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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	NV-12-1441-DKiCo
)		
WILLIAM F. NORDEEN and CAROL)	Bk. No.	09-21273-LED
A. NORDEEN,)		
)	Adv. No.	11-01076-LED
Debtors.)		
<hr/>			
WILLIAM F. NORDEEN; CAROL A.)		
NORDEEN,)		
)		
Appellants,)		
)		
v.)	O P I N I O N	
)		
BANK OF AMERICA, N.A., as)		
successor by merger to BAC)		
Home Loans Servicing, LP;)		
RECONTRUST COMPANY, N.A.,)		
)		
Appellees.)		
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Argued and Submitted on July 19, 2013
at Las Vegas, Nevada

Filed - August 9, 2013

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Bruce A. Markell, Bankruptcy Judge, Presiding

Appearances: Appellant Carol A. Nordeen argued pro se;
David J. de Jesus, Esq. of Reed Smith LLP argued
for appellees Bank of America, N.A., and
ReconTrust Company, N.A.

Before: DUNN, KIRSCHER and COLLINS,¹ Bankruptcy Judges.

¹ Hon. Daniel P. Collins, Bankruptcy Judge for the District
of Arizona, sitting by designation.

1 DUNN, Bankruptcy Judge:

2
3 The appellants William F. and Carol A. Nordeen (the
4 "Nordeens") appeal the dismissal of their Second Amended
5 Complaint against BAC Home Loans Servicing, LP, fka Countrywide
6 Home Loans Servicing LP ("BAC"), and ReconTrust Company, N.A.
7 ("ReconTrust"), without leave to amend. Hereafter, BAC and
8 ReconTrust are referred to collectively as "appellees."² We
9 AFFIRM.

10 **I. FACTUAL BACKGROUND**

11 The following factual narrative is derived from factual
12 statements in the Nordeens' Second Amended Complaint and the
13 exhibits thereto, and the bankruptcy court's Memorandum Decision
14 Dismissing Complaint ("Memorandum Decision") basing its
15 background discussion on facts alleged in the Second Amended
16 Complaint.

17 **A. Loan History**

18 On October 21, 2005, the Nordeens signed a promissory note
19 for \$140,000 (the "Note"), payable to Countrywide Home Loans,
20 Inc. ("Countrywide"). The Note provides that: "[The Nordeens]
21 understand that [Countrywide] may transfer this Note.
22 [Countrywide] or anyone who takes this Note by transfer and who
23 is entitled to receive payment under this Note is called the
24 'Note Holder.'"

25 To secure their payment obligations under the Note, on
26

27 ² BAC Home Loans Servicing, LP merged with Bank of America,
28 N.A. in July 2011.

1 October 21, 2005, the Nordeens also signed a deed of trust (the
2 "Trust Deed") against their rental property in Surprise, Arizona
3 (the "Property"). ReconTrust is the trustee named in the Trust
4 Deed, under which the Nordeens "irrevocably grant[ed] and
5 convey[ed]" the Property "in trust, with power of sale." The
6 named Trust Deed beneficiary was Mortgage Electronic Registration
7 Systems, Inc. ("MERS"), which was identified as "acting solely as
8 a nominee for [Countrywide] and [Countrywide's] successors and
9 assigns."

10 The Trust Deed expressly provides:

11 Borrower [the Nordeens] understands and agrees that
12 MERS holds only legal title to the interests granted by
13 Borrower in this Security Instrument, but, if necessary
14 to comply with law or custom, MERS (as nominee for
15 Lender [Countrywide] and Lender's successors and
16 assigns) has the right: to exercise any or all of those
17 interests, including, but not limited to, releasing and
18 canceling this Security Instrument.

19 The Trust Deed further provides:

20 The Note or a partial interest in the Note (together
21 with this Security Instrument) can be sold one or more
22 times without prior notice to Borrower. A sale might
23 result in a change in the entity (known as the "Loan
24 Servicer") that collects Periodic Payments due under
25 the Note and this Security Instrument and performs
26 other mortgage loan servicing obligations under the
27 Note, this Security Instrument, and Applicable Law.
28 There also might be one or more changes of the Loan
Servicer unrelated to a sale of the Note. If there is
a change of the Loan Servicer, Borrower will be given
written notice of the change which will state the name
and address of the new Loan Servicer, the address to
which payments should be made and any other information
RESPA requires in connection with a notice of transfer
of servicing. If the Note is sold and thereafter the
Loan is serviced by a Loan Servicer other than the
purchaser of the Note, the mortgage loan servicing
obligations to Borrower will remain with the Loan
Servicer or be transferred to a successor Loan Servicer
and are not assumed by the Note purchaser unless
otherwise provided by the Note purchaser.

On October 30, 2005, the Note was sold to the CWALT 2005-

1 73CB REMIC Trust ("CWALT").

2 In December 2008, the Nordeens were unable to make their
3 monthly Note payment, apparently as a result of defaulting
4 tenants leaving the Property in such bad shape that significant,
5 costly repairs were required. The Nordeens contacted Countrywide
6 to see "if they could work anything out," but Countrywide's
7 representative "said they could do nothing." On January 16,
8 2009, BAC mailed the Nordeens a notice of intent to accelerate
9 the Nordeens' payment obligations under the Note. The Nordeens
10 have not made a payment on the Note obligation since December
11 2008.

12 On March 23, 2009, ReconTrust initiated foreclosure
13 proceedings with respect to the Property. On May 29, 2009, the
14 Nordeens sent what they characterized as a Qualified Written
15 Request under RESPA³ to BAC and ReconTrust.

16 ReconTrust initially responded to the Nordeens' request for
17 information. In its response, ReconTrust apparently included

18
19 ³ For purposes of the Real Estate Settlement Procedures Act
20 ("RESPA"), 12 U.S.C. §§ 2601-2617, a "qualified written request"
consists of:

21 [W]ritten correspondence, other than notice on a
22 payment coupon or other payment medium supplied by the
23 [loan] servicer, that-
24 (i) includes, or otherwise enables the servicer to
25 identify, the name and account of the borrower; and
26 (ii) includes a statement of the reasons for the belief
27 of the borrower, to the extent applicable, that the
account is in error or provides sufficient detail to
the servicer regarding other information sought by the
borrower.

28 12 U.S.C. § 2605(e)(1)(B).

1 copies of the Note and Trust Deed and a payment history
2 corresponding to the Nordeens' account. ReconTrust also
3 explained that, despite the Nordeens' apparent assertions to the
4 contrary, the Note and Trust Deed remained enforceable as
5 written. Ultimately, in response to further communications from
6 the Nordeens over a number of months, BAC apparently advised the
7 Nordeens that payments on the Note were due and owing for
8 December 2008 through April 2010, and a foreclosure sale was
9 scheduled for May 18, 2010. No foreclosure sale of the Property
10 has occurred to date.

11 **B. Bankruptcy Proceedings**

12 On June 28, 2009, the Nordeens filed for protection under
13 chapter 13 of the Bankruptcy Code.⁴ On August 7, 2009, BAC filed
14 a proof of secured claim in the Nordeens' bankruptcy case.

15 On March 3, 2011, the Nordeens, acting pro se, filed an
16 adversary proceeding complaint ("Initial Complaint") against the
17 appellees. In the Initial Complaint, the Nordeens asserted
18 claims for declaratory relief, fraud, quiet title, and violations
19 of RESPA, the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-
20 1667f, and the Fair Debt Collection Practices Act ("FDCPA"), 15
21 U.S.C. §§ 1692-1692p. A prominent feature of the Initial
22 Complaint was the Nordeens' theory (the "Securitization Theory")
23 that the securitization of the Note and sale to CWALT constituted
24

25
26 ⁴ Unless otherwise indicated, all chapter and section
27 references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101-
28 1532, and all "Rule" references are to the Federal Rules of
Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of
Civil Procedure are referred to as "Civil Rules."

1 a "true sale" of the Note that vitiated its effectiveness as to
2 them and rendered the Trust Deed unenforceable as to the
3 Property. The Nordeens also argued that the appellees had
4 somehow fabricated the version of the Note that they were trying
5 to enforce against the Nordeens.

