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

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UNITED STATES BANKRUPTCY APPELLATE PANEL

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OF THE NINTH CIRCUIT

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In re:) BAP No. NC-14-1139-KiTAD
ROSANNA MAC TURNER,) Bk. No. 12-44811
Debtor.) Adv. No. 14-4001

ROSANNA MAC TURNER; DAVID)
G. TURNER,)
Appellants,)
v.)
WELLS FARGO BANK, N.A.;)
CITIGROUP GLOBAL MARKETS)
REALTY CORP.; U.S. BANK, N.A.)
as Trustee for the Citigroup)
Mortgage Loan Trust Inc.,)
Mortgage Pass-Through)
Certificates, Series 2005-4;)
CITIMORTGAGE, INC.,)
Appellees.)

M E M O R A N D U M¹

Argued on May 14, 2015, at San Francisco, California
and Submitted on May 26,² 2015,

Filed - June 2, 2015

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

Honorable Roger L. Efremsky, Chief Bankruptcy Judge, Presiding

¹ 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 8024-1.

² We announced at oral argument that this appeal would not be submitted until eleven days post-oral argument to allow appellees time to file a Notice of Supplemental Authority and appellants to respond thereto. Because May 25, 2015, is a federal holiday, the submission date is May 26, 2015.

1 Appearances: Michael James Yesk of Yesk Law argued for
2 appellants Rosanna Mac Turner and David G. Turner;
3 Bernard Kornberg of Severson & Werson argued for
4 appellees Wells Fargo Bank, N.A., Citigroup Global
5 Markets Realty Corp., U.S. Bank, N.A., as Trustee
for the Citigroup Mortgage Loan Trust Inc.,
Mortgage Pass-Through Certificates, Series 2005-4,
and CitiMortgage, Inc.

6 Before: KIRSCHER, TAYLOR and DUNN, Bankruptcy Judges.
7

8 Chapter 13³ debtor Rosanna Mac Turner ("Debtor") and her
9 spouse, David G. Turner (collectively, "Turners"), appeal an order
10 dismissing with prejudice their adversary complaint for failure to
11 state a claim against defendants Wells Fargo Bank, N.A. ("Wells
12 Fargo"), Citigroup Global Markets Realty Corp. ("Citigroup"),
13 U.S. Bank, N.A. ("U.S. Bank") as Trustee for the Citigroup
14 Mortgage Loan Trust Inc., Mortgage Pass-Through Certificates,
15 Series 2005-4 ("Trust" or "Trust Pool"), CitiMortgage, Inc.
16 ("CitiMortgage") and NBS Default Services, LLC ("NBS")
17 (collectively, "Defendants"). We conclude, as did the bankruptcy
18 court, that the Turners lack standing to assert claims against
19 Defendants based on alleged violations of a mortgage trust's
20 pooling and servicing agreement, and we AFFIRM.

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

22 **A. Prepetition events**

23 In 2005, the Turners obtained a \$904,000 loan from Wells
24 Fargo related to their home located in Livermore, California
25

26
27 ³ Unless specified otherwise, all chapter, code and rule
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
28 Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 ("Residence").⁴ The Turners signed a promissory note ("Note") and
2 a deed of trust ("DOT") in favor of Wells Fargo to secure
3 repayment of the Note. The Note allows for transfer and entitles
4 whomever holds it to receive payments. The Turners directed
5 Commonwealth Land Title to record the DOT, which named Fidelity
6 National Title Insurance Company as trustee and Wells Fargo as
7 lender and beneficiary. The DOT entitles the lender to substitute
8 the trustee without notice, assign the Note to third parties
9 without notice, and to foreclose upon the Residence in case of
10 default.

11 According to a Mortgage Securitization Audit and Analysis
12 Report obtained by the Turners in 2013, Wells Fargo sold the Note
13 and DOT on August 1, 2005, to the Trust, which acquired and pooled
14 residential mortgages; interests in the trust were then sold to
15 investors as mortgage-backed securities, subject to a Pooling and
16 Servicing Agreement ("PSA"). U.S. Bank acted as trustee and
17 Citigroup served as the sponsor/seller for the Trust. The Turners
18 claimed New York trust law governed the Trust.

