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NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. NC-13-1400-JuKuPa
)	
RICHARD JOHN MULLIN and)	Bk. No. NC-12-33539
GAYLE ANNE HARSMA,)	
)	Adv. No. NC-13-3026
Debtors.)	
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RICHARD JOHN MULLIN;)	
GAYLE ANNE HARSMA,)	
)	
Appellants,)	
)	
v.)	M E M O R A N D U M*
)	
WELLS FARGO BANK, N.A.)	
)	
Appellee.)	
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Argued and Submitted on October 23, 2014
at San Francisco, California

Filed - November 10, 2014

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Dennis Montali, Bankruptcy Judge, Presiding

Appearances: Michael James Yesk, Esq. argued for appellants;
Robert Collings Little, Esq. of Anglin,
Flewelling, Rasmussen, Campbell & Trytten LLP
argued for appellee.

Before: JURY, KURTZ, and PAPPAS, Bankruptcy Judges.

* 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 Debtors Richard Mullin and Gail Harsma appeal from the
2 bankruptcy court's order dismissing with prejudice their first
3 and second amended adversary complaints filed against appellees,
4 Wells Fargo Bank, N.A. (WFB), Wells Fargo Home Mortgage,
5 Cal-Western Reconveyance Corporation (Cal-Western), and Deutsche
6 Bank National Trust Company as Trustee for World Savings
7 Remic 27. Finding no error, we AFFIRM.

8 I. FACTS

9 A. Prepetition Events

10 In 2006, debtors obtained a \$465,000 loan from WFB's
11 predecessor World Savings Bank, FSB (World Savings), which was
12 secured by a deed of trust (DOT) recorded against their real
13 property located in San Rafael, California.

14 In January 2008, World Savings changed its name to Wachovia
15 Mortgage, FSB (Wachovia). In November 2009, Wachovia merged
16 with WFB.

17 Debtors defaulted on the loan at the end of 2009, and WFB
18 initiated nonjudicial foreclosure proceedings against the
19 property in 2010. A notice of default (NOD) was recorded in
20 July 2010. Two months later, a substitution of trustee (SOT)
21 was recorded naming Cal-Western as trustee. A notice of
22 trustee's sale was recorded in October 2011, and again in
23 January 2012. The total amount of indebtedness at that point
24 had reached \$543,301.

25 A trustee's sale was conducted on May 1, 2012. WFB took
26 ownership of the property by virtue of a credit bid, and a
27 trustee's deed upon sale (TDUS) was recorded on May 8, 2012.
28 This document incorrectly called WFB "Wells Fargo Home Mortgage,

1 A Division Of Wells Fargo Bank, N.A." Consequently, a
2 corrective TDUS was recorded on May 17, 2012, specifying "Wells
3 Fargo Bank, N.A." as grantee.

4 Shortly after the foreclosure, WFB filed a lawsuit against
5 debtors in the Marin County Superior Court seeking equitable
6 relief and damages. WFB alleged that debtors had carried out an
7 illegal scheme to reconvey the DOT without its knowledge or
8 consent and had attempted to deprive it of its right to recover
9 its security for the loan. WFB further alleged that debtors
10 recorded various documents that purported to indicate that its
11 NOD was rescinded, the DOT had been modified to reflect that the
12 note had been paid in full, and the DOT reconveyed as if the
13 underlying obligation had been paid in full. WFB sought
14 cancellation of the various documents and to quiet title and
15 alleged causes of action for fraud and notary liability.
16 Attached to the complaint were the documents that debtors
17 allegedly had fraudulently recorded.

18 **B. Bankruptcy Events¹**

19 Debtors filed their joint petition under chapter 13² on
20 December 19, 2012, which stayed the state court proceeding. WFB
21

22 ¹ We have exercised our discretion to independently review
23 several electronically filed documents in debtors' underlying
24 bankruptcy case in order to develop a fuller understanding of the
25 record. See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert,
Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989).

26 ² Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure and "Civil Rule" references are the Federal Rules of
Civil Procedure.

1 moved for relief from stay. Debtors then filed an emergency
2 motion to enforce the automatic stay in the bankruptcy court,
3 alleging that the state court was holding case management
4 hearings in violation of the stay. The bankruptcy court denied
5 debtors' request for an emergency stay and set the matter to be
6 heard at WFB's relief from stay hearing. At that hearing, the
7 court orally issued an order to show cause why debtors' case
8 should not be dismissed because they were ineligible for
9 chapter 13 relief, and all matters were continued to
10 February 20, 2013.

11 At the February hearing, the bankruptcy court did not
12 dismiss debtors' case, but ordered them to file an adversary
13 proceeding against WFB by February 27, 2013, and also ordered
14 them to begin making adequate protection payments of \$2,100 per
15 month to WFB.