6 On June 6, 2011, the appellees moved to dismiss the Initial
7 Complaint with prejudice under Civil Rule 12(b)(6). After a
8 hearing on the motion on July 26, 2011 ("July 26th Hearing"), the
9 bankruptcy court granted the motion to dismiss in part but
10 granted the Nordeens leave to amend their complaint. At the
11 July 26th Hearing, after hearing argument from the parties, the
12 bankruptcy court rejected the Nordeens' Securitization Theory but
13 granted the Nordeens leave to amend their claim for declaratory
14 relief "so you can sort out who's got what note." The Nordeens'
15 other claims were dismissed without leave to amend. On August 8,
16 2011, the bankruptcy court entered its order on the appellees'
17 motion to dismiss the Initial Complaint, providing that
18 "Defendants' Motion is GRANTED; IT IS FURTHER ORDERED that the
19 Plaintiffs shall have leave until August 26, 2011 to file an
20 amended complaint to assert a declaratory relief action;"

21 On August 8, 2011, the Nordeens moved for reconsideration of
22 the bankruptcy court's order on appellees' motion to dismiss and
23 filed a "disapproval to order on motion to dismiss that attorneys
24 have done for the court." The Nordeens further filed a first
25 amended complaint ("First Amended Complaint") on August 26, 2011.

26 The bankruptcy court held a hearing on September 13, 2011
27 ("September 13th Hearing"), to consider outstanding issues
28 between the parties, including the Nordeens' motion for

1 reconsideration of the prior dismissal order. At the September
2 13th Hearing, the bankruptcy court reiterated to the Nordeens
3 that claims based on their Securitization Theory were not viable.
4 They could replead a more limited declaratory relief claim based
5 upon their allegations that the appellees were trying to collect
6 on the wrong Note. However, if the Nordeens wanted to assert
7 additional claims for relief, they would need to file a motion to
8 amend their complaint. But, the bankruptcy court cautioned, "You
9 [the Nordeens] can't bring back the causes of action I've already
10 dismissed." Ultimately, the bankruptcy court granted the
11 Nordeens leave to file a second amended complaint.

12 The bankruptcy court entered an order denying the Nordeens'
13 motion for reconsideration of the order on appellees' original
14 motion to dismiss (the "Reconsideration Order") on September 21,
15 2011. In the Reconsideration Order, the bankruptcy court granted
16 the Nordeens until October 11, 2011 to file their second amended
17 complaint but further ordered that "no further leave to file
18 additional amended complaints shall be granted."

19 On October 11, 2011, the Nordeens filed their second amended
20 complaint ("Second Amended Complaint"). In the Second Amended
21 Complaint, the Nordeens again focused on their Securitization
22 Theory, asserting claims under that umbrella for declaratory
23 relief, fraud, perjury, "material facts as to contracts,
24 securities, and as to pleading, and practice," "federal laws UCC-
25 3 [and] UCC-9," "possible collusion, RICO Act⁵ and possible
26

27 ⁵ The Racketeer Influenced and Corrupt Organizations Act
28 ("RICO"), 18 U.S.C. §§ 1961-1968.

1 counterfeiting," and "housing laws."

2 The appellees filed an answer to the Second Amended
3 Complaint on November 8, 2011. Following substantial discovery,
4 on May 8, 2012, the appellees moved for judgment on the pleadings
5 ("Pleadings Judgment Motion") under Civil Rule 12(c). The
6 Nordeens filed an opposition to the Pleadings Judgment Motion on
7 May 29, 2012, to which the appellees replied on June 5, 2012.

8 The bankruptcy court heard the Pleadings Judgment Motion on
9 June 12, 2012 ("June 12th Hearing"). At the June 12th Hearing,
10 after hearing argument from the parties, the bankruptcy court
11 took the Pleadings Judgment Motion under advisement. On
12 August 10, 2012, the bankruptcy court issued its Memorandum
13 Decision. On the same date, for the reasons stated in the
14 Memorandum Decision, the bankruptcy court entered an order
15 dismissing the Second Amended Complaint with prejudice. The
16 Nordeens filed a timely Notice of Appeal on August 23, 2012.

17 **II. JURISDICTION**

18 The bankruptcy court had jurisdiction under 28 U.S.C.
19 §§ 1334 and 157(b)(1) and (b)(2)(B), (K) and (O). We have
20 jurisdiction under 28 U.S.C. § 158.

21 **III. STANDARDS OF REVIEW**

22 We review a bankruptcy court's decision to grant a motion to
23 dismiss an adversary complaint on the pleadings de novo. Henry
24 A. v. Willden, 678 F.3d 991, 998 (9th Cir. 2012); Movsesian v.
25 Victoria Versicherung AG, 670 F.3d 1067, 1071 (9th Cir. 2012) (en
26 banc). De novo means that we examine a matter anew, as if no
27 decision previously had been rendered, giving no deference to the
28 bankruptcy court's prior determinations. Dawson v. Marshall, 561

1 F.3d 930, 933 (9th Cir. 2009). "We accept as true all well
2 pleaded facts in the complaint and construe them in the light
3 most favorable to the nonmoving party." Henry A. v. Willden, 678
4 F.3d at 998 (citation omitted).

5 We review the bankruptcy court's decision to dismiss an
6 adversary complaint without leave to amend for an abuse of
7 discretion. Id. A bankruptcy court abuses its discretion only
8 if it applies the wrong legal standard or if its factual findings
9 are illogical, implausible or without support in the evidentiary
10 record before it. TrafficSchool.com, Inc. v. Edriver Inc., 653
11 F.3d 820, 832 (9th Cir. 2011).

12 We may affirm the bankruptcy court's decisions on any
13 grounds supported by the record. Shanks v. Dressel, 540 F.3d
14 1082, 1086 (9th Cir. 2008).

15 **IV. ISSUES⁶**

16 1. Did the bankruptcy court err in applying an incorrect
17 legal standard to its review of the Second Amended Complaint in
18 granting the Pleadings Judgment Motion?

19 2. Did the bankruptcy court err in considering the
20 Pleadings Judgment Motion and granting it after the appellees had
21 answered the Second Amended Complaint and the parties were
22 preparing for trial on September 24, 2012?

23 3. Did the bankruptcy court err in rejecting the Nordeens'
24 Securitization Theory?

25 4. Did the bankruptcy court err in dismissing the Nordeens'

26
27 ⁶ The following twelve issues are distilled down from the
28 nineteen issues stated over five pages in the Nordeens' opening
brief.

1 claim for declaratory relief based on the appellees' alleged
2 fabrication of the Note?

3 5. Did the bankruptcy court err in dismissing the Nordeens'
4 fraud claims?

5 6. Did the bankruptcy court err in dismissing the Nordeens'
6 perjury claims?

7 7. Did the bankruptcy court err in dismissing the Nordeens'
8 UCC claims?

9 8. Did the bankruptcy court err in dismissing the Nordeens'
10 RICO claims?

11 9. Did the bankruptcy court err in dismissing the Nordeens'
12 TILA claims?

13 10. Did the bankruptcy court err in dismissing the
14 Nordeens' RESPA claims?

15 11. Did the bankruptcy court err in dismissing the
16 Nordeens' FDCPA claims?

17 12. Did the bankruptcy court err in dismissing the Second
18 Amended Complaint with prejudice?

19 **V. DISCUSSION**

20 **1) Standards for consideration of a motion to dismiss**

21 As the bankruptcy court noted in the Memorandum Decision, it
22 "evaluates motions for judgment on the pleadings under Rule
23 7012(b), which incorporates Civil Rule 12(c)." Rule 7012(b)
24 (Civil Rule 12(b)-(i) apply in adversary proceedings in
25 bankruptcy). Where the defense of failure to state a claim upon
26 which relief can be granted is raised in a Civil Rule 12(c)
27 motion, the legal test applied is the same as if the defense had
28 been raised earlier in a motion to dismiss under Civil Rule

1 12(b) (6). McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810
2 (9th Cir. 1988).

