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

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

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|-------------------------------|---|----------|-------------------|
| In re:                        | ) | BAP No.  | AZ-11-1265-KiWiJu |
| LASHAUNA COLEMAN,             | ) | Bk. No.  | 10-18396-CGC      |
| Debtor.                       | ) | Adv. No. | 10-1164           |
| _____                         | ) |          |                   |
| LASHAUNA COLEMAN,             | ) |          |                   |
| Appellant,                    | ) |          |                   |
| v.                            | ) |          |                   |
| AMERICAN HOME MORTGAGE        | ) |          |                   |
| SERVICING, INC.; SAND CANYON  | ) |          |                   |
| CORPORATION; WELLS FARGO BANK | ) |          |                   |
| as Trustee of Carrington      | ) |          |                   |
| Mortgage Loan Trust, Series   | ) |          |                   |
| 2006-OPT1 Asset-Backed        | ) |          |                   |
| Pass-Through Certificates,    | ) |          |                   |
| Appellees.                    | ) |          |                   |
| _____                         | ) |          |                   |

M E M O R A N D U M<sup>1</sup>

Argued and Submitted on January 19, 2012,  
at Phoenix, Arizona

Filed - February 3, 2012

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

Honorable Charles G. Case, II, Bankruptcy Judge, Presiding

Appearances: LaShauna Coleman, appellant, argued pro se;  
Mark L. Collins of Gust Rosenfeld PLC argued for  
appellees.

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<sup>1</sup> This disposition is not appropriate for publication.  
Although it may be cited for whatever persuasive value it may have  
(see Fed. R. App. P. 32.1), it has no precedential value. See 9th  
Cir. BAP Rule 8013-1.

1 Before: KIRSCHER, WILLIAMS<sup>2</sup> and JURY, Bankruptcy Judges.

2 Appellant, chapter 13<sup>3</sup> debtor LaShauna Coleman ("Coleman"),  
3 has been a party to numerous actions involving appellees, American  
4 Home Mortgage Servicing, Inc. ("American Home"), Option One  
5 Mortgage Company ("Option One"), Wells Fargo Bank, N.A., as  
6 Trustee for the Certificate holders of Carrington Mortgage Loan  
7 Trustee, Series 2006-OPT1, Asset Backed Pass-Through Certificates  
8 ("Wells Fargo"), Quality Loan Servicing, Inc. ("Quality"), and  
9 Sand Canyon Corporation ("Sand Canyon")(American Home, Wells Fargo  
10 and Sand Canyon are collectively referred to as "Appellees"), and  
11 several other defendants along the way. All of the actions  
12 involve a mortgage loan transaction from 2005, a subsequent non-  
13 judicial foreclosure, and a forcible detainer action. In this  
14 appeal, Coleman argues that the bankruptcy court erred in granting  
15 Appellees summary judgment on the grounds of claim preclusion  
16 and/or that Coleman's claims were time barred by A.R.S. § 33-  
17 811(C). We AFFIRM.<sup>4</sup>

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21 <sup>2</sup> Hon. Patricia C. Williams, Bankruptcy Judge for the Eastern  
District of Washington, sitting by designation.

22 <sup>3</sup> Unless specified otherwise, all chapter, code, and rule  
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
24 the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The  
Federal Rules of Civil Procedure are referred to as "FRCP."

25 <sup>4</sup> On December 23, 2011, the Panel issued an order denying  
26 Coleman's motion to strike portions of Appellees' brief. We now  
27 also deny Coleman's request for judicial notice filed on  
28 October 7, 2011, as the attached documents have no bearing on this  
appeal. We further deny Coleman's additional mention of joining  
as parties BAC Home Loans and Keller Williams Realty because she  
failed to ask the Panel to take any action.

1                   **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

2 **A. Events prior to the adversary proceeding.**

3           Coleman purchased a single family home in Phoenix, Arizona in  
4 1994 (the "Property"). In 2005, Coleman refinanced the mortgage  
5 on her home with Option One (the "Loan"). In exchange for the  
6 Loan, Coleman executed a promissory note for \$120,000 and a first  
7 deed of trust in favor of Option One. The deed of trust was  
8 recorded on December 6, 2005.

