sued Ocwen in

Ocwen I and Defendant in this case.^{6 7} (Compare Doc. 6 with Doc. 10-6.) It is undisputed that Defendant is the successor of Ocwen, the ⁸ defendant in Ocwen I. (See Doc.

^{6 ¶¶ 6, 28.)} Defendant also participated in Ocwen I, as it filed ⁹ a motion for summary judgment (as Ocwen’s successor by merger) against Plaintiff. (See Doc. 10 10-7.) Defendant’s participation in Ocwen I and its status as Ocwen’s successor-in-interest is ¹¹ sufficient to find privity between Ocwen and Defendant for purposes of res judicata. See *Tevra 12 Brands, LLC v. Elanco Animal Health Inc.*, No. 24-CV-04683-BLF, 2025 WL 964694, at *7 ¹³ (N.D.

Cal. Mar. 31, 2025) (citing *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1243 n.8 (9th ¹⁴ Cir. 2004) (holding the parties in two different actions are the same considering the “status as ¹⁵ successor” between parties in the two actions)). b. Identity of Claims ¹⁶ Under this element of the res judicata analysis, California law determines whether two ¹⁷ causes of action are identical “by analyzing the primary right at stake.” *Le Parc Cmty.*

Ass’n v. 18 Workers’ Comp. Appeals Bd., 110 Cal. App. 4th 1161, 1170 (2003). For example, if “two ¹⁹ actions involve the same injury to the plaintiff and the same wrong by the defendant then the ²⁰ same primary right is at stake even if in the second suit the plaintiff pleads different theories of ²¹ recovery, seeks different forms of relief and/or adds new facts supporting recovery.” *Id.* “What ²² is critical to the analysis ‘is the harm suffered; that the same facts are involved in both suits is not ²³ conclusive.’”⁷ *San Diego Police Officers’ Ass’n v. San Diego City Employees’ Ret.*

Sys., 568 ^{24 25 6} As noted above, Plaintiff originally sued Ocwen in this case (see Doc. 1), then subsequently amended her complaint to name Defendant as “successor via merger with Ocwen” (see Doc. 6). ^{26 7} Defendant contends in their motion that “[t]he central criterion in determining whether there is an identity of claims between the first and second adjudications is ‘whether the two suits arise out of the same transactional nucleus of ²⁷ facts,’” citing *Frank v. United Airlines, Inc.*, 216 F.3d 845, 851 (9th Cir.

2000). (Doc. 9 at 12.) However, Frank, and the cases on which it relied, applied federal—not California—res judicata standards. Here, because a federal court ²⁸ must apply state law regarding res judicata to a prior state court judgment, *Holcombe v. Hosmer*, 477 F.3d 1094, 1097 ¹ F.3d 725, 734 (9th Cir. 2009) (citing *Agarwal v. Johnson*, 25 Cal. 3d 932 (1979)). “Moreover, ² California, as most states, recognizes that the doctrine of res judicata will bar not only claims ³ actually litigated in a prior proceeding, but also claims that could have been litigated.” *Palomar 4 Mobilehome Park Ass’n v. City of San Marcos*, 989 F.2d 362, 364 (9th Cir.

1993). ⁵ In Ocwen I, Plaintiff sought redress for Ocwen’s conduct during the foreclosure process ⁶ and the alleged wrongful foreclosure of the property located at 117 E. 21st Street, Merced, ⁷ California. (See Doc. 10-6.) That is the same harm for which Plaintiff seeks relief in this case. ⁸

(See Doc. 6 ¶ 1 (“This action arises from Ocwen Loan Servicing, LLC’s (“Ocwen”) systemic failures in servicing the mortgage loan secured by the property located at 117 E 21st Street, 10 Merced, California (the “Property”).

Ocwen’s misconduct includes wrongful foreclosure, dual tracking, violations of the Real Estate Settlement Procedures Act (“RESP A”), breaches of California Civil Code § 2923.6, and numerous procedural failures that unjustly deprived the Plaintiff of substantial equity and property rights.”).)