3 In reviewing the bankruptcy court's dismissal of the Second
4 Amended Complaint, we start from the proposition that complaints
5 prepared by pro se parties must be construed liberally, and we
6 have a duty to ensure that "pro se litigants do not lose their
7 right to a hearing on the merits of their claim due to ignorance
8 of technical procedural requirements." Balistreri v. Pacifica
9 Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). As stated by
10 the Supreme Court in Estelle v. Gamble, 429 U.S. 97, 106 (1976):

11 As the Court unanimously held in Haines v. Kerner, 404
12 U.S. 519 (1972), a pro se complaint, "however
13 inartfully pleaded," must be held to "less stringent
14 standards than formal pleadings drafted by lawyers" and
15 can only be dismissed for failure to state a claim if
16 it appears "beyond doubt that the plaintiff can prove
17 no set of facts in support of his claim which would
18 entitle him to relief.'" (Citations omitted.)

19 However, no matter how a complaint is worded, ultimately it must
20 state a legally cognizable claim entitling the claimant to some
21 relief in order to survive a motion to dismiss. See id. at 107
22 ("Even applying these liberal standards, however, Gamble's claims
23 against Dr. Gray, both in his capacity as treating physician and
24 as medical director of the Corrections Department, are not
25 cognizable under § 1983.").

26 Civil Rule 8 sets forth general rules for pleading in
27 federal court litigation. "The pleading provisions in the Civil
28 Rules are intended to provide parties with adequate notice of the
opposing party's claims or defenses." Charlie Y., Inc. v. Carey
(In re Carey), 446 B.R. 384, 391 (9th Cir. BAP 2011). Civil Rule
8(a) (2), applicable in adversary proceedings in bankruptcy under

1 Rule 7008, provides that a claim for relief must contain "a short
2 and plain statement of the claim showing that the pleader is
3 entitled to relief."

4 The factual allegations in a complaint "must be enough to
5 raise a right to relief above the speculative level," Bell Atl.
6 Corp. v. Twombly, 550 U.S. 544, 555 (2007), and must be
7 sufficient to "state a claim to relief that is plausible on its
8 face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), quoting Bell
9 Atl. Corp. v. Twombly, 550 U.S. at 570. "A claim has facial
10 plausibility when the plaintiff pleads factual content that
11 allows the court to draw the reasonable inference that the
12 defendant is liable for the misconduct alleged." Ashcroft v.
13 Iqbal, 556 U.S. at 678. The bankruptcy court explicitly
14 recognized the application of these standards to its
15 consideration of the Pleadings Judgment Motion. See Memorandum
16 Decision, at pp. 6-7. It also recognized, however, that although
17 it was required to "take all the factual allegations in the
18 complaint as true, we are not bound to accept as true a legal
19 conclusion couched as a factual allegation." Papasan v. Allain,
20 478 U.S. 265, 286 (1986). Bell Atl. Corp. v. Twombly, 550 U.S.
21 at 555 (A claim for relief "requires more than labels and
22 conclusions, and a formulaic recitation of the elements of a
23 cause of action will not do").

24 The bankruptcy court clearly applied the correct legal
25 standards to its consideration of the Pleadings Judgment Motion.
26 The Nordeens complain in the statement of issues in their Opening
27 Brief that the bankruptcy court treated all of their factual
28 allegations as "nothing more than labels and conclusions and mere

1 conclusory statements or legal characterizations cast in the form
2 of factual allegations." Appellants' Opening Brief, at 1. Yet,
3 nowhere in their Opening Brief do the Nordeens cite one example
4 of where the bankruptcy court erred in so characterizing their
5 factual allegations as legal conclusions. We perceive no such
6 error in the bankruptcy court's consideration of the Nordeens'
7 factual allegations in its analysis set forth in the Memorandum
8 Decision.

9
10 **2) Timing of the bankruptcy court's consideration of the
Pleadings Judgment Motion**

11 Although their argument as to the timing of the bankruptcy
12 court's consideration of the Pleadings Judgment Motion is less
13 than clear (see Appellants' Opening Brief, at 1 and 11-12), the
14 Nordeens appear to argue that the bankruptcy court erred in
15 considering the Pleadings Judgment Motion after 1) all of the
16 pleadings had been settled, 2) the parties had agreed on a
17 scheduling plan and had engaged in substantial discovery, and 3)
18 September 24, 2012 had been set as the trial date. In essence,
19 the argument is, after all that had been accomplished in the
20 adversary proceeding, the bankruptcy court should have tried it
21 rather than dismissing it in response to the Pleadings Judgment
22 Motion.

23 Civil Rule 12(c) provides that, "After the pleadings are
24 closed-but early enough not to delay trial-a party may move for
25 judgment on the pleadings." (Emphasis added.) We emphasize that
26 under Civil Rule 12(c), it was not for the bankruptcy court to
27 raise the issue of the appropriateness of granting judgment on
28 the pleadings sua sponte. Under the rule, the bankruptcy court

1 could not consider such a motion until brought by an interested
2 party, in this case, the appellees. The bankruptcy court did not
3 consider the Pleadings Judgment Motion until after it was filed,
4 the Nordeens had an opportunity to respond, and the bankruptcy
5 court heard argument at the June 12th Hearing. The bankruptcy
6 court's decision to grant the Pleadings Judgment Motion with
7 prejudice did not "delay" the trial. Rather it avoided a trial
8 that the bankruptcy court determined was unwarranted because the
9 Nordeens had failed to state a claim upon which relief could be
10 granted. Based on this record, we conclude that the bankruptcy
11 court did not err in acting consistently with the provisions of
12 Civil Rule 12(c).

13
14 **3) The bankruptcy court did not err in rejecting the Nordeens'
Securitization Theory.**

15 As early as the July 26th Hearing, the bankruptcy court
16 advised the Nordeens that their Securitization Theory was not
17 viable and dismissed the Nordeens' claims based on the
18 Securitization Theory. Yet, in every iteration of their
19 complaint filed since then, including the Second Amended
20 Complaint that the bankruptcy court ultimately dismissed with
21 prejudice, the Nordeens have extensively repeated their
22 Securitization Theory allegations in the service of their
23 ultimate objectives: "[The Nordeens] want to restraint [sic] all
24 parties from ever going after [the Nordeens] again and to declare
25 this contract [the Note and the Trust Deed] void." Appellants'
26 Opening Brief, at 10. "[The Nordeens] want to prevent all
27 parties from ever attempting to foreclose on us again."
28 Appellants' Opening Brief, at 30.

1 The bankruptcy court did not err in rejecting and in
2 dismissing the Nordeens' claims based on their Securitization
3 Theory, and its rulings are consistent with repeated
4 determinations of the district courts sitting in Nevada and
5 Arizona and elsewhere in the Ninth Circuit. See, e.g., Albritton
6 v. Tiffany & Bosco, P.A., 2013 WL 3153848, at *8 (D. Ariz.
7 June 19, 2013); Hagos v. MTC Financial, Inc., 2013 WL 1292703 (D.
8 Nev. March 29, 2013); Joson v. Bank of Am., NA, 2013 WL 1249714
9 (D. Nev. March 22, 2013); Banks v. Freddie Mac, 2013 WL 1182685
10 (D. Nev. March 20, 2013); Lowry v. EMC Mortg. Corp., 2013 WL
11 841326 (D. Ariz. March 6, 2013); Reyes v. GMAC Mortg. LLC, 2011
12 WL 1322775, at *2, *3 (D. Nev. April 5, 2011) and cases cited
13 therein:

14 [F]ive of plaintiffs' claims are based on the idea that
15 securitization inherently changes the "existing legal
16 relationship between the parties to the extent that the
17 original parties cease to occupy the roles they did at
18 the closing." . . . This argument has been rejected in
19 this district, because the securitization of a loan
20 does not in fact alter or affect the legal
21 beneficiary's standing to enforce the deed of trust.

19 Joyner v. Bank of Am. Home Loans, 2010 WL 2953969, at *1, *5, *6
20 (D. Nev. July 26, 2010):

21 Each of these ideas [based on the Securitization
22 Theory] has been addressed on multiple occasions by
23 this Court, weighed and found wanting.

23 . . . This Court rejects the notion, as it has previously,
24 that "transfer of a promissory note causes prior
25 security instruments to auto-nullify unless
26 reexecuted." (Citation omitted.)