16 **1. The Adversary Proceeding**

17 On February 27, 2013, debtors as pro se plaintiffs
18 commenced the adversary proceeding from which this appeal
19 arises. The adversary proceeding cover sheet states the causes
20 of action are "Wrongful Foreclosure/Quiet Title & Rescind [sic]
21 of Sale of Real Property/Tender of Default Amount at the Time of
22 Default." Debtors did not organize their complaint along these
23 lines, but alleged causes of action based on variations of
24 wrongful foreclosure and violations of state and federal
25 statutory law. Due to the length of the complaint, we recite
26 an abbreviated version of the causes of action which all revolve
27 around WFB's standing to foreclose on their property.

28 In their first cause of action, debtors sought a

1 determination of the extent and validity of the lien and quiet
2 title. Debtors alleged that WFB was neither the holder of the
3 note nor did it have the right to enforce it. One basis for
4 this allegation was the securitization of the loan. In that
5 process the loan was sold as part of a mortgage backed
6 securities trust, and thus the lender no longer had any interest
7 in the loan or note and no power to transfer it. Debtors also
8 alleged that the purported trustee sale was in violation of
9 numerous state and federal laws, including the Fair Debt
10 Collection Practices Act (FDCPA).

11 In their second cause of action to recover money for false
12 recorded documents and notary fraud, debtors alleged that
13 essentially all the documents that had been recorded in
14 connection with the foreclosure were false for various reasons,
15 including, but not limited to, robo-signing violations.

16 In their third cause of action, debtors sought declaratory
17 relief seeking to have all the documents recorded in connection
18 with the foreclosure declared null and void on the grounds that
19 WFB did not have standing to enforce the note.

20 Debtors' fourth cause of action was a contingent claim for
21 credit for third party payments. Debtors alleged that if any
22 entity could come forward and prove itself the owner of the
23 note, debtors would show that they had been discharged by
24 satisfaction of the entire obligation by a combination of
25 payments from themselves plus payments from third party sources.
26 If WFB proved any right to payment on the loan, debtors sought a
27 complete accounting.

28

1 **2. WFB's Motion To Dismiss**

2 WFB filed a motion to dismiss (MTD) the complaint under
3 Civil Rule 12(b) (6). Attached to the MTD were judicially
4 noticeable documents showing the name change of World Savings to
5 Wachovia and Wachovia's merger with WFB. These documents showed
6 that WFB was the holder of the note and the beneficiary under
7 the DOT. Based on these documents and legal authorities cited,
8 WFB maintained that all of debtors' causes of action asserted in
9 the complaint failed to state a claim for relief.

10 In response to the MTD, debtors filed a first amended
11 complaint (FAC). The FAC did not materially differ from the
12 initial complaint. In the FAC, debtors again alleged that WFB
13 was not the holder of the note nor did it have the right to
14 enforce the note. They again sought cancellation of the various
15 documents associated with the foreclosure and requested
16 declaratory relief that such documents were null and void.
17 Debtors also alleged that they exercised their right of
18 redemption and WFB failed to verify the amount due, provide an
19 accounting, or verify the identity of the creditor. Therefore,
20 debtors maintained that, under California law, the note was no
21 longer secured. Finally, debtors alleged WFB had violated the
22 FDCPA.

23 In the prayer for relief, debtors requested a decree
24 stating that WFB "never acquired an enforceable interest in the
25 note and DOT as alleged above."

26 At the hearing on the MTD, after some discussion with the
27 parties, the bankruptcy court treated debtors' FAC as a
28 "response" to the MTD. The bankruptcy court opined that the FAC

1 was just a "re-shuffling" of the facts, and that the FAC still
2 came down to the basic contention that WFB did not have standing
3 to proceed with the foreclosure. Therefore, the FAC did not
4 change the bankruptcy court's analysis with respect to the
5 pending MTD. No party objected to the bankruptcy court's intent
6 to apply the MTD to the allegations in the FAC.

7 Without addressing the merits of the MTD as it pertained to
8 the FAC, debtors' counsel stated that he should have the
9 opportunity to file a second amended complaint (SAC) because the
10 California Homeowner's Bill of Rights (HBOR)³ that went into
11 effect January 1, 2013, applied to debtors' circumstances. The
12 bankruptcy court questioned whether that law would apply
13 retroactively since the foreclosure of debtors' home had taken
14 place in May 2012. Debtors' counsel represented that if the
15 HBOR was not applicable, and if none of the other facts alleged
16 would afford relief for debtors in the action, the complaint
17 then should be dismissed.

18 In dismissing the FAC, the court stated:

19 Wells Fargo has the winning argument. The Ninth
20 Circuit made it clear that involvements of MERS do not

21 ³ The HBOR, and specifically Cal. Civ. Code § 2924.18(a)(2),
22 prohibits the practice of "dual tracking" by mortgage servicers
23 if the borrower is working on securing a loan modification. Cal.
24 Civ. Code § 2924.18(a)(2). When a homeowner completes an
25 application for a loan modification, the foreclosure process is
26 essentially paused until the complete application has been fully
27 reviewed, and the borrower's mortgage servicer, trustee,
28 mortgagee, beneficiary, or authorized agent "shall not record a
notice of default, notice of sale, or conduct a trustee's sale
while the complete first lien loan modification application is
pending, and until the borrower has been provided with a written
determination by the mortgage servicer regarding that borrower's
eligibility for the requested loan modification." Id.