The undersigned therefore concludes that Plaintiff is attempting to file a new action based on the same injury alleged in Ocwen I, thereby meeting the “identity of claims” element of res judicata. Plaintiff asserts that res judicata does not bar her claims in this case because “[t]he cause of actions differ” and “[n]ew evidence and violations exist.” (Doc.

20 at 4.) Plaintiff does not identify the “new evidence and violations” to which she refers. In fact, the factual allegations in Ocwen I and this case substantially overlap.⁸ (Compare Doc. 6 at ¶¶ 18–25 (appraisals of the property and foreclosure sale) with Doc. 10-6 ¶¶ 25–36 (same).) But even if there were “new evidence and violations,” this does not prevent the application of res judicata in this case.

Le Parc Cmty. Ass’n, 110 Cal. App. 4th at 1170. Further, while some of the claims alleged in this case are the same as in Ocwen I and some are not the same, they still ultimately challenge the foreclosure of the property in 2018.⁹ As such, they stem from the same primary right at issue in Ocwen I. Plaintiff makes other allegations in the First Amended Complaint about her attempts to settle the Ocwen I dispute with Defendant’s counsel in October 2024 (see Doc.

6 ¶ 32–35), but these allegations do not form the basis of her claims, all of which concern the foreclosure process and the foreclosure sale that occurred in 2018 (see *id.* ¶¶ 43–70). In fact, these allegations appear to give rise to Plaintiff’s newly filed action against Defendant in this Court. (See Doc. 25.) Moreover, because the unique claims alleged in the First Amended Complaint could have been brought in Ocwen I, Ocwen I and are barred on that basis, so long as the other requirements for res judicata are met.

2 See *Lomeli v. JPMorgan Chase Bank, N.A.*, No. 15-cv-04022, 2015 WL 12746210, at *5 (C.D. 3 Cal. Oct. 5, 2015) (“In California, a wrongful foreclosure constitutes an injury to a single primary right, regardless of the legal theory challenging the foreclosure.”); see also *Le v. Bank of America, N.A.*, 585 F. App’x 362 (9th Cir. 2014) (“The district court properly dismissed the 6 action as precluded by the doctrine of res judicata (claim preclusion) because Le alleged claims arising out of the same loan transaction and related foreclosure proceedings against the same 8 defendant, or an entity in privity with the current defendants, in two prior federal actions in 9

which there were final judgments on the merits.”); *Zinni v. Jackson White, PC*, 565 F. App’x 10 613, 616–17 (9th Cir.

2014) (“To the extent that Plaintiffs’ claims arise out of events flowing 11 from the 2009 default and notice of sale, they are barred by claim preclusion because they arise 12 from the same claim —M & I Bank’s attempt to foreclose on Plaintiffs’ loan—that was finally 13 adjudicated on the merits by the district court”). 14 c. Final Judgment on the Merits 15 The last remaining element of res judicata requires that the prior proceeding resulted in a 16 final judgment on the merits.

Here, that element is met: in *Ocwen I*, the defendants’ summary 17 judgment motion was granted on March 13, 2024 (Doc. 10-7), judgment was entered in favor of 18 the defendants and against Plaintiff on April 9, 2024 (Doc. 10-8), no appeal from the judgment 19 was taken and the time to do so has expired, see Cal. Rule of Court 8.104(a) (requiring judgment 20 to be appealed within 60 to 180 days after entry of judgment).

See *Kay v. City of Ranch Palos 21 Verdes*, 504 F.3d 803, 808 (9th Cir. 2008) (explaining that “the finality required to invoke the 22 preclusive bar of res judicata [under California law] is not achieved until an appeal from the trial 23 court judgment has been exhausted or the time to appeal has expired.”); see also *Franklin & 24 Franklin v. 7–Eleven Owners for Fair Franchising*, 85 Cal. App.