25 . . . Plaintiff has not tendered the amount owed on the loan.
26 Rather, he argues that [Bank of America] received the
27 full amount of the loan when it securitized the loan
28 and therefore Plaintiff has no further obligations
under the loan. This argument is completely without
merit.

1 Das v. JPMorgan Chase Bank, N.A., 2012 WL 1658718, at *1 (D.
2 Ariz. May 11, 2012); Kuc v. Bank of Am., NA, 2012 WL 1268126,
3 at *3 (D. Ariz. April 16, 2012) (“[T]he theory that
4 securitization renders the Deed of Trust unenforceable has been
5 repeatedly rejected.”); White v. Indymac Bank, FSB, 2012 WL
6 966638, at *6 (D. Haw. March 20, 2012) (“The argument that
7 parties lose their interest in a loan when it is assigned to a
8 securitization trust or REMIC has been rejected by numerous
9 courts.”); Washburn v. Bank of Am., N.A., 2011 WL 7053617, at *5
10 (D. Idaho Oct. 21, 2011) (“This is not a new battlefield.
11 Several courts have rejected various theories that
12 ‘securitization of a loan somehow diminishes the underlying power
13 of sale that can be exercised upon a trustor’s breach.’”
14 (citations omitted)); Lane v. Vitek Real Estate Indus. Group, 713
15 F. Supp. 2d 1092, 1099 (E.D. Cal. 2010) (“The argument that
16 parties lose their interest in a loan when it is assigned to a
17 trust pool has also been rejected by many district courts.”).
18 The Nordeens cite no contrary authority from court decisions.

19 The definition of a “security” in the Securities Exchange
20 Act of 1934 is very broad and includes promissory notes. See 15
21 U.S.C. § 78c(a)(10); Marine Bank v. Weaver, 455 U.S. 551, 555 &
22 n.3 (1982). However, until fairly recently, most promissory
23 notes, including notes secured by mortgages on homes, were not
24 considered to be securities. See, e.g., Reves v. Ernst & Young,
25 494 U.S. 56, 65 (1990), citing Exchange Nat’l Bank of Chi. v.
26 Touche Ross & Co., 544 F.2d 1126, 1138 (2d Cir. 1976). Now, when
27 a vast market has been established for mortgage-backed
28 securities, that view seems quaint.

1 However, home loan borrowers are not purchasing an
2 investment when they enter into a loan agreement to purchase or
3 refinance a home. When they sign a promissory note and mortgage
4 or trust deed secured by their real property, they are entering
5 into a contract for a loan transaction on fixed terms, and any
6 "upside" or investment incentive to enter into the transaction is
7 based on a prospective increase in the value of the subject real
8 property. Accordingly, the borrower's loan contract (the Note
9 and Trust Deed in this appeal) is distinct and separate from any
10 securities transaction in the "secondary market" encompassing
11 assignment of the contract. The Note in this case documents this
12 distinction in its provisions that, "[The Nordeens] understand
13 that [Countrywide] may transfer this Note. [Countrywide] or
14 anyone else who takes this Note by transfer and who is entitled
15 to receive payments under this Note is called the 'Note Holder.'"
16 Likewise, the Trust Deed provides that, "The Note or a partial
17 interest in the Note (together with this Security Instrument) can
18 be sold one or more times without prior notice to Borrower."

19 (Emphasis added.) This distinction between the "loan" contract
20 and the "securitization" contract has been recognized by the
21 courts that have rejected the Securitization Theory. See, e.g.,
22 Reyes v. GMAC Mortg. LLC, 2011 WL 1322775, at *3:

23 Since the securitization "merely creates a 'separate
24 contract, distinct from [plaintiffs'] debt
25 obligations'" under the note and does not change the
26 relationship of the parties in any way, plaintiffs'
27 claims arising out of the securitization fail.
28 Commonwealth Prop. Advocates, LLC v. First Horizon Home
Loan Corp., . . . 2010 WL 4788209, at *4 (D. Utah Nov.
16, 2010) . . . (quoting Larota-Florez v. Goldman Sachs
Mortgage Co., 719 F. Supp. 2d 636, 642 (E.D. Va. 2010).
Further, as plaintiffs consented to the securitization
in the agreement by explicitly agreeing that they

1 "understand that the [l]ender may transfer this
2 [n]ote," their assertion that they did not consent also
3 fails. See Suss v. JP Morgan Chase Bank, N.A., . . .
4 [2010] WL 2733097, *6 . . . (D. Md. 2010) (court
5 rejected plaintiff's argument that he did not consent
6 to securitization because the note contained such
7 consent). (Emphasis added.)

8 As long as a borrower in such circumstances makes all of the
9 scheduled promissory note payments to a loan servicer, the
10 contract functions seamlessly (at least theoretically), and the
11 borrower may never know (or have any reason to know) who ends up
12 owning the note. The problem arises, as in this case, when a
13 borrower faces difficulties making loan payments and needs to
14 enter into constructive negotiations with the lender to
15 restructure the loan to make it work for both parties. As the
16 Nordeens discovered, to their increasing frustration and anguish
17 over time, it is difficult to make contact with decision makers
18 for a securitized loan, and the reaction of loan servicer
19 representatives in our experience often has been exactly the
20 response the Nordeens received to their pleas: "We can do
21 nothing." Foreclosure ensues.

22 Various attempts to amend the Bankruptcy Code to give
23 bankruptcy courts the authority to modify mortgage or trust deed
24 secured loans to reflect the reality of declining real property
25 values have been made, without success to date. That leaves
26 parties, like the Nordeens, in the situation where they often
27 have no legal remedy to the perceived ills and unfairness
28 resulting from the securitization of their Note and Trust Deed.
29 While we are sympathetic to the Nordeens' plight, we agree with
30 the bankruptcy court that claims based on the Nordeens'
31 Securitization Theory are not viable in this case. As bankruptcy

1 courts, unfortunately, we have no general authority to require
2 lenders or loan servicers to behave reasonably.

3 Contrary to the Nordeens' assertion that the bankruptcy
4 court violated their rights to due process by not allowing them
5 to present securitization-based claims (see Appellants' Opening
6 Brief, at 2, 22-23), the bankruptcy court properly dismissed
7 their Securitization Theory arguments that did not assert a
8 legally cognizable claim. The bankruptcy court clearly told the
9 Nordeens at an early stage in the proceedings that their
10 Securitization Theory claims were not viable and dismissed them,
11 but the Nordeens kept pleading them anyway.

12 **4) The Nordeens' further claims for declaratory relief based on**
13 **alleged fabrications of the Note are not viable.**

14 At the July 26th Hearing and the September 13th Hearing, the
15 bankruptcy court considered and allowed the Nordeens to amend and
16 restate their claim for declaratory relief based on their
17 expressed concerns as to whom they owed an obligation to pay and
18 issues as to alleged fabrication of the Note. As noted by the
19 bankruptcy court in the Memorandum Decision, at p. 8:

20 Declaratory relief is appropriate "(1) when the
21 judgment will serve a useful purpose in clarifying and
22 settling the legal relations in issue, and (2) when it
23 will terminate and afford relief from the uncertainty,
24 insecurity, and controversy giving rise to the
25 proceeding." McGraw-Edison Co. v. Prefomed Line
26 Products, Co., 362 F.2d 339, 342 (9th Cir. 1966)
27 (citation and internal quotation marks omitted).

28 The problem for the Nordeens is that ultimately, shorn of
the permeating Securitization Theory claims that we previously
have concluded are not viable, the declaratory relief claim
stated in the Second Amended Complaint has no substance. Aside

1 from questions relating to who is entitled to enforce the Trust
2 Deed obligations, discussed infra, the Nordeens rely on
3 allegations that the appellees have produced a "false and
4 fabricated" Note. Helpfully, the Nordeens attached as Exhibit O
5 to the Second Amended Complaint a "Certified Copy of the Note
6 that [the Nordeens] closed with [and signed] on October 21, 2005
7 and took . . . home with them" (the "Genuine Note"), and as
8 Exhibit P to the Second Amended Complaint "the fabricated copy of
9 [the Nordeens'] Note that has been presented in this court as the
10 'original' and as a 'copy'" (the "Bogus Note").