19 Wells Fargo subsequently assigned its beneficial interest
20 under the DOT to Citigroup on May 9, 2011 (the "Assignment"). The
21 Assignment was recorded on May 12, 2011.

22 The Turners defaulted on the Note, and on February 10, 2012,
23 NBS "as either the original trustee, the duly appointed
24 substituted trustee, or acting as agent for the trustee or
25 beneficiary under the [DOT]" recorded a notice of default ("NOD").

26
27 ⁴ The Turners received an additional loan for \$350,000 in
this same transaction and executed a second position deed of trust
in favor of Wells Fargo. The second deed of trust is not at
28 issue.

1 The NOD indicates that Wells Fargo, who has continued to service
2 the loan, was the contact for any payment arrangements. The
3 attached declaration indicates that "beneficiary" Wells Fargo
4 complied with the notice requirements under CAL. CIV. CODE § 2923.5.

5 On May 2, 2012, a Substitution of Trustee ("SOT") was
6 recorded, whereby Citigroup appointed NBS to substitute in as
7 trustee of the DOT.⁵ The SOT was executed on January 23, 2012,
8 and issued by Wells Fargo as "servicing agent" for Citigroup.

9 NBS, as trustee, recorded a notice of sale ("NOS") on May 16,
10 2012. A trustee's sale was scheduled for June 5, 2012, but was
11 postponed due to Debtor's bankruptcy filing. No trustee's sale
12 has occurred to date.

13 **B. Postpetition events**

14 **1. Debtor's bankruptcy filing**

15 Debtor, pro se, filed a chapter 13 bankruptcy case on
16 June 4, 2012. She valued the Residence at \$1,066,800, with
17 secured claims totaling \$1,261,000, and identified Wells Fargo as
18 the secured lender. Debtor later filed amended schedules,
19 reflecting the Residence's value at \$1 million and conceding that
20 \$904,000 was due to Wells Fargo on the Note.

21 With the assistance of counsel, Debtor filed a first amended
22 chapter 13 plan on September 4, 2012 ("Plan"). Debtor agreed to
23 pay the arrearage on the Note totaling \$36,441. The Plan proposed
24 monthly payments of \$1,226 for 60 months, with a monthly payment
25 of \$4,049.19 to be paid directly to Wells Fargo on the Note. The
bankruptcy court confirmed Debtor's Plan on October 4, 2012.

27
28 ⁵ The Turners alleged this fact, but the parties provided no
document establishing such fact.

1 Meanwhile, on September 19, 2012, Citigroup, by Wells Fargo
2 as its attorney-in-fact, recorded a Corporate Assignment of Deed
3 of Trust, assigning its beneficial interest under the DOT to
4 U.S. Bank, as trustee of the Trust (the "Second Assignment").

5 After Debtor failed to make any of the direct Note payments
6 per the Plan, U.S. Bank moved for relief from stay one year later
7 on October 10, 2013. Debtor did not oppose the motion. The
8 bankruptcy court granted U.S. Bank relief from stay on November 6,
9 2013 ("Stay Relief Order").

10 **2. The Turners' state court action against Defendants**

11 On November 22, 2013, the Turners filed suit against
12 Defendants in the Alameda Superior Court, alleging seven claims⁶:
13 (1) Wrongful Foreclosure, asserting that none of the Defendants
14 was the true beneficiary under the DOT and that Defendants had no
15 authority to invoke the power of sale, in violation of CAL. CIV.
16 CODE § 2924 et seq.; (2) Breach of Express Agreement, asserting
17 that Defendants breached the DOT by improperly invoking the power
18 of sale and that they also breached the terms of the PSA;
19 (3) Breach of Implied Agreement based on Defendants' breach of the
20 Trust and PSA; (4) Slander of Title based on Defendants' wrongful
21 recording of the Assignment, the SOT, the NOD and the NOS;
22 (5) Violation of CAL. CIV. CODE § 2923.5 based on Citigroup's
23 inability to comply with the statute because it was not the
24 "beneficiary" of the DOT when the NOD was filed; (6) Violation of
25 18 U.S.C. § 1962 ("RICO") based on Defendants' wire and mail fraud

26 ⁶ Although these seven claims for relief may constitute
27 causes of action under state law, as Defendants removed this state
28 court action to the bankruptcy court, we will for purposes of this
memorandum refer to them as "claims."