4th 1168, 1174 (2000). 25 Plaintiff asserts that a “[d]ismissal due to attorney incapacitation does not equate to an 26 adjudication on the merits.” (Doc. 20 at 4.) Such assertion, however, is belied by the record. 27 28 judicata operates to bar relitigation of a claim “if the cause of action could have been brought, whether or not it was 1 *Ocwen I* was not dismissed due to “attorney incapacitation.” In fact, contrary to the allegations 2 in the First Amended Complaint, Attorney Chappars, Plaintiff’s attorney in *Ocwen I*, filed an 3 opposition to the defendant’s motion for summary judgment on March 4, 2024 (see Doc.

23), 4 and appeared at the hearing on the motion (remotely, via Zoom) on March 13, 2024. 5 In sum, the undersigned concludes that Plaintiff’s claims are barred under the doctrine of 6 res judicata. Accordingly, any amendment would be futile and leave to amend is inappropriate. 7 See *Tramell v. Golden 1 Credit Union*, No. CIV S-09-1470 GEB EFB, 2010 WL 3341623, at *4 8 (E.D.

Cal. Aug. 24, 2010) (finding pro se plaintiff’s claims barred by res judicata and dismissing 9 without leave to amend on futility grounds). 10 C. Plaintiff’s Claims are Also Time Barred 11 Defendant alternatively contends that all of Plaintiff’s cognizable claims are time barred.10 12 “A claim may be dismissed under Rule 12(b)(6) on the ground that it is barred by the applicable 13 statute of limitations only when ‘the running of the statute is apparent on the face of the 14

complaint.” Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 969 (9th Cir. 2010).

2010) (quoting Huynh v. Chase Manhattan Bank, 465 F.3d 992, 997 (9th Cir. 2006)). 16 Here, each of Plaintiff’s claims concerns conduct that occurred between 2015 and 2018.11 17 All of Plaintiff’s claims, which are statutory in nature, have statutes of limitations that range 18 from 1 to 4 years. See 12 U.S.C. § 2614 (Real Estate Settlement Procedures Act (“RESPA”) 19 limitations period); 15 U.S.C. § 1640(e) (Truth in Lending Act (“TILA”) limitations period); 20 Toye v. Newrez LLC, No. 19-CV-02322-BAS-LL, 2020 WL 4569128, at *10 n.5 (S.D.

Cal. Aug. 21 7, 2020) (discussing the limitations period for violations of the California’s Homeowner Bill of 22 Rights statutes); Flores v. Fed. Home Loan Mortg. Corp., No. ED-CV-18-1311-JVS (KKx), 23 2018 WL 6184778, at *3 (C.D. Cal. Sept. 10, 2018) (same); Cal. Bus. & Prof. Code § 17208 24 25 10 Defendant asserts that Plaintiff’s claim for violation of the Consumer Financial Protection Act (Doc.

6 ¶¶ 47–49) is not cognizable because there is no private right of action under the Act. (Doc. 9 at 13.) The undersigned agrees that 26 such claim is subject to dismissal. See Goziker v. Wells Fargo Bank, N.A., No. 8:23-CV-00860-FWS-DFM, 2023 WL 8872294, at *7 (C.D. Cal. Oct. 17, 2023) (Consumer Financial Protection Act does not create a private right of action) 27 (collecting cases); Carmichael v. Sacramento Reg’l Transit, No. 2:16-CV-2476-JAM-EFB PS, 2018 WL 338977, at *3 (E.D.

Cal. Jan. 8, 2018) (same). 28 11 As noted above, Plaintiff includes facts in the First Amended Complaint that took place in 2024 (see Doc. 6 ¶ 32– 1 (California Unfair Competition Law limitations period). Plaintiff filed this lawsuit on November 2 19, 2024. (Doc. 1.)

The undersigned agrees with Defendant that Plaintiff’s claims are time- 3 barred, which is an independent reason for dismissing Plaintiff’s claims. The undersigned 4 further finds that no amendment of the complaint could resolve that defect. See Platt Elec. 5 Supply v. EOFF Elec., Inc., 522 F.3d 1049, 1060 (9th Cir. 2008) (affirming district court’s 6 dismissal of a time-barred claim without leave to amend because “any amendments would have 7 been futile”).