11 The differences between the Genuine Note and the Bogus Note
12 are detailed by the Nordeens as follows: 1) In the upper left
13 hand corner of the first page of the Genuine Note, it states
14 "Prepared by MARGARITA RUIZ;" the Bogus Note states "Prepared by
15 REMEDIOS BROWN." 2) The Nordeens assert that their initials are
16 "different" and in different places on the two note exhibits.
17 3) The "supposed signatures" on the Bogus Note "are not the
18 same." 4) The color of ink on the Bogus Note, presented as the
19 original Note at the July 26th Hearing, is a "strange light
20 blue." 5) There are orange highlighter marks under the
21 signatures and initials on the Bogus Note. 6) The
22 "Certification" on the Bogus Note is allegedly different from the
23 "Certification" on the Genuine Note, as appearing to be "in a
24 different place and appear[ing] to be signed by a different
25 person." (Actually, the only "certification" on Exhibit O that
26 we see is the "true copy" certification on page one of Exhibit O.
27 No such certification appears on Exhibit P.) 7) Finally,
28 "[t]here are other variations with completely different barcodes

1 and redactions and punch holes that could indicate multiple
2 pledges or sales of this mis-represented [sic] fabricated Note
3 but none that are the [Nordeens'] Certified copy from closing."
4 Second Amended Complaint, ¶ 96-97, pp. 26-28; Exhibits O and P.

5 Conspicuously absent from the Nordeens' allegations in the
6 Second Amended Complaint is any allegation that the terms of the
7 Genuine Note and the Bogus Note are different in any respect. In
8 addition, although the Nordeens cannot quite bring themselves to
9 state that they signed the Note in their description of the
10 Genuine Note, they admitted earlier in the Second Amended
11 Complaint that they signed the Note. See Second Amended
12 Complaint, ¶ 15, p. 6. The Nordeens further do not deny that the
13 initials and the signatures on the Genuine Note are theirs. At
14 the July 26th Hearing, counsel for the appellees addressed the
15 differences between copies of the Note as follows:

16 From what I can tell from looking at those notes, the
17 major differentiations were things that happen when you
18 copy notes that have been highlighted, when you copy
19 notes where redactions have taken place, when notes get
20 copied and placed in binders, and hole punches get put
through the notes.

I was hoping to put all of that to rest by
bringing the original note with me today, and

21 July 26th, 2011 Hr'g Tr., at 29:7-13.

22 However, whatever explanation applies with respect to the
23 alleged discrepancies between the Genuine Note and the Bogus Note
24 noted by the Nordeens is beside the point in this appeal. What
25 is important is the substance of the alleged differences, and as
26 a bottom line matter, the Nordeens' allegations about different
27 Notes make no substantive difference. See, e.g., Donaldson v.
28 BAC Home Loans Servicing, L.P., 813 F. Supp. 2d 885, 894 (M.D.

1 Tenn. 2011) ("Plaintiff claims that the fact that [d]efendant is
2 able to produce multiple copies of the alleged original documents
3 'with different markings, endorsements, bar codes, signatures,
4 and etc.' is evidence that it does not possess any of the
5 original documents. . . . The Court finds this argument to be
6 meritless.").

7 Section 3-309 of the Uniform Commercial Code provides for
8 enforcement of "lost, destroyed or stolen" promissory notes by a
9 person not in possession of the original promissory note when the
10 subject person was entitled to enforce the note when the loss
11 occurred, and the terms of the note can be proved. See Nevada
12 Revised Statutes ("NRS") § 104.3309.⁷

13 _____
14 ⁷ NRS § 104-3309, entitled "Enforcement of lost, destroyed
15 or stolen instrument," provides in relevant part as follows:

- 16 1. A person not in possession of an instrument is
17 entitled to enforce the instrument if:
18 (a) The person seeking to enforce the instrument:
19 (1) Was entitled to enforce the instrument when
20 loss of possession occurred; or
21 (2) Has directly or indirectly acquired ownership
22 of the instrument from a person who was entitled to
23 enforce the instrument when loss of possession
24 occurred;

25 . . .
26 2. A person seeking enforcement of an instrument under
27 subsection 1 must prove the terms of the instrument and
28 his or her right to enforce the instrument. If that
proof is made, NRS 104.3308 applies to the case as if
the person seeking enforcement had produced the
instrument. . . .

Arizona law does not apply with respect to the Nordeens'
declaratory relief claim based on the appellees' alleged
fabrication of the Note. See n.7 infra. However, in any event,
(continued...)

1 Even if the original Note were lost, a point not conceded by
2 the appellees, no proof of the terms of the Note is required
3 because there is no difference in terms between the Genuine Note
4 and the Bogus Note. As to the right to enforce, the Nordeens'
5 allegations in that regard arise from their Securitization Theory
6 that we previously have determined to be nonviable. The Nordeens
7 do not challenge the form of the endorsement in blank on the
8 alleged Bogus Note. While the Note was transferred at an early
9 stage from Countrywide to CWALT, the record reflects that the
10 Nordeens have always dealt with BAC, formerly known as
11 Countrywide Home Loans Servicing LP, as their loan servicer, and
12 ReconTrust has always served as the named trustee in the Trust
13 Deed. In their opening brief, the Nordeens concede that BAC has
14 operated as their loan servicer. Appellants' Opening Brief, at
15 16.

16 The bankruptcy court raised a red herring when it gave as
17 one of the bases for its dismissal of the declaratory judgment
18 claim "the absence of any allegation [by the Nordeens] that they
19 have placed funds into a segregated account in anticipation of
20 the day when the proper payee is revealed," but it did not err in
21 concluding that the motivation of the Nordeens was to invalidate
22 the Note so that any obligations reflected in the terms of the
23 Note are unenforceable. See Memorandum Decision, at pp. 8-9.

24
25
26 ⁷(...continued)
27 Arizona Uniform Commercial Code law with respect to enforcement
28 of "lost, destroyed or stolen" instruments is essentially the
same as Nevada's. See Arizona Revised Statutes ("A.R.S.")
§ 47-3309.

1 The Nordeens have admitted as much. See Appellants' Opening
2 Brief at 10. However, the claim for declaratory relief in the
3 Second Amended Complaint is inadequate to accomplish that
4 objective, and the bankruptcy court did not err in dismissing it.

5 **5) Fraud**

6 While, as we have emphasized above, we construe pro se
7 pleadings liberally, Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir.
8 2010), Civil Rule 9(b), applicable in this adversary proceeding
9 under Rule 7009, requires that, "In alleging fraud or mistake, a
10 party must state with particularity the circumstances
11 constituting fraud or mistake." Vess v. Ciba-Geigy Corp. USA,
12 317 F.3d 1097, 1103 (9th Cir. 2003) ("It is established law, in
13 this circuit and elsewhere, that [Civil] Rule 9(b)'s
14 particularity requirement applies to state-law causes of
15 action.").

16 Under Nevada law,⁸ applicable in construing the Nordeens'

18 ⁸ The Nordeens reside in Nevada. They signed the Note and
19 Trust Deed in Nevada. BAC sent the Nordeens their monthly
20 billing statements and the notices of foreclosure on the Property
21 to the Nordeens' residence in Nevada. The Nordeens further filed
22 their bankruptcy case and the subject adversary proceeding in
23 Nevada. In these circumstances, the bankruptcy court properly
24 applied Nevada law, as the law of the forum, to the Nordeens'
25 nonbankruptcy state law claims that do not relate specifically to
26 rights to foreclose with respect to the Property. See, e.g.,
27 Hanna v. Plumer, 380 U.S. 460, 465 (1965) ("[F]ederal courts are
28 to apply state substantive law and federal procedural law.");
Vacation Vill., Inc. v. Clark Cnty., Nev., 497 F.3d 902, 914 (9th
Cir. 2007); Vess v. Ciba-Geigy Corp. USA, 317 F.3d at 1103 ("[A]
federal court will examine state law to determine whether the
elements of fraud have been pled sufficiently to state a cause of
action"); Rubenstein v. Ball Bros., Inc. (In re New

(continued...)