1 in purporting to be the holders of the beneficial interest under
2 the DOT; and (7) Violation of CAL. BUS. & PROF. CODE § 17200 et seq.
3 based on Defendants' unlawful and unfair business practices in
4 wrongfully foreclosing on the Residence.⁷

The Turners' claims stemmed from their general allegation that defects occurred in the securitization process in 2005. In short, the Turners alleged that Wells Fargo's purported transfer of the Note and DOT to the Trust – by way of the Assignment to Citigroup in May 2011 – was void because the purported Assignment occurred nearly six years after the Trust Pool had closed, in violation of the PSA. The Turners alleged that because of the procedural defects in the securitization, the subsequent assignments of the DOT to Citigroup and U.S. Bank, the SOT substituting NBS as trustee, the NOD and the NOS were likewise void. Consequently, the foreclosure process initiated by Defendants was invalid and wrongful because none of them held any beneficial interest in the DOT.

3. Defendants remove the Turners' action to bankruptcy court

a. Defendants' motion to dismiss

Defendants timely removed the Turners' action to the

23 ⁷ While the Turners' statement of issues on appeal makes
24 mention of all seven claims pled in their complaint, their brief
25 does not advance any arguments with respect to how the bankruptcy
26 court erred in dismissing their claims for Breach of Implied
27 Agreement, Slander of Title, RICO and Violation of CAL. BUS. & PROF.
28 CODE § 17200. Therefore, we consider these claims to be abandoned
and do not discuss them any further. See Branam v. Crowder (In re Branam), 226 B.R. 45, 55 (9th Cir. BAP 1998), aff'd, 205 F.3d 1350 (9th Cir. 1999) (an issue not adequately addressed by appellant in its opening brief is deemed abandoned). We consider only the Turners' claims for Wrongful Foreclosure, Breach of Express Contract and Violation of CAL. CIV. CODE § 2923.5.

1 bankruptcy court and moved to dismiss the complaint under Civil
2 Rule 12(b)(6) ("Motion to Dismiss"). As for the Turners' wrongful
3 foreclosure claim, Defendants argued that the Turners, who were
4 not parties to the PSA or third-party beneficiaries of it, lacked
5 standing to challenge the validity of the DOT assignments or NBS's
6 recording of the NOD based on any alleged violations of the PSA.
7 Defendants disputed the Turners' reliance on Glaski v. Bank of
8 America, 218 Cal.App.4th 1079 (2013), contending that several
9 California courts have declined to follow it. In Glaski, the
10 California Court of Appeal for the Fifth District held that the
11 assignment of a deed of trust to a securitized investment trust is
12 void under New York trust law if the assignment violated the
13 trust's governing PSA. Glaski further held that the borrower had
14 standing to challenge foreclosure on the basis of the void
15 assignments. Id. at 1094-1097.

16 Defendants relied on Jenkins v. JPMorgan Chase Bank, N.A.,
17 216 Cal.App.4th 497 (2013), decided three months before Glaski and
18 holding to the contrary. In Jenkins, the California Court of
19 Appeal for the Fourth District held that the borrower, as an
20 unrelated third party to the securitized investment trust, lacked
21 standing to challenge foreclosure on the basis of purported
22 violations of the trust's pooling and servicing agreement. Id. at
23 514-15. Defendants further argued that the Turners had not
24 alleged any prejudice or particularized injury traceable to the
25 challenged assignments; they did not dispute their default and had
26 not claimed they paid the original holder of the Note but were not
27 given credit for those payments by the assignee – i.e., Citigroup
28 or U.S. Bank. Defendants argued it was the Turners' default that

1 caused the foreclosure, not any purported defect in the
2 assignments of the Note and/or DOT; they were in no different
3 position than if the Note and DOT had never been assigned.