1 - and MERS functioning in the foreclosure process, as
2 much as it's been attacked by countless borrowers and
3 confusing to countless borrows [sic] and lawyers and
4 judges, the Ninth Circuit has made it clear that even
5 if MERS technically splits the note from the trustee
6 by its function, that that [sic] doesn't jeopard [sic]
7 -- or deprive the lender from foreclosing.

8 The bankruptcy court found that the decision in Cervantes
9 v. Countrywide Home Loans, Inc., 656 F.3d 1034, 1045 (9th Cir.
10 2011), supported its view. The court noted that other courts
11 have rejected various theories that somehow securitization of a
12 loan diminishes the power of sale. Finally, the bankruptcy
13 court found that the notion of a robo-signer did not create a
14 fraud if there's no dispute about the underlying default. The
15 court concluded that the MTD was "well-taken" and dismissed the
16 FAC with leave to amend only to state a cause of action under
17 the HBOR. The bankruptcy court entered the order consistent
18 with its decision on May 6, 2013.

19 **3. The SAC**

20 A month later, debtors filed the SAC. In the first cause
21 of action, debtors alleged that the HBOR did not preclude the
22 rescission of the foreclosure sale where the lender has accepted
23 post-petition payments. The remainder of the SAC contained
24 factual allegations and causes of action similar to those in the
25 FAC. This time in their prayer for relief, debtors requested an
26 accounting, ongoing protection of the adequate protection order,
27 attorney's fees and costs, and protections afforded under the
28 HBOR to give them a good faith opportunity to enter into a
29 viable "workout" plan with the lender.

30 **4. WFB's Second MTD**

31 WFB filed a second MTD. WFB argued that debtors failed to

1 state a cause of action under the HBOR because conduct occurring
2 before its effective date could not give rise to a claim for
3 relief. In addition, WFB asserted that the completed and proper
4 non-judicial foreclosure sale extinguished the lien on the
5 property and thus there was no lien for debtors to modify.

6 Debtors opposed, arguing that they were in an active loan
7 modification and there was no justification to depart from the
8 protection of the HBOR. They also asserted that they were
9 compliant with the adequate protection order issued by the
10 bankruptcy court and therefore WFB would not be prejudiced if
11 the matter were to proceed to trial. Finally, debtors pointed
12 out there was litigation that resulted in WFB being fined over
13 \$3 million dollars and that the person who signed the TDUS on
14 behalf of Cal-Western was a "suspected robo-signor." Debtors
15 submitted various exhibits purporting to support these last
16 arguments.⁴

17 Debtors' declaration filed in support stated that they were
18 trying to ascertain the merits of WFB's state court action
19 against them and believed discovery in the adversary proceeding
20 would show there was fraud in the purported foreclosure. They
21 further declared that "[i]t would appear that this bank is
22

23
24 ⁴ The purpose of a motion to dismiss under Civil
25 Rule 12(b)(6) is simply to test the legal sufficiency of the
26 complaint. Therefore, our inquiry is limited to the content of
27 the complaint. N. Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d
28 578, 581 (9th Cir. 1983). While some of the exhibits pass muster
as a public record permissible for consideration in the context
of a Civil Rule 12(b)(6) motion, none of them have had any
bearing on our resolution of any portion of WFB's second MTD
which addressed the applicability of the HBOR.

1 guilty of much predatory lending to others such as ourselves.”⁵

2 On July 31, 2013, the bankruptcy court entered an order
3 dismissing debtors’ SAC. The court found that since all the
4 alleged misconduct by WFB occurred prior to January 1, 2013, the
5 effective date of the HBOR, debtors had no viable claim under
6 that statute. See Sepehry-Fard v. Aurora Bank FSB, 2013 WL
7 2239820, at *3 (N.D. Cal. May 21, 2013). Moreover, the
8 bankruptcy court noted that it had already dismissed the
9 remaining causes of action and that debtors were not given leave
10 to revive them. Therefore, the SAC in its entirety was
11 dismissed. The court took the hearing on the second MTD off
12 calendar.

13 **5. Post-Dismissal Pleadings**

14 After the bankruptcy court issued its order, debtors’
15 counsel filed a pleading consenting to a substitution of
16 attorney which had the effect of leaving debtors representing
17 themselves.

18 Debtors then filed a supplemental response pro se in
19 opposition to WFB’s second MTD. Debtors stated that they simply
20 wanted to have a workable loan and work out a payment plan to
21 the true creditor. They also filed an emergency request for
22 enlargement of time under Rule 9006(b), seeking an extension of
23 time before the court ruled on the second MTD so that they could
24 replace their attorney and proceed with their case. Debtors

26 ⁵ Likewise, consideration of debtors’ declaration is
27 improper in a Civil Rule 12(b)(6) motion. Again, we note that
28 the declaration does not have any bearing on the resolution of
any portion of WFB’s second MTD.