1 fraud claim, the Nordeens bear the burden of proof to establish
2 each of four elements:

- 3 (1) a false representation made by the defendant;
4 (2) defendant's knowledge or belief that its
5 representation was false or that defendant has an
6 insufficient basis of information for making the
7 representation; (3) defendant intended to induce
8 plaintiff to act or refrain from acting upon the
9 misrepresentation; and (4) damage to the plaintiff as a
10 result of relying on the misrepresentation.

11 Barmettler v. Reno Air, Inc., 114 Nev. 441, 446-47, 956 P.2d
12 1382, 1386 (Nev. 1998). An omission to state a material fact
13 "which a party is bound in good faith to disclose is equivalent
14 to a false representation, since it constitutes an indirect
15 representation that such fact does not exist." Nelson v. Heer,
16 123 Nev. 217, 225, 163 P.3d 420, 426 (Nev. 2007) (internal
17 quotation marks omitted). "Where an essential element of a claim
18 for relief is absent, the facts, disputed or otherwise, as to
19 other elements are rendered immaterial," and summary adjudication
20 is appropriate. Bulbman, Inc. v. Nev. Bell, 108 Nev. 105, 111,
21 825 P.2d 588, 592 (Nev. 1992).

22 The Nordeens' allegations in support of their fraud claim
23 reference various communications raising questions as to who was
24 the Note Holder and who were the beneficiary and trustee under
25 the Trust Deed. The alleged communications were made at various
26 times in 2009 and 2010. Whatever confusion may have resulted

27 ⁸(...continued)
28 England Fish Co.), 749 F.2d 1277, 1280-81 (9th Cir. 1984) ("In
deciding questions of state law, a bankruptcy court should apply
the law that a court of the forum state would apply.") (emphasis
added); Gen. Motors Corp. v. Eighth Jud. Dist. Ct. of Nev., 122
Nev. 466, 473-74, 134 P.3d 111, 116 (Nev. 2006).

1 from the alleged communications, the Nordeens cannot have relied
2 on any of the alleged communications on October 21, 2005, when
3 they signed the Note and Trust Deed. And since they ceased
4 making payments on the Note obligation in December 2008, they can
5 assert no damages from the alleged communications. They have not
6 alleged that any of the payments they made on the Note obligation
7 prior to December 2008 were misapplied. Accordingly, the
8 Nordeens cannot assert either that the allegedly fraudulent
9 communications from the appellees induced actual reliance on
10 their parts or that damages resulted therefrom, essential
11 elements of a fraud claim under Nevada law.

12 The Nordeens argue that the bankruptcy court erred in
13 applying Nevada law rather than federal law in considering their
14 fraud claim. We disagree. See authorities cited in n.7 supra.
15 However, even if federal law applied, it would not help the
16 Nordeens.

17 The federal standard for fraud is a five-element test:
18 1) misrepresentation, fraudulent omission or deceptive conduct by
19 the offending party; 2) knowledge of the falsity or deceptiveness
20 of the statement or conduct; 3) an intent to deceive;
21 4) justifiable reliance by the claimant on such statement or
22 conduct; and 5) damage to the claimant proximately caused by
23 claimant's reliance on such statement or conduct. Ghomeshi v.
24 Sabban (In re Sabban), 600 F.3d 1219, 1222 (9th Cir. 2010); Oney
25 v. Weinberg (In re Weinberg), 410 B.R. 19, 35 (9th Cir. BAP
26 2009). The claimant bears the burden of proof on each of those
27 five elements.

28 The Nordeens face the same irremediable impediments to

1 stating plausible claims of reliance and proximate causation of
2 damages under the federal fraud standard as they do under the
3 Nevada state law fraud standard. Accordingly, the Nordeens'
4 fraud claim was properly dismissed.

5 **6) Perjury**

6 The Nordeens allege that appellees committed perjury by
7 filing a proof of claim in the Nordeens' bankruptcy case stating
8 that BAC is a secured creditor. However, no civil claim for
9 perjury is recognized under Nevada law. See, e.g., Jordan v.
10 State ex rel. Dep't of Motor Vehicles & Public Safety, 121 Nev.
11 44, 68 n.51, 110 P.3d 30, 47 n.51 (Nev. 2005), overruled on other
12 grounds, Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224,
13 228 n.6, 181 P.3d 670, 672 n.6 (Nev. 2008). Any alleged perjury
14 committed in the filing of a claim in a bankruptcy case is
15 subject to criminal sanctions under 18 U.S.C. § 152,⁹ not to any
16 private right of action by the Nordeens. Accordingly, the

17
18 ⁹ 18 U.S.C. § 152 provides in relevant part:

19 A person who -

20 . . .

21 (3) knowingly and fraudulently makes a false
22 declaration, certificate, verification or
23 statement under penalty of perjury as permitted
24 under section 1746 of title 28, in or in relation
25 to any case under title 11;

26 (4) knowingly and fraudulently presents any
27 false claim for proof against the estate of a
28 debtor, or uses any such claim in any case
under title 11, in a personal capacity or as
or through an agent, proxy, or attorney;

29 . . .

shall be fined under this title, imprisoned not more
than 5 years, or both.

1 bankruptcy court did not err in dismissing the Nordeens' perjury
2 claim.

3 **7) UCC claims**

4 The Nordeens' Fifth Cause of Action is confusing to say the
5 least. First, the claim is titled, "Federal Laws UCC-3 UCC-9."
6 "UCC" refers to the Uniform Commercial Code, which is a model
7 uniform act designed to harmonize the laws of sales and certain
8 other commercial transactions among the fifty states. It has
9 been adopted, with variations, by all of the states but has not
10 been adopted as federal law by Congress. See, e.g., Bank of Am.
11 Nat'l Trust & Sav. Ass'n v. United States, 552 F.2d 302, 303 n.1
12 (9th Cir. 1977); O'Neill v. United States, 50 F.3d 677, 684 (9th
13 Cir. 1995) ("The Uniform Commercial Code is a source of federal
14 common law and may be relied upon in interpreting a contract to
15 which the federal government is a party." (Emphasis added.)).

16 In their Fifth Cause of Action, the Nordeens complain about
17 various alleged misrepresentations made by the appellees "through
18 the U.S. Mails" and presentation of the Bogus Note to the
19 Nordeens, all following the sale of the Note to CWALT. See
20 Second Amended Complaint, ¶ 167-70, p. 44. In light of those
21 allegations, the Nordeens ask that the bankruptcy court void the
22 Note and Trust Deed and enjoin the appellees from ever attempting
23 to foreclose on the Property.

24 If the Nordeens' "UCC" claim can be interpreted as a state
25 law Uniform Commercial Code claim, Arizona law applies. The
26 Property is located in Arizona, and Arizona law applies to
27 foreclosures on Arizona property. See Vasquez v. Saxon Mortg.,
28 Inc. (In re Vasquez), 228 Ariz. 357, 359-60, 266 P.3d 1053, 1055-

1 56 (Ariz. 2011) (en banc). However, under Arizona law, the
2 Nordeens' UCC claim fails as a matter of law.

3 As recently concluded by the Ninth Circuit:

4 The Arizona Supreme Court has definitively rejected the
5 Zadroznys' argument that a trustee must comply with UCC
6 provisions to pursue foreclosure proceedings. In
7 Hogan, the Arizona Supreme Court explained that "[t]he
8 UCC does not govern liens on real property. The trust
9 deed statutes do not require compliance with the UCC
before a trustee commences a nonjudicial foreclosure."
Hogan [v. Washington Mutual Bank, N.A.], 277 P.3d
[781,] 783 [(Ariz. 2012) (en banc), as amended]
(citations omitted).

10 Zadrozny v. Bank of N.Y. Mellon, ___ F.3d ___, 2013 WL 3242528, at
11 *6 (9th Cir. June 28, 2013).

12 To the extent that the Nordeens' Fifth Cause of Action
13 relies on their Securitization Theory, we reject it for the
14 reasons previously stated. To the extent that it reiterates
15 their fraud and fabricated note claims, we likewise reject it for
16 reasons previously stated. We discern nothing more of substance
17 in the Nordeens' Fifth Cause of Action and conclude that the
18 bankruptcy court properly dismissed it.