4 Defendants argued that the Turners' breach of contract claim
5 also failed because it was based on the erroneous belief that they
6 had standing to challenge alleged breaches of the PSA. Further,
7 the NOD was not void as the Turners had alleged; the recordation
8 of the SOT was conclusive evidence that NBS was the proper
9 foreclosure trustee and had the right to issue the NOD.
10 Defendants also argued that the Turners could not sue for breach
11 of contract when they were in default on the Note, a default which
12 Debtor admitted in her petition, schedules and Plan. Finally,
13 argued Defendants, even if the Turners had standing as third-party
14 beneficiaries to the PSA, they failed to allege any other elements
15 of a claim for breach of contract, particularly damages.

16 Regarding violations of CAL. CIV. CODE § 2923.5, Defendants
17 argued this claim failed because the Turners failed to allege that
18 they were not contacted about their options to avoid foreclosure
19 and/or that Defendants failed to comply with the statute; rather,
20 they alleged that any contact was insufficient because it was not
21 undertaken by the "true beneficiary." Defendants argued that
22 contact by an "agent" satisfied the statute.

23 In support of their Motion to Dismiss, Defendants asked the
24 bankruptcy court to take judicial notice of the following
25 documents filed either in the state court action or in Debtor's
26 bankruptcy case: the DOT recorded in 2005; the Assignment to
27 Citigroup recorded on May 12, 2011, and the Second Assignment to
28 U.S. Bank recorded on September 19, 2012; the NOD recorded on

1 February 10, 2012, and the NOS recorded on May 16, 2012; Debtor's
2 bankruptcy petition and initial schedules; Debtor's Plan and
3 confirmation order; and U.S. Bank's motion for relief from stay
4 and the Stay Relief Order.

5 **b. The Turners' opposition to the Motion to Dismiss**

6 The Turners opposed the Motion to Dismiss and Defendants'
7 supporting RJN. They contended that the RJN should be denied
8 because Defendants were seeking judicial notice of the truth of
9 the statements asserted within the documents, which constituted
10 hearsay and were reasonably subject to dispute.

11 Relying on Glaski, the Turners contended they had standing to
12 challenge Defendants' wrongful foreclosure of the Residence based
13 on the void assignments of the DOT. The Turners further contended
14 they had stated sufficient facts for their breach of contract
15 claim. Again, basing this claim on alleged breaches of the DOT
16 and PSA, the Turners contended that because Wells Fargo recorded
17 the Assignment to Citigroup years after the Trust Pool had closed,
18 Wells Fargo was not the true beneficiary of the DOT and therefore
19 could not have appointed NBS as trustee to record the NOD in
20 February 2012. In addition, NBS could not have been properly
21 substituted as trustee because the SOT was recorded after the
22 break in the chain of title occurred due to improper
23 securitization.

24 As for the Turners' claim for violation of CAL. CIV. CODE
25 § 2923.5, they now contended they were never contacted by **anyone**
26 at least 30 days prior to the recording of the NOD to discuss
27 options in lieu of foreclosure, despite the declaration attached
28 to the NOD stating that contact had been made. They failed to

1 allege this new fact in their complaint. In any event, the
2 Turners argued that failure to comply with the statute rendered
3 the NOD and all subsequent proceedings based on it, including the
4 NOS, invalid and void.

5 **4. The bankruptcy court's ruling on the Motion to Dismiss**

6 The bankruptcy court held a hearing on Defendants' Motion to
7 Dismiss on February 27, 2014. After considering brief argument
8 from the Turners' counsel, the court first ruled on Defendants'
9 RJN, overruling the Turners' objection and taking judicial notice
10 of Debtor's bankruptcy filings and the documents relied upon by
11 the complaint.