1 maintained that their current attorney was not familiar with
2 their non-judicial remedies in conjunction with their consumer
3 rights.

4 The bankruptcy court received debtors' supplemental
5 response after it entered the July 31, 2013 order dismissing the
6 SAC. Therefore, the court treated the pleading as a motion for
7 reconsideration of the dismissal order. The bankruptcy court
8 found the pleading simply repeated arguments previously made and
9 rejected by the court and thus there was no basis for
10 reconsideration under Rules 9023 or 9024. The court denied the
11 motion by order entered on August 5, 2013, and reiterated that
12 the adversary proceeding remained dismissed with prejudice.

13 Debtors timely appealed from this order.

14 **II. JURISDICTION**

15 The bankruptcy court had jurisdiction under 28 U.S.C.
16 §§ 1334 and 157(b)(2)(K). We have jurisdiction under 28 U.S.C.
17 § 158.

18 **III. ISSUES**

19 A. Whether the bankruptcy court erred in dismissing
20 debtors' FAC;

21 B. Whether the bankruptcy court erred in dismissing
22 debtors' SAC;

23 C. Whether the bankruptcy court abused its discretion in
24 dismissing the SAC with prejudice; and

25 D. Whether the bankruptcy court abused its discretion by
26 treating debtors' supplemental response as a motion for
27 reconsideration and then denying it.

28

1 **IV. STANDARDS OF REVIEW**

2 We review a bankruptcy court's decision to grant a motion
3 to dismiss an adversary complaint de novo. Movsesian v.
4 Victoria Versicherung AG, 670 F.3d 1067, 1071 (9th Cir. 2012)
5 (en banc).

6 We review the bankruptcy court's decision to dismiss an
7 adversary complaint without leave to amend for an abuse of
8 discretion. Henry A. v. Willden, 678 F.3d 991, 998 (9th Cir.
9 2012). We also review for an abuse of discretion a denial of a
10 motion for reconsideration. First Ave. W. Bldg. LLC v. James
11 (In re OneCast Media, Inc.), 439 F.3d 558, 561 (9th Cir. 2006).

12 In determining whether the bankruptcy court abused its
13 discretion we first determine de novo whether the trial court
14 identified the correct legal rule to apply to the relief
15 requested and then, if the correct legal standard was applied,
16 we determine whether the court's application of that standard
17 was "(1) illogical, (2) implausible, or (3) without support in
18 inferences that may be drawn from the facts in the record."
19 United States v. Loew, 593 F.3d 1136, 1139 (9th Cir. 2010).

20 **V. DISCUSSION**

21 **A. Standards For Dismissal Under Civil Rule 12(b) (6)**

22 Rule 7012(b) makes Civil Rule 12(b) (6) applicable to
23 adversary proceedings. When ruling on a motion to dismiss under
24 Civil Rule 12(b) (6), "we accept all factual allegations in the
25 complaint as true and construe the pleadings in the light most
26 favorable to the nonmoving party." Movsesian, 629 F.3d at 905.
27 However, we need not accept as true allegations that contradict
28 matters properly subject to judicial notice or by exhibit. See

1 Mullis v. United States Bankr. Ct., 828 F.2d 1385, 1388 (9th
2 Cir. 1987). Moreover, we are not required to accept as true
3 allegations that are merely conclusory, unwarranted deductions
4 of fact, or unreasonable inferences. See Clegg v. Cult
5 Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994).

6 We then must determine whether the facts alleged are
7 sufficient to show that the plaintiff has a plausible claim for
8 relief. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (citing
9 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A
10 plaintiff's obligation to provide the grounds of his entitlement
11 to relief requires more than labels and conclusions, and a
12 formulaic recitation of the elements of a cause of action will
13 not do." Twombly, 550 U.S. at 555. Determining whether a
14 complaint states a plausible claim for relief will "be a
15 context-specific task that requires the reviewing court to draw
16 on its judicial experience and common sense." Iqbal, 129 S.Ct.
17 at 1950. In the end, the determinative question is whether
18 there is any set of "facts that could be proved consistent with
19 the allegations of the complaint" that would entitle plaintiff
20 to some relief. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514
21 (2002). If the allegations show that relief is barred as a
22 matter of law, the complaint is subject to dismissal. Jones v.
23 Bock, 549 U.S. 199, 215 (2007).

24 Finally, the purpose of a motion to dismiss under Civil
25 Rule 12(b)(6) is simply to test the legal sufficiency of the
26 complaint. Therefore, our narrow scope of review of the orders
27 on appeal does not allow us to reach the merits of any issue,
28 and our inquiry is limited to the content of the complaint.