9           By a Certificate of Amendment dated May 29, 2008, and filed  
10 with the California Secretary of State on June 4, 2008, Option One  
11 changed its name to Sand Canyon.

12           On June 11, 2008, Coleman received a letter from Sand Canyon  
13 stating that it would no longer be servicing the Loan and that,  
14 instead, American Home would be responsible for servicing her Loan  
15 and accepting her payments. Soon thereafter, Coleman defaulted on  
16 the Loan.

17           On December 22, 2008, Coleman sent a letter to American Home  
18 alleging that it was not the holder in due course of her mortgage,  
19 demanding that it cease and desist any collection activities, and  
20 requesting that it provide certain documents to her. On  
21 February 5, 2009, Coleman sent another letter to American Home and  
22 to Sand Canyon stating that she was "rescinding" the Loan. On  
23 February 18, 2009, American Home responded with a letter stating  
24 that it was not required to comply with Coleman's demands and, in  
25 light of the documents she provided, it appeared Coleman had  
26 encountered a "Mortgage Elimination" company, which purports the  
27 ability to eliminate a debtor's mortgage for a fee. In April  
28

1 2009, Coleman sent additional letters and documents to American  
2 Home and Sand Canyon, including a notice of cancellation, a notice  
3 of revocation of power of attorney and signature, and a notice of  
4 removal of trustee.

5 A Notice of Trustee's Sale was recorded against the Property  
6 in Maricopa County on September 15, 2009. The beneficiary listed  
7 on the notice was Wells Fargo. The sale was scheduled for  
8 December 15, 2009.

9 On October 23, 2009, Sand Canyon assigned its rights under  
10 Coleman's note and deed of trust to Wells Fargo. Sand Canyon  
11 recorded the Assignment of Mortgage/Deed of Trust in Maricopa  
12 County on October 28, 2009, which was after the recording of the  
13 Notice of Trustee's Sale.

14 On November 17, 2009, Coleman filed a complaint against  
15 American Home and other defendants in the United States District  
16 Court for the District of Arizona ("District Court"), case no.  
17 CV-09-02403-PHX-NVW ("Case 2403"), as well as a motion seeking,  
18 inter alia, a temporary restraining order, injunctive relief  
19 enjoining the trustee sale of the Property, and removal of  
20 trustee. On December 2, 2009, the District Court (Judge Wake)  
21 dismissed the complaint for "falling far short of satisfying the  
22 requirements of FRCP 8," with leave to file an amended complaint  
23 by December 18, 2009.<sup>5</sup> The District Court also denied Coleman's  
24 TRO motion for failing to comply with FRCP 65(b)(1), and for her  
25

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26 <sup>5</sup> In his December 2 order, Judge Wake stated that Coleman's  
27 complaint was dismissed because "[i]t does not allege that any of  
28 the defendants committed any specific acts and it does not  
identify what each defendant did that violates the law."

1 failure to submit any evidence from which the court could  
2 determine the likelihood of success on the merits of her claim.

3 Coleman never filed an amended complaint in the pre-sale Case  
4 2403. Meanwhile, the trustee's sale went forward on December 15,  
5 2009, and Wells Fargo was the successful bidder on the Property at  
6 \$79,000.

7 On December 28, 2009, Coleman filed another suit against the  
8 same defendants in District Court, case no. CV-09-2692-PHX DGC  
9 ("Case 2692") alleging multiple claims including wrongful  
10 foreclosure, fraud, TILA and RESPA violations, and  
11 theft/conversion. All of Coleman's alleged claims against the  
12 defendants involved the Property, the note, the deed of trust, and  
13 the related trustee's sale.

14 On January 19, 2010, Coleman filed a First Amended Complaint  
15 in Case 2692 against the same defendants alleging the same causes  
16 of action and seeking the same relief. Coleman demanded that:  
17 defendants deed the Property back to her; the court void her  
18 mortgage contract; the trustee's sale be vacated; the trustee's  
19 deed be cancelled; and that she be awarded compensatory and  
20 punitive damages.