12 The bankruptcy court then ruled on the Motion to Dismiss,
13 granting it as to all seven claims and denying leave to amend.
14 The court found that the Turners' complaint failed to state a
15 claim for wrongful foreclosure because: (1) California's
16 nonjudicial foreclosure law cannot be used by borrowers to
17 challenge a beneficiary's authority to enforce its note; (2) the
18 record established Defendants' compliance with CAL. CIV. CODE § 2924
19 et seq. and the Turners admitted their default; (3) the Turners
20 lacked standing to complain about PSA issues or to challenge the
21 validity of the assignments because they could not show
22 particularized injury traceable to the challenged assignments; and
23 (4) the Turners had failed to alleged prejudice; it was their
24 default that caused the foreclosure process to begin.

25 The bankruptcy court found that the Turners' complaint also
26 failed to state a claim for breach of express contract, because it
27 incorrectly alleged that the NOD was invalid because the SOT was
28 not issued by the correct beneficiary and, thus, the DOT was

1 breached. In the court's opinion, the recorded SOT conclusively
2 established that NBS had the right to issue the NOD. Further, a
3 party in default could not enforce the DOT. Finally, the Turners
4 had not alleged any damages; the PSA arguments made in support of
5 their wrongful foreclosure claim failed for this claim as well.

6 Lastly, the bankruptcy court found that the Turners'
7 complaint failed to state a claim for violation of CAL. CIV. CODE
8 § 2923.5, because the declaration attached to the NOD stated that
9 the Turners were contacted prior to the filing of the NOD in
10 accordance with the statute and the Turners never alleged they
11 were not contacted; they alleged only that they were not contacted
12 by the "true beneficiary." Because contact can be made by an
13 agent, the Turners had not alleged facts to support a violation of
14 CAL. CIV. CODE § 2923.5. The Turners timely appealed the dismissal
15 order entered on March 10, 2014.⁸

16 **II. JURISDICTION**

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

19 **III. ISSUES**

- 20 1. Did the bankruptcy court err when it granted the Motion to
21 Dismiss?
22 2. Did the bankruptcy court abuse its discretion in denying
23 leave to amend the complaint?

24 **IV. STANDARDS OF REVIEW**

25 We review de novo the bankruptcy court's Civil Rule 12(b)(6)
26 dismissal. Barnes v. Belice (In re Belice), 461 B.R. 564, 572

27 ⁸ Debtor's bankruptcy case was dismissed while this appeal
28 was pending on May 13, 2014, for failure to make plan payments.

1 (9th Cir. BAP 2011). When we review a matter de novo, we consider
2 the matter anew as if the bankruptcy court had not previously
3 ruled. Sachan v. Huh (In re Huh), 506 B.R. 257, 262 (9th Cir. BAP
4 2014) (en banc).

5 The court's decision to not grant leave to amend is reviewed
6 for an abuse of discretion. Zadrozny v. Bank of N.Y. Mellon,
7 720 F.3d 1163, 1167 (9th Cir. 2013). A bankruptcy court abuses
8 its discretion if it applied the wrong legal standard or
9 misapplied the correct legal standard or its factual findings were
10 illogical, implausible or without support in the record.
11 TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th
12 Cir. 2011).

13 **V. DISCUSSION**

14 **A. Standards for dismissal under Civil Rule 12(b)(6)**

15 Under Civil Rule 12(b)(6), made applicable in adversary
16 proceedings by Rule 7012, a complaint may be dismissed for
17 "failure to state a claim upon which relief can be granted." To
18 survive a motion under Civil Rule 12(b)(6), a complaint must
19 present cognizable legal theories and sufficient factual
20 allegations to support those theories. Johnson v. Riverside
21 Healthcare Sys., LP, 534 F.3d 1116, 1121-22 (9th Cir. 2008).

22 As the Supreme Court has explained:

23 a complaint must contain sufficient factual matter,
24 accepted as true, to state a claim to relief that is
25 plausible on its face. . . . A claim has facial
26 plausibility when the plaintiff pleads factual content
27 that allows the court to draw the reasonable inference
that the defendant is liable for the misconduct alleged
. . . . Threadbare recitals of the elements of a cause
of action, supported by mere conclusory statements, do
not suffice.