1 N. Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d at 581.

2 **B. The Bankruptcy Court Did Not Err In Dismissing The FAC.**

3 On appeal, debtors argue the dismissal of the FAC was
4 improper because the bankruptcy court made inaccurate factual
5 findings and legal conclusions, and its attempt to dispose of
6 the adversary proceeding on the basis of rote statements of fact
7 and law, that did not even apply to their case, constituted an
8 abuse of discretion. In this regard, debtors assert that the
9 bankruptcy court improperly mentioned MERS when MERS is not, and
10 has never been, a party to this action and they never alleged
11 any claim against MERS or based any of their claims on MERS's
12 practice of splitting the note from the deed of trust. Debtors
13 also contend that the court improperly relied on a
14 securitization theory that they never alleged in dismissing
15 their FAC. Finally, debtors argue that the bankruptcy court
16 incorrectly found that they never disputed the default when they
17 disputed the amount owed and also alleged that the default was
18 noticed by the wrong party in the FAC.

19 Putting these assignments of error aside, debtors
20 acknowledge that the crux of their allegations in the FAC relate
21 to their challenge to WFB's standing to initiate foreclosure
22 proceedings against their property despite not being the true
23 beneficiary under the DOT. As borrowers on the loan, they
24 maintain that they have standing to challenge foreclosure
25 conducted at the direction of the incorrect party, citing Glaski
26 v. Bank of Am., N.A., 218 Cal.App.4th 1079, 1094 (Cal. Ct. App.
27 2013) in support.

28 We are not persuaded by these arguments. The record shows

1 that the bankruptcy court was fully aware that the crux of
2 debtors' original complaint and FAC was their allegation that
3 WFB did not have standing to foreclose on their property. We
4 interpret the court's comments at the dismissal hearing to
5 simply provide a context for this litigation by noting a long
6 line of case law that has rejected standing arguments such as
7 here, based on improper party assertions or chain of title
8 issues.

9 Error, or not, our review of the bankruptcy court's
10 decision to dismiss the FAC is de novo. De novo means that we
11 examine a matter anew, as if no decision previously had been
12 rendered, giving no deference to the bankruptcy court's prior
13 determinations. Dawson v. Marshall, 561 F.3d 930, 933 (9th Cir.
14 2009). We may affirm the bankruptcy court's decision on any
15 grounds supported by the record. Shanks v. Dressel, 540 F.3d
16 1082, 1086 (9th Cir. 2008).

17 "[H]owever inartfully pleaded," the FAC which was filed pro
18 se must be held to "less stringent standards than formal
19 pleadings drafted by lawyers" and can only be dismissed for
20 failure to state a claim if it appears "'beyond doubt that the
21 plaintiff can provide no set of facts in support of his claim
22 which would entitle him to relief.'" Nordeen v. Bank of Am.,
23 N.A. (In re Nordeen), 495 B.R. 468, 477 (9th Cir. BAP 2013).
24 "However, no matter how a complaint is worded, ultimately it
25 must state a legally cognizable claim entitling the claimant to
26 some relief in order to survive a motion to dismiss." Id. None
27 of debtors' allegations, on the whole or specifically, state a
28 cause of action to invalidate the foreclosure sale or the

1 trustee's deed conveying the property to WFB or to support an
2 award of monetary damages.

3 While debtors label their causes of action somewhat
4 differently, their causes of action seeking to set aside the
5 trustee's sale can be summarized as: wrongful foreclosure,
6 voiding or cancellation of the recorded trustee's deed upon
7 sale, quiet title, and declaratory relief.

8 **1. Wrongful Foreclosure**

9 Under California law, the elements to maintain a wrongful
10 foreclosure claim are the same as for obtaining the equitable
11 set-aside of a trustee's sale. See Lona v. Citibank, N.A.,
12 202 Cal.App.4th 89, 104 (Cal. Ct. App. 2011). A plaintiff must
13 allege that: "(1) defendants caused an illegal, fraudulent, or
14 willfully oppressive sale of the property pursuant to a power of
15 sale in a mortgage or deed of trust; (2) the plaintiff suffered
16 prejudice or harm; and (3) the plaintiff tendered the amount of
17 the secured indebtedness or was excused from tendering." Chavez
18 v. Indymac Mortg. Servs., 219 Cal.App.4th 1052, 1062 (Cal. Ct.
19 App. 2013). Absent any evidence to the contrary, a nonjudicial
20 foreclosure sale is presumed to have been conducted regularly
21 and fairly. See Cal. Civ. Code § 2924.

22 Although debtors do not discuss the above-cited legal
23 elements, they alleged in the FAC: (1) the foreclosure sale was
24 illegal because WFB was not the holder of their note and thus
25 did not have the right to enforce the note; (2) due to WFB's
26 lack of standing and other irregularities, the NOD, the notice
27 of trustee sale, and the corrective TDUS are all false, suffer
28 from fatal defects, and are "void or voidable"; (3) the false

1 documents may cause injury to debtors because they will be
2 required to pay the wrong party and will be forcefully removed
3 from the property by parties with no enforceable interest; and
4 (4) the unlawful instruments put a cloud on title.

5 We do not need to accept allegations in debtors' FAC (or
6 variations of them) as true when they are contradicted by
7 judicially noticeable documents.⁶ The exhibits attached to
8 WFB's MTD shows that WFB obtained a beneficial interest in
9 debtors' DOT as a successor-in-interest due to a merger with
10 World Savings. The note and DOT both refer to the lender as
11 "World Savings Bank, FSB, its successors and/or assignees." The
12 documents show there was no break in the chain of title.