21 On January 26, 2010, American Home and other defendants moved  
22 to dismiss Coleman's First Amended Complaint in Case 2692 for  
23 failing to state a claim under FRCP 12(b)(6). Defendants  
24 contended that Coleman's suit was time barred because A.R.S. § 33-  
25 811(C) required her to raise any challenge to the trustee's sale  
26 before it occurred.

27 After a hearing on February 11, 2010, the District Court  
28

1 (Judge Campbell) entered an order on February 16, 2010, denying  
2 Coleman's TRO request stating that "[b]ecause Plaintiff has not  
3 shown a likelihood of success on the merits, she may not obtain a  
4 TRO invalidating the trustee's sale of her property that occurred  
5 on December 15, 2009, and blocking any enforcement rights created  
6 by the trustee's sale." The order also stated that Coleman had  
7 waived all defenses and objections to the trustee's sale because  
8 she failed to obtain a court order prior to the sale as required  
9 by A.R.S. § 33-811(C).

10 On February 25, 2010, the Superior Court of Maricopa County  
11 ("State Court") entered a forcible detainer judgment ("FED  
12 Judgment") in favor of Wells Fargo to remove Coleman and any other  
13 occupants from the Property. The FED Judgment provided that if  
14 Coleman failed to vacate immediately, the court would issue a Writ  
15 of Restitution on March 3, 2010. Coleman failed to attend the  
16 hearing on Wells Fargo's detainer action.

17 On March 1, 2010, before the Writ of Restitution could be  
18 issued, Coleman filed a third lawsuit, this time against Wells  
19 Fargo in State Court seeking, inter alia, to enjoin enforcement of  
20 and/or vacate the FED Judgment ("Case 0654"). Coleman also sought  
21 "injunctive relief against a fraudulent trustee's sale" and  
22 requested that the Property be deeded back to her - the same  
23 relief that was already denied by the District Court on  
24 February 16. The State Court denied Coleman's requests in their  
25 entirety on March 4, 2010. Thereafter, Wells Fargo removed Case  
26 0654 to the District Court (Judge Wake).

27 On March 30, 2010, the District Court (Judge Campbell)

28

1 entered an order granting the defendants' motions to dismiss under  
2 FRCP 12(b)(6) in Case 2692 ("March 30 Order"). Specifically, the  
3 District Court determined that Coleman's suit was barred as  
4 untimely per A.R.S. § 33-811(C); Coleman had waived her rights  
5 under the statute by not timely challenging the trustee's sale.

6 The District Court considered and rejected all of Coleman's  
7 arguments in opposition to the motions. Coleman contended, inter  
8 alia, that A.R.S. § 33-811(C) was unconstitutional because it did  
9 not provide a remedy for fraud, and that the statute waives a  
10 party's due process rights under the Fourteenth Amendment. The  
11 District Court rejected this, concluding that the statute does not  
12 eliminate fraud claims, but merely provides that a party must  
13 assert any claims before the trustee's sale, and Coleman never  
14 disputed receiving timely notice of the sale. Thus, according to  
15 the District Court, Coleman could have asserted her fraud claim  
16 before the trustee's sale, particularly since she was aware of the  
17 alleged fraud prior to the sale as evidenced by her attempt to  
18 rescind the Loan on that basis almost one year before.

19 The District Court also rejected Coleman's due process  
20 argument, concluding that A.R.S. § 33-811(C) (and other related  
21 statutes) afforded her time to seek redress if she believed the  
22 trustee's sale was defective. The court reasoned that Coleman  
23 lost her rights because she failed to act in a timely manner, not  
24 because she was denied due process of law.

25 Finally, the District Court rejected Coleman's argument that  
26 defendants were not entitled to dismissal because the trustee's  
27 sale was based on a fraudulent assignment, meaning that the sale  
28

1 was not final, and that the sale was invalid because it was  
2 "scheduled prior to the fraudulent retroactive assignment." The  
3 District Court concluded that based on the mandate of A.R.S. § 33-  
4 811(B), the trustee's deed constituted evidence of regularity of  
5 the trustee's sale, and Coleman had failed to allege any facts  
6 that would allow the court to draw a reasonable inference the sale  
7 was illegal. The District Court (Judge Campbell) also denied  
8 Coleman's motion to reconsider the March 30 Order.