19 **8) RICO claims**

20 RICO makes it unlawful "for any person employed by or
21 associated with any enterprise engaged in, or the activities of
22 which affect, interstate or foreign commerce, to conduct or
23 participate, directly or indirectly, in the conduct of such
24 enterprise's affairs through a pattern of racketeering activity
25 or collection of unlawful debt." 18 U.S.C. § 1962(c). To plead
26 a claim for relief under 18 U.S.C. § 1962(c), a plaintiff must
27 assert "(1) conduct (2) of an enterprise (3) through a pattern
28 (4) of racketeering activity." Sedima, S.P.R.L. v. Imrex Co.,

1 473 U.S. 479, 496 (1985); Odom v. Microsoft Corp., 486 F.3d 541,
2 547 (9th Cir. 2007) (en banc).

3 For purposes of this appeal, we focus on the two elements of
4 "a pattern" and "racketeering activity." A "pattern" "requires
5 at least two acts of racketeering activity." 18 U.S.C.
6 § 1961(5). "Racketeering activity" encompasses "any act
7 indictable under several provisions of Title 18 of the United
8 States Code, and includes the predicate acts of mail fraud, wire
9 fraud and obstruction of justice." Turner v. Cook, 362 F.3d
10 1219, 1229 (9th Cir. 2004). A claimant may seek civil relief for
11 any RICO violation(s) resulting in injury to his or her business
12 or property. 18 U.S.C. § 1964(c).

13 To have standing under civil RICO, [a claimant] is
14 required to show that the racketeering activity was
15 both a but-for cause and a proximate cause of his
16 injury. See Holmes v. Sec. Investor Prot. Corp., 503
17 U.S. 258, 268 . . . (1992). Proximate causation for
18 RICO purposes requires "some direct relation between
19 the injury asserted and the injurious conduct alleged."
20 Id.

21 Rezner v. Bayerische Hypo-Und Vereinsbank AG, 630 F.3d 866, 873
22 (9th Cir. 2010). Chaset v. Fleer/Skybox Int'l, LP, 300 F.3d
23 1083, 1086 (9th Cir. 2002) ("First, a civil RICO plaintiff must
24 show that his injury was proximately caused by the [prohibited]
25 conduct. Second, the plaintiff must show that he has suffered a
26 concrete financial loss."), quoting Fireman's Fund Ins. Co. v.
27 Stites, 258 F.3d 1016, 1021 (9th Cir. 2001).

28 The Nordeens' Sixth Cause of Action, titled "Possible
Collusion, RICO Act and Possible Counterfeiting," falls far short
of those standards. First, the Nordeens allege in conclusory
fashion that "collusion or racketeering acts may have occurred."

1 (Emphasis added.) Second, the Nordeens do not allege any
2 "concrete financial loss" to them or their property resulting
3 from what the appellees may have done. The Nordeens embellish
4 their claim with further fulminations against the appellees in
5 light of their Securitization Theory. In their Opening Brief,
6 the Nordeens' argument in support of their RICO claim is that
7 "the [appellees] brought an active security into the court room
8 and proffered it as [the Nordeens'] original Note. You cannot
9 use a security as a Note when it is an active security."
10 Appellants' Opening Brief, at 29. In short, the Nordeens do not
11 state a civil RICO claim that is remotely plausible, and their
12 Sixth Cause of Action was appropriately dismissed.

13 **9) Truth in Lending**

14 The purpose of TILA is "to assure a meaningful disclosure of
15 credit terms so that the consumer will be able to compare more
16 readily the various credit terms available to him and avoid the
17 uninformed use of credit, and to protect the consumer against
18 inaccurate and unfair credit billing and credit card practices."
19 15 U.S.C. § 1601(a). "Accordingly, [TILA] requires creditors to
20 provide borrowers with clear and accurate disclosures of terms
21 dealing with things like finance charges, annual percentage rates
22 of interest, and the borrower's rights." Beach v. Ocwen Fed.
23 Bank, 523 U.S. 410, 412 (1998).

24 While the Nordeens' claims do not appear to fit the TILA
25 model, they ultimately are precluded by applicable statutes of
26 limitations. The general limitations period that applies with
27 respect to TILA claims is "one year from the date of the
28 occurrence of the violation." 15 U.S.C. § 1640(e). The Nordeens

1 did not initiate their adversary proceeding against the appellees
2 until March 3, 2011. The Nordeens signed the Note and Trust Deed
3 on October 21, 2005, more than five years earlier. The sale of
4 the Note to CWALT occurred on October 30, 2005. If the TILA
5 limitations period runs from October 2005, the one-year TILA
6 limitations period ran years ago.

7 There is authority for the proposition that the TILA statute
8 of limitations can be equitably tolled until the borrower has
9 actual notice of the claimed TILA violation. See, e.g., King v.
10 California, 784 F.2d 910, 914-15 (9th Cir. 1986). However, the
11 Nordeens did not assert equitable tolling of the TILA limitations
12 period in the Second Amended Complaint, and in any event, the
13 Nordeens assert that they learned of the alleged "TRUE SALE" of
14 their Note and Trust Deed "on January 16, 2009 and even more
15 clearly on September 8, 2009," well over one year before they
16 filed the Initial Complaint. Their TILA claim was not filed
17 within the general TILA one-year statute of limitations.

18 To the extent that the Nordeens' TILA claim could be
19 interpreted as a claim for rescission, a longer period of
20 limitations applies. Under 15 U.S.C. § 1635(f), "An obligor's
21 right of rescission shall expire three years after the date of
22 consummation of the transaction or upon the sale of the property,
23 whichever occurs first, notwithstanding the fact that the
24 information and forms required under this section or any other
25 disclosures required under this part have not been delivered to
26 the obligor" The Supreme Court has held that "[15
27 U.S.C.] § 1635(f) completely extinguishes the right of rescission
28 at the end of the 3-year period." Beach v. Ocwen Fed. Bank, 523

1 U.S. at 412.

2 The Ninth Circuit has held that an obligor's rescission
3 under TILA is conditioned on the obligor repaying any amounts
4 advanced by the lender. See, e.g., Yamamoto v. Bank of N.Y., 329
5 F.3d 1167, 1171 (9th Cir. 2003), cert. denied, 540 U.S. 1149
6 (2004); LaGrone v. Johnson, 534 F.2d 1360, 1362 (9th Cir. 1976).
7 The Nordeens do not offer to repay any outstanding balance of the
8 loan evidenced by the Note for purposes of implementing a
9 rescission anywhere in the Second Amended Complaint, but even if
10 they did, the three-year limitations period to exercise a right
11 of rescission under TILA ran in 2008, before the Nordeens ceased
12 making Note payments and years before they filed the Initial
13 Complaint. The bankruptcy court did not err in dismissing the
14 Nordeens' TILA claim as barred by applicable statutes of
15 limitations.

16 **10) RESPA**

17 RESPA was designed to change the settlement process for the
18 financing of purchases of residential real estate, resulting

- 19 (1) in more effective advance disclosure to home buyers
20 and sellers of settlement costs;
21 (2) in the elimination of kickbacks or referral fees
22 that tend to increase unnecessarily the costs of
23 certain settlement services;
24 (3) in a reduction in the amounts home buyers are
25 required to place in escrow accounts established to
26 insure the payment of real estate taxes and insurance;
27 and
28 (4) in significant reform and modernization of local
recordkeeping of land title information.

12 U.S.C. § 2601(b).

26 RESPA requires loan servicers to provide borrowers with
27 information concerning any transfers of loan servicing. See 12
28 U.S.C. § 2605(a)-(d). RESPA further requires that loan servicers

1 respond to borrower inquiries requesting "information relating to
2 the servicing of such loan[s]." 12 U.S.C. § 2605(e)(1)(A). Such
3 inquiries are submitted in the form of a "qualified written
4 request." A qualified written request must contain information
5 that will allow the loan servicer to identify the name and
6 account of the borrower and "includes a statement of the reasons
7 for the belief of the borrower . . . that the account is in error
8 or provides sufficient detail to the [loan] servicer regarding
9 other information sought by the borrower." 12 U.S.C.
10 § 2605(e)(1)(B). Accordingly, RESPA concerns and encompasses
11 issues with respect to costs and services related to the closing
12 of home loans and loan servicer accounting for the borrower's
13 loan payments and escrow charges.