13 Accordingly, there can be no reasonable dispute that World
14 Savings Bank became Wachovia, which was merged into Wells Fargo.
15 WFB was the holder of the note and had a right to enforce the
16 DOT after the merger with World Savings. See Christiansen v.
17 Wells Fargo Bank, N.A., 2013 WL 1832644, at *3 (N.D. Cal. May 1,
18 2013) ("Many courts have recognized Wells Fargo's interest in

19
20 ⁶ We take judicial notice of the exhibits attached to WFB's
21 request for judicial notice in connection with the MTD and the
22 exhibits attached to debtors' FAC. These documents and their
23 contents are "fact[s] that [are] not subject to reasonable
24 dispute because [they] . . . (2) can be accurately and readily
25 determined from sources whose accuracy cannot reasonably be
26 questioned." Fed. R. Evid. 201(b); see Gamboa v. Tr. Corps &
27 Cent. Mortg. Loan Servicing Co., 2009 WL 656285, at *3 (N.D. Cal.
28 March 12, 2009) (noting that deeds of trust are "part of the
public record and are easily verifiable"); Marder v. Lopez,
450 F.3d 445, 448 (9th Cir. 2006) ("A court may consider evidence
on which the complaint 'necessarily relies' if: (1) the complaint
refers to the document; (2) the document is central to the
plaintiff's claim; and (3) no party questions the
authenticity.").

1 the note and deed of trust following World Savings Bank's name
2 change and eventual merger with Wells Fargo.").

3 Debtors do not challenge the accuracy of the evidence
4 chronicling the succession of Wells Fargo from Wachovia and
5 World Savings. Rather, they wish to inspect the original note
6 and contend that the written communications received by them
7 contain irreconcilable discrepancies as to the identity of the
8 real party-in-interest to the DOT and note. However,
9 "California's non judicial foreclosure scheme . . . broadly
10 allows a trustee, mortgagee, beneficiary, or any of their agents
11 to initiate non judicial foreclosure. Accordingly, the statute
12 does not require a beneficial interest in both the Note and the
13 Deed of Trust to commence a non judicial foreclosure sale."
14 Lane v. Vitek Real Estate Indus. Grp., 713 F.Supp.2d 1092, 1099
15 (E.D. Cal. 2010).

16 Debtors cite Glaski, 218 Cal.App.4th 1079, as standing for
17 the proposition that a party may plead a wrongful foreclosure
18 action if the complaint alleges specific facts showing the
19 foreclosure was not initiated by the correct person. But
20 debtors have not alleged any specific facts that support such a
21 claim and Glaski does not save their cause of action for
22 wrongful foreclosure. In Glaski, the California Court of Appeal
23 for the fifth Appellate District found:

24 [A] borrower may challenge the securitized trust's
25 chain of ownership by alleging the attempts to
26 transfer the deed of trust to the securitized trust
27 (which was formed under New York law) occurred after
28 the trust's closing date. Transfers that violate the
terms of the trust instrument are void under New York
law, and borrowers have standing to challenge void
assignments of their loans[.]

1 Glaski, 218 Cal.App.4th at 1083. This narrow holding does not
2 stand for the broad proposition cited by debtors. Moreover,
3 their citation to Glaski, which is a securitization case, is
4 curious given their position that they do not rely on a
5 securitization theory in their FAC.

6 At the hearing, debtors' counsel argued that the recently
7 published case of Fonteno v. Wells Fargo Bank, N.A.,
8 228 Cal.App.4th 1358 (Cal. App. 2014) also supported their right
9 to challenge the foreclosure sale. There, the California
10 appellate court held that residential mortgage borrowers are
11 entitled to seek the equitable cancellation of a trustee's deed,
12 issued following a nonjudicial foreclosure sale, based on the
13 lender's failure to meet with the borrowers prior to foreclosure
14 as required by the National Housing Act (NHA) regulations which
15 were incorporated into their deed of trust. Nowhere do debtors
16 allege that WFB failed to meet with them prior to foreclosure as
17 required by the NHA nor do they allege that the NHA regulations
18 were incorporated into their DOT. Accordingly, Fonteno is
19 factually distinguishable and does not assist debtors.

20 Nor can debtors state a claim for wrongful foreclosure
21 based on their allegation that no substitution of trustee was
22 effected before the purportedly new trustee recorded a notice of
23 default in violation of Cal. Civ. Code § 2924(a)(1). The
24 judicially noticeable NOD shows that it was signed by WFB's
25 agent and such delegation is expressly authorized by Cal. Civ.
26 Code § 2924(a)(1) (stating that the notice of default may be
27 filed by the "trustee, mortgagee, or beneficiary, or any of
28 their authorized agents."). See Jenkins, 216 Cal.App.4th at 515

1 (agent of beneficiary is authorized to record notice of
2 default); Lane, 713 F.Supp.2d at 1099.