9 Coleman then proceeded to seek leave to file a second amended  
10 complaint in Case 2692. The case had now been transferred to the  
11 Hon. Roslyn O. Silver because Coleman sought to add Judge Campbell  
12 as a defendant, as well as two U.S. Marshals and the attorneys for  
13 several of the defendants. On August 18, 2010, the District Court  
14 (Judge Silver) entered an order denying Coleman's request and  
15 granting a motion to dismiss under FRCP 12(b)(6), with prejudice,  
16 to two remaining defendants who were not parties to the March 30  
17 Order, thereby terminating Case 2692. The District Court  
18 concluded that Coleman's First Amended Complaint (as with her  
19 others) failed to comply with FRCP 8 and that any further  
20 amendments would be futile.<sup>6</sup> Coleman filed her chapter 13  
21 bankruptcy petition on June 11, 2010, while Case 2692 was pending  
22 before Judge Silver.

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23  
24 <sup>6</sup> On September 15, 2010, Coleman appealed the rulings in Case  
25 2692 to the Ninth Circuit Court of Appeals (10-17052). It entered  
an order on March 15, 2011, summarily affirming:

26 A review of the record and the opening brief indicates  
27 that the questions raised in this appeal are so  
28 insubstantial as not to require further argument  
(citation omitted). Accordingly, we summarily affirm the  
district court's judgment.



1 **B. The adversary proceeding.**

2 On August 5, 2010, after the District Court had already  
3 issued its March 30 Order and its April 29, 2010 order denying  
4 Coleman's motion to reconsider, Coleman filed an adversary  
5 complaint against Appellees.<sup>7</sup>

6 On September 1, 2010, the District Court (Judge Wake) entered  
7 an order in Case 0654 (Coleman's case to enjoin/vacate the FED  
8 Judgment) dismissing it with prejudice as against Wells Fargo.  
9 Coleman did not appeal that order.

10 On September 23, 2010, after the District Court issued its  
11 order dismissing Coleman's First Amended Complaint with prejudice  
12 as to the remaining defendants and terminating Case 2692, Coleman  
13 filed her First Amended Adversary Complaint ("FAAC"). The claims  
14 Coleman asserted in the FAAC were essentially the same claims she  
15 had asserted in her prior suits before the District Court and  
16 State Court.

17 On January 5, 2011, the bankruptcy court granted Coleman's  
18 motion to stay the adversary proceeding so she could focus on her  
19 appeal of Case 2692 pending before the Ninth Circuit.

20 Despite her stay request, just days later on January 11,  
21 2011, Coleman moved for summary judgment against Appellees.  
22 Appellees responded with an opposition and cross motion for  
23 summary judgment, contending that Coleman's claims in the FAAC,  
24 all of which arose out of facts surrounding the Property, the

25 \_\_\_\_\_  
26 <sup>7</sup> Appellees moved to dismiss Coleman's initial complaint on  
27 the grounds of claim preclusion, contending that all substantive  
28 issues raised by Coleman had been disposed of by judgments in  
prior lawsuits. It was later denied without prejudice on  
January 5, 2011.

1 note, the deed of trust, the foreclosure process, the trustee's  
2 sale, the FED Judgment, and the Writ of Restitution, had been  
3 raised and decided against her, and were therefore barred by res  
4 judicata.<sup>8</sup> Specifically, Appellees contended that the District  
5 Court in Case 2692 addressed the substantive merits of Coleman's  
6 claims and determined that she had waived all claims, defenses,  
7 and objections to the trustee's sale under A.R.S. § 33-811(C).  
8 Furthermore, asserted Appellees, any of Coleman's claims for  
9 possessory rights in the Property were decided against her in the  
10 FED Judgment. Appellees alternatively argued that if claim  
11 preclusion did not apply, they were entitled to summary judgment  
12 because Coleman waived her defenses and objections to the  
13 trustee's sale by failing to timely obtain an injunction to  
14 prevent it per A.R.S. § 33-811(C).