8 Plaintiff does not dispute the limitations periods for her claims. Instead, she contends that 9 that the periods should be tolled because Defendant “prevent[e]d [her] from discovering the 10 extent of their fraudulent activity.” (Doc. 20 at 3.) Plaintiff further asserts that the “continuing 11 violations doctrine applies.” (Id.) Both arguments are without merit.

First, Plaintiff does not 12 plead any facts in the First Amended Complaint supporting tolling based on fraudulent 13 concealment, which must be pleaded with particularity. See Guerrero v. Gates, 442 F.3d 697, 14 706–07 (9th Cir. 2006) ([F]raudulent concealment... halts the statute of

limitations when there is active conduct by a defendant, above and beyond the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time.

The plaintiff must demonstrate that he relied on the defendant's misconduct in failing to file in a timely manner and must plead with particularity the facts which give rise to the claim of fraudulent concealment.) (citations and quotation marks omitted); see also *Tseng v. PeopleConnect, Inc.*, 665 F. Supp. 3d 1136, 1149 (N.D. Cal. 2023). ("Fraudulent concealment tolling must be pled with particularity under Fed.

R. 21 Civ. P. 9(b)."). In fact, Plaintiff was not prevented by Defendant from filing her lawsuit in a timely manner: she filed an action seeking redress for the same harm—and asserting some of the same claims—against Defendant's predecessor in state court in March 2019 (*Ocwen I*). See, e.g., *McCloskey v. Carlton Builders*, 165 Cal. App. 3d 689, 693 (1985) ("Not only did appellants have a reasonable suspicion of fraud, which starts the statute of limitations running... they proved in suit 1 that Carlton fraudulently concealed the nature of the soil.

Suit 2 is barred both by the running of the statute of limitations and by *res judicata*.) (emphasis in original). Accord *Larisey v. Smith*, 66 F.3d 323 (5th Cir. 1995) ("The circumstances of Larisey's case, which includes the earlier dismissed RICO suit and the Claims Court decision covering the same operative facts underlying this case, negate any claim that Larisey has been so diligent as to invoke equitable tolling.").

4 Second, while Plaintiff contends that Defendant's "misapplication of payments, failure to process loss mitigation applications, and dual tracking persisted beyond foreclosure, keeping the claims active and actionable" (Doc. 20 at 3), the First Amended Complaint does not include any such facts supporting a "continuing violation" theory.¹² Instead, Plaintiff pleads that each of 8 these acts occurred between 2015 and 2018—outside of the limitations period.

(See Doc. 6 ¶¶ 9 12–13 (misapplication of payments); ¶¶ 9, 15–16, 20, 22, 24, 44 (failure to process loan mitigation applications); ¶ 25 (dual tracking).) 11 V. RECOMMENDATION 12 For the reasons set forth above, the undersigned RECOMMENDS that Defendant's motion 13 to dismiss (Doc. 9) be GRANTED without leave to amend. 14 These findings and recommendation are submitted to the district judge assigned to this 15 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 304.

Within twenty- 16 one (21) days of service of this recommendation, any party may file written objections to these 17 findings and recommendation with the Court and serve a copy on all parties. Such a document 18 should be captioned "Objections to Magistrate Judge's Findings and Recommendation." The 19 district judge will review the magistrate judge's findings and recommendation pursuant to 20 28 U.S.C. § 636(b)(1)(C).

The parties are advised that failure to file objections within the 21 specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 22 838–39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)). 23 IT IS SO ORDERED. 24 25 Dated: May 5, 2025 /s/ Sheila K. Oberto. UNITED STATES MAGISTRATE JUDGE 26 27 12 “The continuing violations doctrine is an equitable exception to the timely filing requirement, which allows a 28 plaintiff to plead facts that occurred outside the statute of limitations.” *Miranda v. Hokinson*, No. 2:07-CV-00609-