3 Debtors also assert that the SOT "was invalid because the
4 new trustee attempted to appoint itself as trustee when the Deed
5 of Trust explicitly stated that only the lender could exercise
6 that right." However, the SOT is signed by WFB's "Attorney In
7 Fact." Further, the DOT attached to their FAC states that they
8 "agree[d] that Lender may at any time appoint a successor
9 trustee and that person shall become the Trustee under this
10 Security Instrument as originally named as Trustee."

11 In the end, none of debtors' allegations state a cause of
12 action for wrongful foreclosure. Even if there were
13 irregularities, debtors would not be entitled to relief because
14 they cannot allege any prejudice. The allegations in the FAC
15 demonstrate that debtors lost their home through nonjudicial
16 foreclosure because they defaulted on the home loan, and not
17 because of WFB's lack of authority or any other irregularities
18 in the foreclosure process. Although debtors argue on appeal
19 that they dispute the default and the amount owed, there are no
20 factual allegations in the FAC to support these legal
21 conclusions. Instead, debtors effectively concede that they
22 were in default in the absence of any factual allegations
23 showing that they had made the required payments on their home
24 loan.

25 On the tender of payment element, debtors did not even
26 mention this element on appeal. See Padgett v. Wright, 587 F.3d
27 983, 985 n.2 (9th Cir. 2003) (refusing to consider matters on
28 appeal that were not specifically and distinctly raised and

1 argued in appellant's opening brief). When pressed at oral
2 argument on this point, debtors' counsel explained that there
3 are equitable exceptions to the tender rule. For example,
4 tender is not required when the lender has not yet foreclosed
5 and has allegedly violated laws related to avoiding the
6 necessity for a foreclosure. See Pfeifer v. Countrywide Home
7 Loans, Inc., 211 Cal.App.4th 1250, 1280 (Cal. App. 2012).
8 Pfeifer, like Fonteno, involved the violation of the NHA which
9 required a pre-foreclosure face-to-face meeting to discuss
10 alternatives to foreclosure. While we acknowledge there are
11 exceptions to the tender rule under California law, there were
12 no allegations in the FAC that any exception was applicable
13 under these circumstances.

14 In sum, debtors' FAC not only fails to allege facts that
15 meet the critical elements for a wrongful foreclosure cause of
16 action, but as noted above, it also fails to allege a true
17 irregularity in the proceedings. It therefore follows that the
18 allegations are insufficient to state a cause of action for
19 voiding or cancellation of the recorded TDUS.

20 **2. Quiet Title**

21 The FAC also does not state a plausible claim for quiet
22 title. The FAC does not adequately allege that debtors are the
23 rightful owners. The FAC reflects that debtors defaulted on
24 their loan payments and that their property is subject to a DOT.
25 WFB is the beneficiary under the DOT and stands in the shoes of
26 the original lender, World Savings, and has foreclosed on their
27 property.

28 Further, under California law, "[a] borrower may not . . .

1 quiet title against a secured lender without first paying the
2 outstanding debt on which the . . . deed of trust is based.”
3 Lueras v. BAC Homes Loans Servicing, LP, 221 Cal.App.4th 49, 86
4 (Cal. Ct. App. 2013). There is no allegation that such a
5 payment was made. Accordingly, this claim is barred as a matter
6 of law.

7 **3. Declaratory Relief**

8 In their request for declaratory relief, debtors seek a
9 declaration, among other things, that “no party owns the note,
10 debt, or DOT.” Plainly, debtors seek a windfall rather than
11 equitable declaratory relief. Because debtors’ request for
12 declaratory relief is dependent upon the previous causes of
13 action which have all been dismissed, declaratory relief is not
14 available on the grounds alleged.

15 **4. Remaining Causes of Action**

16 Debtors’ FAC also alleged causes of action denominated
17 accounting, right of redemption under Cal. Civ. Code § 2903, and
18 violations of the FDCPA. Debtors, however, make no arguments on
19 appeal regarding these claims or why those causes of action were
20 improperly dismissed. “[W]e cannot ‘manufacture arguments for
21 an appellant’ and therefore we will not consider any claims that
22 were not actually argued in appellant’s opening brief.” Indep.
23 Towers of Wash. v. Wash., 350 F.3d 925, 929 (9th Cir. 2003); see
24 Padgett v. Wright, 587 F.3d at 985 n.2.

25 Concerning the violation of the FDCPA, foreclosing on a
26 property pursuant to a deed of trust is not the collection of a
27 debt within the meaning of FDCPA. Rosal v. First Fed. Bank of
28 Cal., 671 F. Supp. 2d 1111, 1135 (N.D. Cal. 2009). Further, the

1 term "debt collector" under the FDCPA does not include
2 creditors, mortgage beneficiaries and servicers, or assignees of
3 a debt. Wise v. Wells Fargo, 850 F.Supp.2d 1047, 1053 (C.D.
4 Cal. 2012). Because WFB owns the loan through the above
5 described name changes and mergers, it is a creditor/originator
6 of debtors' debt and is not a "debt collector." See Esquivel v.
7 Bank of Am., N.A., 2013 WL 682925, at *5-7 (E.D. Cal. Feb. 21,
8 2013).