15 The bankruptcy court held a hearing on the cross motions for  
16 summary judgment on April 12, 2011. Coleman failed to appear.  
17 After hearing oral argument from Appellees and considering  
18 Coleman's "many pleadings," the bankruptcy court granted  
19 Appellees' motion for summary judgment; Coleman's claims in her  
20 FAAC were barred on the grounds of claim preclusion.  
21 Alternatively, the bankruptcy court held that even if it were to  
22 reach the merits of Coleman's claims, it would have concluded, as  
23 did Judge Campbell, that they were barred by A.R.S. § 33-811(C).

24 Before the bankruptcy court entered an order, Coleman filed a  
25

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26 <sup>8</sup> We use the term "claim preclusion" which has "supplanted  
27 the term 'res judicata' that was traditionally used in a  
28 now-obsolete, non-generic sense . . . ." The Alary Corp. v.  
Sims (In re Associated Vintage Grp., Inc.), 283 B.R. 549, 555  
(9th Cir. BAP 2002)(discussing res judicata terminology).

1 motion to reconsider on April 18, 2011, which the bankruptcy court  
2 denied on May 16, 2011. An order granting Appellees' motion for  
3 summary judgment was entered on April 22, 2011. Coleman timely  
4 appealed the order granting Appellees' motion for summary judgment  
5 and the order denying her motion to reconsider on May 24, 2011.  
6 See Rule 8002(b)(timely Rule 9024 motion caused appeal time to run  
7 from date the order disposing of the tolling motion was entered).

## 8 **II. JURISDICTION**

9 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 157  
10 (b)(2)(K) and 1334. We have jurisdiction under 28 U.S.C. § 158.<sup>9</sup>

## 11 **III. ISSUES**

12 Did the bankruptcy court err in determining that Coleman's  
13 claims were barred on the grounds of claim preclusion and granting  
14 summary judgment to Appellees?

15 Did the bankruptcy court err in alternatively determining  
16 that Coleman's claims were time barred by A.R.S. § 33-811(C) and  
17 granting summary judgment to Appellees?

## 18 **IV. STANDARDS OF REVIEW**

19 Whether a prior judgment has a claim preclusive or issue  
20 preclusive effect is either a question of law or a mixed question  
21 of law and fact with the legal issues predominating. We review  
22 the bankruptcy court's determinations on these issues de novo.

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23  
24 <sup>9</sup> We raise the following issue sua sponte. In this case, the  
25 bankruptcy court did not enter a separate judgment. In the case  
26 of a motion for summary judgment under FRCP 56, a separate  
27 document embodying a final judgment that is distinct from and in  
28 addition to an order granting it should be entered. See Rule  
9021. Nonetheless, the parties have waived that requirement by  
continuing to treat the order as a final judgment. See Casey v.  
Albertson's Inc., 362 F.3d 1254, 1256-59 (9th Cir. 2004), cert.  
denied, 543 U.S. 870 (2004).

1 In re Associated Vintage Grp., Inc., 283 B.R. at 554. A trial  
2 court's grant of summary judgment on the grounds of claim  
3 preclusion is also reviewed de novo. Akootchook v. United States,  
4 271 F.3d 1160, 1164 (9th Cir. 2001).

#### 5 V. DISCUSSION

6 Much of Coleman's arguments go beyond the scope of this  
7 appeal and fail to properly address how the bankruptcy court erred  
8 in granting Appellees' motion for summary judgment. Rather,  
9 Coleman argues the underlying merits of the claims she has been  
10 asserting for the past two years before the State Court, District  
11 Court, and the Ninth Circuit Court of Appeals. To the extent  
12 Coleman seeks relief from the final orders in Case 2692, or any  
13 other case from the State Court, District Court, and the Ninth  
14 Circuit Court of Appeals, we reject her request. We are not the  
15 appellate court for those courts, and we have no authority to  
16 review the merits of their decisions.