14 Nothing in the Nordeens' Seventh Cause of Action (covering
15 their claims under RESPA, TILA and the FDCPA) alleges how either
16 of the appellees purportedly violated any provision of RESPA.
17 Reading the Second Amended Complaint very broadly, the bankruptcy
18 court interpreted the Nordeens' RESPA claim as a further
19 iteration of their "challenge [to] the validity of their loan,"
20 i.e., the Note and Trust Deed, rather than as complaining about
21 the economics of the settlement or servicing arrangements for
22 their loan. We consider that interpretation as giving the
23 Nordeens the benefit of a liberal interpretation of their Second
24 Amended Complaint, and we see no error by the bankruptcy court in
25 dismissing the Nordeens' RESPA claim based on that
26 interpretation. See, e.g., Consumer Solutions REO, LLC v.
27 Hillery, 658 F. Supp. 2d 1002, 1014 (N.D. Cal. 2009) (RESPA claim
28 dismissed without leave to amend where the borrower disputed the

1 validity of the loan rather than any aspect of its servicing);
2 MorEquity, Inc. v. Naeem, 118 F. Supp. 2d 885, 900-01 (N.D. Ill.
3 2000).

4 **11) FDCPA**

5 Under the FDCPA, "A debt collector may not use any false,
6 deceptive, or misleading representation or means in connection
7 with the collection of any debt." 15 U.S.C. § 1692e (emphasis
8 added). Under the FDCPA, the term "debt collector" generally is
9 defined as,

10 any person who uses any instrumentality of interstate
11 commerce or the mails in any business the principal
12 purpose of which is the collection of any debts, or who
13 regularly collects or attempts to collect, directly or
14 indirectly, debts owed or due or asserted to be owed or
15 due another.

16 15 U.S.C. § 1692a(6).

17 The bankruptcy court dismissed the Nordeens' FDCPA claim
18 because the appellees were not "debt collectors" subject to
19 liability under the FDCPA for the following reasons: BAC is the
20 servicer of the Nordeens' loan, and as such, BAC is not subject
21 to liability under the FDCPA. As Trustee under the Trust Deed,
22 ReconTrust likewise is not subject to liability under the FDCPA,
23 as foreclosing on real property under a deed of trust is not an
24 act to collect a debt, as contemplated under the FDCPA. See
25 Hulse v. Ocwen Fed. Bank, FSB, 195 F. Supp. 2d 1188, 1204 (D. Or.
26 2002) ("Foreclosing on a trust deed is distinct from the
27 collection of the obligation to pay money" and is "not an attempt
28 to collect funds from the debtor.").

The bankruptcy court's decision is supported by the recent
published opinion of the Ninth Circuit in Schlegel v. Wells Fargo

1 Bank, NA, ___ F.3d ___, 2013 WL 3336727 (9th Cir. July 3, 2013).

2 In Schlegel, the plaintiffs sued Wells Fargo Bank, NA ("Wells
3 Fargo"), the assignee of the promissory note and trust deed
4 secured by their residence property, for alleged violations of
5 the FDCPA and the Equal Credit Opportunity Act ("ECOA"). The
6 district court had dismissed both claims for failure to state a
7 claim upon which relief could be granted. Id., at *1, *2. The
8 Ninth Circuit reversed the district court's dismissal of the
9 Schlegels' ECOA claim but affirmed the dismissal of the FDCPA
10 claim because Wells Fargo did not fit the definition of a "debt
11 collector" under the FDCPA.

12 The complaint fails to provide any factual basis from
13 which we could plausibly infer that the principal
14 purpose of Wells Fargo's business is debt collection.
15 Rather, the complaint's factual matter, viewed in the
16 light most favorable to the Schlegels, establishes only
17 that debt collection is some part of Wells Fargo's
18 business, which is insufficient to state a claim under
19 the FDCPA. See Dougherty [v. City of Covina,] 654 F.3d
20 [892,] 900-01 [(9th Cir. 2011)].

21 Id., at *3 (emphasis added).

22 Since the bankruptcy court's decision to dismiss the
23 Nordeens' FDCPA claim is entirely consistent with the Ninth
24 Circuit's analysis and conclusion that the FDCPA claim in
25 Schlegel was appropriately dismissed, we perceive no error.

26 **12) Dismissal without leave to amend**

27 In this case, the Nordeens had three bites at the apple
28 before the bankruptcy court dismissed their Second Amended
Complaint with prejudice. The appellees filed a motion to
dismiss the Initial Complaint, which the bankruptcy court
granted. However, at the July 26th Hearing on the motion to
dismiss, the bankruptcy court listened carefully to the Nordeens'

1 arguments and took great pains to explain to them what claims in
2 their Initial Complaint were not viable and what claims might be
3 plausibly stated. Then, in its order, the bankruptcy court
4 granted the Nordeens leave to file an amended complaint for
5 declaratory relief. Thereafter, the Nordeens filed a motion to
6 reconsider the dismissal order and filed a First Amended
7 Complaint that reiterated extensively the same Securitization
8 Theory claims that the bankruptcy court had advised them at the
9 July 26th Hearing were not viable. The bankruptcy court sorted
10 through the issues between the parties at the September 13th
11 Hearing, reiterating to the Nordeens that their Securitization
12 Theory claims did not work but granting them leave to file a
13 further amended complaint seeking declaratory relief and possibly
14 asserting further claims. In its order denying the Nordeens
15 motion for reconsideration, the bankruptcy court expressly
16 authorized the Nordeens to file a second amended complaint but
17 warned that "no further leave to file additional amended
18 complaints shall be granted." The Nordeens filed their Second
19 Amended Complaint, again based primarily on their Securitization
20 Theory claims. The bankruptcy court ultimately dismissed the
21 Second Amended Complaint with prejudice in response to the
22 Pleadings Judgment Motion.

23 The Ninth Circuit addressed the standards for dismissing a
24 complaint without leave to amend in its recent published opinion
25 in Zadrozny v. Bank of N.Y. Mellon, __ F.3d __, 2013 WL 3242528,
26 at *8 (9th Cir. June 28, 2013):

27 Because the Zadrozny's claims . . . are factually and
28 legally implausible, denial of leave to amend lay
within the district court's discretion. See Mirmehdi

1 v. United States, 689 F.3d 975, 985 (9th Cir. 2012)
2 (“[A] party is not entitled to an opportunity to amend
3 his complaint if any potential amendment would be
4 futile. . . .”), as amended (citation omitted). This
5 is particularly true as the Zadroznys had a prior
6 opportunity to amend their complaint. See Cafasso,
7 United States ex rel. v. Gen. Dynamics C4 Sys., Inc.,
8 637 F.3d 1047, 1058 (9th Cir. 2011) (“The district
9 court’s discretion to deny leave to amend is
10 particularly broad where plaintiff has previously
11 amended the complaint.”) (citation and alteration
12 omitted). (Emphasis added.)

8 Under this standard, we conclude that the bankruptcy court did
9 not err in dismissing the Nordeens’ Second Amended Complaint with
10 prejudice. It is our perception that the bankruptcy court bent
11 over backwards at several substantive hearings concerning the
12 Nordeens’ various complaints to explain to them what would work
13 to state a plausible claim in a complaint that could be tried.
14 Despite the bankruptcy court’s best efforts, the Nordeens
15 insisted throughout on filing complaints that shed much heat but
16 little light on their potential claims and ultimately did not
17 state any plausible claims under applicable law and pleading
18 standards in a federal court. In light of the Nordeens’ failures
19 to state a plausible claim for relief through three prolix
20 efforts after receiving substantial guidance from the bankruptcy
21 court, we agree with the bankruptcy court that giving them a
22 further opportunity to amend their complaint would be futile.
23 The Second Amended Complaint was properly dismissed without leave
24 to amend.

25 **VI. CONCLUSION**

26 Based on the foregoing analysis of the issues raised in this
27 appeal under applicable law, we AFFIRM.