9 In sum, reviewing the dismissal of the FAC de novo, and
10 considering the parties' arguments on appeal, we find no reason
11 to disagree with the bankruptcy court's conclusion that under
12 Civil Rule 12(b)(6) the FAC failed to state legally cognizable
13 causes of action and thus dismissal was proper.

14 **C. The Bankruptcy Court Did Not Err In Dismissing the SAC.**

15 In their opening brief, debtors do not tell us why the
16 bankruptcy court's decision to dismiss their SAC was error. As
17 stated above, we do not consider matters that were not
18 specifically and distinctly raised and argued in their opening
19 brief. Padgett v. Wright, 587 F.3d at 985 n.2.

20 However, debtors failed to state a claim for relief under
21 the HBOR which took effect on January 1, 2013. Michael J. Weber
22 Living Trust v. Wells Fargo Bank, N.A., 2013 WL 1196959, at *4
23 (N.D. Cal. March 25, 2013). "Like federal courts, 'California
24 courts comply with the legal principle that unless there is an
25 express retroactivity provision, a statute will not be applied
26 retroactively unless it is very clear from extrinsic sources
27 that the Legislature . . . must have intended a retroactive
28 application.'" Id. at *4. The HBOR does not state that it has

1 retroactive effect. Id.; see also Sepehry-Fard, 2013 WL
2 2239820, at *3. Therefore, the bankruptcy court properly
3 dismissed debtors' claims under the HBOR because the facts
4 alleged relate to conduct that arose prior to the HBOR's
5 effective date.

6 **D. The Bankruptcy Court Did Not Abuse Its Discretion In**
7 **Dismissing The FAC and SAC With Prejudice.**

8 We find no error with the bankruptcy court's decision to
9 dismiss the FAC and SAC without leave to amend. Although a
10 bankruptcy court should grant leave to amend liberally, the
11 court does not err in dismissing a complaint if amendment would
12 be futile. Gordon v. City of Oakland, 627 F.3d 1092, 1094 (9th
13 Cir 2012). In deciding whether amendment is futile, we are only
14 required to take into account hypothetical amended pleadings
15 containing facts consistent with those already alleged. Swatz
16 v. KPMG LLP, 476 F.3d 756, 761 (9th Cir. 2007). In their
17 arguments on appeal, debtors have failed to set forth any
18 factual allegations that sufficiently state all the elements for
19 wrongful foreclosure or for that matter any cause of action. We
20 thus do not need to decide whether any of the case law cited in
21 their reply brief supports their theories asserted in their FAC
22 or SAC. In short, debtors have not demonstrated that any viable
23 cause of action exists against WFB or the other defendants.

24 **E. The Bankruptcy Court Did Not Abuse Its Discretion When**
25 **Making Its Post-Dismissal Rulings.**

26 Finally, debtors assert that the bankruptcy court abused
27 its discretion by failing to address their emergency request for
28 enlargement of time, and by treating their supplemental response

1 in opposition to the second MTD as a motion for reconsideration
2 and then denying it.

3 The bankruptcy court was within its discretion to consider
4 debtors' supplemental response as a motion for reconsideration
5 when the response was late-filed and received after the
6 bankruptcy court ruled on the merits of the second MTD. At that
7 point, debtors could obtain relief from the ruling by either
8 filing a motion for reconsideration or by filing an appeal. We
9 discern no abuse of discretion in denying the motion when the
10 response failed to meet the requirements for reconsideration
11 under Rules 9023 or 9024 and contained no arguments that would
12 have altered the bankruptcy court's dispositive ruling.

13 We likewise conclude that the court did not abuse its
14 discretion by failing to grant their emergency request to
15 continue the hearing on the second MTD so that they could hire
16 another attorney. Debtors argue in their reply brief that the
17 effect of the court's ruling was to preclude them from
18 meaningfully amending their SAC to demonstrate the applicability
19 of the HBOR. According to debtors, in this amendment they would
20 allege that WFB as the servicer of their loan had no right to
21 foreclose in its own name. In that event, they contend that a
22 new NOD would be required bringing them within the time frame of
23 the HBOR's applicability, post-January 1, 2013. However, as
24 noted above, debtors failed to allege any violation under Cal.
25 Civ. Code § 2924(a)(1) based on improper party status. Further,
26 debtors' request for an extension of time was made after the
27 bankruptcy court ruled so there was no hearing to continue. We
28 find no abuse of discretion under these circumstances. United

1 States v. Flynt, 756 F.2d 1352, 1358 (9th Cir. 1985) (“The
2 decision to grant or deny a requested continuance lies within
3 the broad discretion of the [bankruptcy] court and will not be
4 disturbed on appeal absent clear abuse of that discretion.”).

5 **VI. CONCLUSION**

6 For the reasons stated, we AFFIRM.

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