17 All that is before us is whether the bankruptcy court erred  
18 in determining that claim preclusion barred litigating the claims  
19 set forth in Coleman's FAAC, and/or whether her claims were barred  
20 by A.R.S. § 33-811(C). We conclude that the record supports the  
21 bankruptcy court's order granting Appellees' motion for summary  
22 judgment on the basis of claim preclusion or, alternatively, that  
23 Coleman's claims were time barred by A.R.S. § 33-801(C).

24 **A. The bankruptcy court did not err when it determined that  
25 Coleman's claims were barred by claim preclusion.**

26 Because the final judgments at issue here were issued by a  
27 federal court, federal law dictates the preclusive effect of the  
28 judgments. In re Gen. Adjudication of All Rights to Use Water in

1 the Gila River Sys. & Source, 127 P.3d 882, 887 (Ariz. 2006)  
2 ("Federal law dictates the preclusive effect of a federal  
3 judgment."). In the Ninth Circuit, claim preclusion applies when  
4 "the earlier suit . . . (1) involved the same claim or cause of  
5 action as the later suit, (2) reached a final judgment on the  
6 merits, and (3) involved identical parties or privies." Sidhu v.  
7 Flecto Co., Inc., 279 F.3d 896, 900 (9th Cir. 2002).

8         Although difficult to discern from her brief on appeal,  
9 Coleman appears to argue that the prior judgments by the District  
10 Court in Case 2692 were not based on the merits. She is  
11 incorrect. The District Court dismissed Case 2692 on Appellees'  
12 motions for failing to state a claim under FRCP 12(b)(6). Such  
13 dismissals are granted based on a plaintiff's failure to plead a  
14 cognizable claim. When determining a FRCP 12(b)(6) motion, a  
15 district court analyzes the facts and legal claims in the  
16 complaint to determine if the plaintiff has alleged a claim for  
17 relief. Dismissal of an action for failure to state a claim under  
18 FRCP 12(b)(6) is a "judgment on the merits," and claim preclusion  
19 bars a plaintiff from filing another complaint on the same claim  
20 for relief. Stewart v. US Bancorp, 297 F.3d 953, 957 (9th Cir.  
21 2001)(citing Federated Dep't Stores v. Moitie, 452 U.S. 394, 399  
22 n.3 (1981)). Therefore, the second element for claim preclusion  
23 is satisfied.

24         The third element is also satisfied. In her FAAC, Coleman  
25 sued American Home, Wells Fargo, Quality, and Sand Canyon. These  
26 are the same parties she sued in Case 2692 (and others).

27         Finally, the first element of claim preclusion is also  
28 satisfied. In determining whether the same claim or cause of

1 action was involved in both suits, we consider: (1) whether rights  
2 or interests established in the prior judgment would be destroyed  
3 or impaired by prosecution of the second action; (2) whether  
4 substantially the same evidence is presented in the two actions;  
5 (3) whether the two suits involve infringement of the same right;  
6 and (4) whether the two suits arise out of the same transaction or  
7 nucleus of facts. Rein v. Providian Fin. Corp., 270 F.3d 895, 903  
8 (9th Cir. 2001). A determination of this last factor in the  
9 affirmative can alone establish that the same claim for relief was  
10 involved in both suits. Id. at 903-04 (citing C.D. Anderson &  
11 Co., Inc. v. Lemos, 832 F.2d 1097, 1100 (9th Cir. 1987)(noting  
12 that "[t]he last of these criteria [regarding whether the two  
13 suits arise out of the same transaction or nucleus of facts] is  
14 the most important.").

15       Clearly, the claims at issue in Coleman's FAAC involve the  
16 same transaction or nucleus of facts as did Case 2692. All of her  
17 claims related to events and occurrences arising from the  
18 foreclosure of the Property, including the note, the deed of  
19 trust, the assignment from Sand Canyon to Wells Fargo, the  
20 trustee's sale, the FED Judgment, and the Writ of Restitution. To  
21 the extent Coleman raised any "new" claims in the FAAC, claim  
22 preclusion bars her from raising them. Owens v. Kaiser Found.  
23 Health Plan, Inc., 244 F.3d 708, 714 (9th Cir. 2001)(claim  
24 preclusion "bars litigation in a subsequent action of any claims  
25 that . . . could have been raised in the prior action."). As for  
26 the remaining elements, although not necessary to our decision,  
27 Coleman's complaint in Case 2692 and her FAAC alleged infringement  
28 by Appellees of the same rights. Moreover, the documentary

1 evidence Coleman submitted in support of her motion for summary  
2 judgment (and the FAAC) is the same evidence she presented before  
3 the District Court in Case 2692.

4 Accordingly, the bankruptcy court did not err in determining  
5 that Coleman's claims raised in her FAAC were barred on the  
6 grounds of claim preclusion.

7 **B. The bankruptcy court did not err when it alternatively**  
8 **determined that Coleman's claims were time barred by**  
9 **A.R.S. § 33-811(C).**

10 Alternatively, the bankruptcy court determined that even if  
11 claim preclusion did not apply to Coleman's claims, they were  
12 nonetheless barred by A.R.S. § 33-811(C). We agree.

13 Subsection (C) was added to A.R.S. § 33-811 in 2002. It  
14 states:

15 The trustor, its successors or assigns, . . . shall waive  
16 all defenses and objections to the sale not raised in an  
17 action that results in the issuance of a court order  
18 granting relief pursuant to rule 65, Arizona rules of  
19 civil procedure, entered before 5:00 p.m. mountain  
20 standard time on the last business day before the  
21 schedule date of the sale.

22 The record reveals that although Coleman filed her first case in  
23 District Court (Case 2403) prior to the trustee's sale, which it  
24 dismissed sua sponte without prejudice for failing to comply with  
25 FRCP 8, Coleman never filed an amended complaint, and a final  
26 judgment was entered in that case. All of Coleman's other cases,  
27 including Case 2692, were filed after the trustee's sale occurred.  
28 Therefore, it is undisputed that Coleman failed to obtain  
injunctive relief against any of the defendants prior to the  
trustee's sale. As a result, she "waived any defense or objection  
to the sale." Luciano v. WMC Mortg. Corp., 2010 WL 1491952 at \*2  
(Ariz. Ct. App. Apr. 13, 2010)(Arizona courts "give effect to the

1 plain meaning of [this] statute" and thus Plaintiff's failure to  
2 seek an injunction pursuant to Rule 65 before the sale was held  
3 waived any defense or objection to the sale); Maher v. Bank One.,  
4 N.A., 2009 WL 2580100 at \*3 (Ariz. Ct. App. Aug. 20, 2009)(a  
5 trustee's failure to comply with provisions over trustee sales is  
6 a defense or ground for objection to the sale, but under  
7 § 33-811(C) the objecting party must seek an injunction pursuant to  
8 FRCP 65 before the sale is held; allowing a trustor to void a sale  
9 based on a claim that those provisions were violated after the  
10 trustor failed to seek and obtain a preliminary injunction would  
11 render § 33-811(C) a practical nullity); Thomas v. Wells Fargo  
12 Bank, N.A., 2011 WL 3809922 at \*2 (D. Ariz. Aug. 29, 2011)(citing  
13 Luciano); Maxhimer v. Wells Fargo Bank, N.A., 2011 WL 3418389 at  
14 \*3 (D. Ariz. Aug. 4, 2011); Jada v. Wells Fargo Bank, N.A.,  
15 2011 WL 3267330 at \*2 (D. Ariz. July 29, 2011)(citing Luciano);  
16 Woods v. BAC Home Loans Servicing LP, 2011 WL 2746310 at \*2  
17 (D. Ariz. July 15, 2011)(citing Luciano); Spielman v. Katz,  
18 2010 WL 4038838 at \*3 (D. Ariz. Oct. 14, 2010)(holding same).<sup>10</sup>  
19 The cases cited by Coleman allowing a party to bring an action to  
20 set aside a trustee's sale after-the-fact were decided prior to  
21 the amendment of A.R.S. § 33-811, which added the waiver provision  
22 in subsection (C).

23 Several of the above courts have further recognized that  
24 A.R.S. § 33-811(C) provides no leeway for self-representing  
25 homeowners. Even if a plaintiff's assertions are true, that

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26  
27 <sup>10</sup> We recognize that as of the time of this appeal, no  
28 published Arizona decisions interpreting A.R.S. § 33-811(C) exist.  
However, we have no reason to believe that the Arizona Supreme  
Court would rule any differently if asked to address the issue.



1 provision precludes them from contesting the non-judicial  
2 foreclosure of the subject property. Thomas, 2011 WL 3809922 at  
3 \*2; Jada, 2011 WL 3267330 at \*2; Woods, 2011 WL 2746310 at \*2.

4 More importantly, some Arizona courts have concluded that  
5 A.R.S. § 33-811(C) establishes a complete defense to virtually any  
6 attack on the sale, including claims of fraud. E.g., Spielman v.  
7 Katz, 2010 WL 4038838 at \*3 (D. Ariz. Oct. 24, 2010)(concluding  
8 plaintiff's claims, including claims of fraud, were barred by  
9 § 33-811(C)); Cettolin v. GMAC, 2010 WL 3834628 at \*3 (D. Ariz.  
10 Sept. 24, 2010)(reading § 33-811(C) broadly).

11 Coleman contends that the Notice of Trustee's Sale  
12 erroneously failed to cite or mention the waiver provisions set  
13 forth in A.R.S. § 33-811(C). Coleman cites to no authority  
14 supporting her position that Arizona law requires notices to  
15 contain this information. Furthermore, Coleman's argument that  
16 she was ignorant of A.R.S. § 33-811(C) is undermined by the fact  
17 that she filed her first suit after the Notice was recorded but  
18 prior to the trustee's sale.

19 Coleman also challenges the constitutionality of A.R.S.  
20 § 33-811(C) and contends that no court has determined this issue.  
21 Contrary to Coleman's assertion, this issue was squarely addressed  
22 by the District Court in Case 2692. Judge Campbell concluded that  
23 § A.R.S. § 33-811(C) was constitutional because it does not  
24 eliminate an objector's claim for fraud (or any other claims), but  
25 merely requires that a party assert any claims before the  
26 trustee's sale. He further rejected Coleman's due process  
27 argument, concluding that A.R.S. § 33-811(C) (and other related  
28 statutes) afforded her time to seek redress if she believed the

1 trustee's sale was defective. The Ninth Circuit summarily  
2 affirmed the District Court's decisions in Case 2692. Because  
3 Coleman did not appeal that decision to the United States Supreme  
4 Court, it is final and certainly not reviewable by this Panel.

5 **C. Coleman abandoned any argument on the motion to reconsider.**

6 Although Coleman attached to her notice of appeal the  
7 bankruptcy court's order denying her motion to reconsider, she  
8 fails to articulate any basis for how the bankruptcy court abused  
9 its discretion in denying it. Therefore, this issue is deemed  
10 abandoned. See Branam v. Crowder (In re Branam), 226 B.R. 45, 55  
11 (9th Cir. BAP 1998), aff'd, 205 F.3d 1350 (9th Cir. 1999).

12 **VI. CONCLUSION**

13 Because no genuine issues of material fact existed and  
14 Appellees were entitled to judgment as a matter of law, the  
15 bankruptcy court did not err in granting Appellees summary  
16 judgment on the grounds of claim preclusion or, alternatively,  
17 that Coleman's claims were barred by A.R.S. § 33-811(C).  
18 Accordingly, we AFFIRM.<sup>11</sup>

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24 <sup>11</sup> The Arizona Supreme Court recently held that while Arizona  
25 law expressly requires that a notice of trustee's sale be  
26 recorded, it does not require that an assignment of a deed of  
27 trust be recorded before recording the notice of trustee's sale.  
28 Vasquez v. Saxon Mortg., Inc. (In re Vasquez), --- P.3d ---, 2011  
WL 5599440 at \*2 (Ariz. Nov. 18, 2011). Notably, one of Coleman's  
primary complaints is that Wells Fargo's foreclosure was illegal  
because it recorded the notice of trustee's sale prior to the date  
the assignment of Sand Canyon's rights under the note and deed of  
trust to Wells Fargo was recorded.