28 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal citations and

1 quotation marks omitted). See also Bell Atl. Corp. v. Twombly,
2 550 U.S. 544, 555-56 (2007) (court is not required to accept any
3 legal characterizations cast in the form of factual allegations).

4 By definition, a claim cannot be plausible when it lacks any
5 legal basis. Cedano v. Aurora Loan Servs. (In re Cedano),
6 470 B.R. 522, 528 (9th Cir. BAP 2012). A dismissal under Civil
7 Rule 12(b) (6) may be based on either the lack of a cognizable
8 legal theory or on the absence of sufficient facts alleged under a
9 cognizable legal theory. Johnson, 534 F.3d at 1121.

10 We may use judicially noticed facts to establish that a
11 complaint does not state a claim for relief. See Skilstaf, Inc.
12 v. CVS Caremark Corp., 669 F.3d 1005, 1016 n.9 (9th Cir. 2012).
13 We can take judicial notice of the existence, filing and content
14 of documents in Debtor's underlying bankruptcy case. See O'Rourke
15 v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955,
16 957-58 (9th Cir. 1989).

17 We also may consider the existence and content of documents
18 attached to and referenced in the complaint as exhibits. Lee v.
19 City of L.A., 250 F.3d 668, 688 (9th Cir. 2001); Durning v. First
20 Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). Even when a
21 document is not attached to the complaint, we may consider its
22 existence and contents when its authenticity is not contested and
23 when it necessarily is relied upon by the plaintiffs in their
24 complaint. See United States v. Ritchie, 342 F.3d 903, 907-08
25 (9th Cir. 2003); Lee, 250 F.3d at 688.

26 **B. The bankruptcy court did not err when it granted the Motion
27 to Dismiss.**

28 The issues the Turners state are presented on appeal do not

1 align with much of the arguments in their opening brief or, for
2 that matter, the actual rulings of the bankruptcy court. In any
3 event, before we address the merits of their specific arguments,
4 we first address their general arguments that: (1) the bankruptcy
5 court made incorrect "factual findings" as to the secured status
6 of the Note by wrongfully taking judicial notice of the truth of
7 the matters asserted in Debtor's bankruptcy documents; (2) their
8 claims were timely filed or were equitably tolled due to
9 Defendants' deceitful acts; and (3) the doctrines of issue or
10 claim preclusion did not apply to the Plan confirmation order or
11 the Stay Relief Order.

12 The Turners contend the bankruptcy court improperly
13 determined the Note was a secured obligation based on Debtor's
14 statements made in her schedules, Plan and confirmation order,
15 which led to the court's erroneous conclusion that they lacked
16 standing to challenge the assignments. While the bankruptcy court
17 questioned the Turners' counsel why Debtor should not be bound by
18 statements in her bankruptcy documents that the Note was a secured
19 obligation, the court did not make a "finding" that the Note was
20 in fact secured. The only observation it made respecting the Note
21 is that Debtor admitted the Turners' default in her confirmed
22 Plan.

23 And, contrary to the Turners' argument, the court was free to
24 consider Debtor's admission of default in her Plan under Fed. R.
25 Evid. 801(d)(2) as a party admission. Alternatively, because the
26 Plan's authenticity was not contested nor was it reasonably
27 subject to dispute, the court could take judicial notice of its
28 contents under Fed. R. Evid. 201. In re E.R. Fegert, Inc.,

1 887 F.2d at 957-58. However, any alleged "finding" as to the
2 Note's secured status is of no moment because, as we explain more
3 thoroughly below, that is not the basis for the bankruptcy court's
4 determination that the Turners lack standing to challenge the
5 assignments.

6 The Turners next argue that their claims alleging
7 securitization irregularities were timely filed or were equitably
8 tolled. The issue of timeliness was never raised by Defendants or
9 considered by the bankruptcy court. It certainly was not a basis
10 for any of the court's rulings on their claims. Therefore, we
11 fail to see the merit of this argument. In any event, the
12 Turners' claims regarding defects in the securitization process
13 fail for reasons other than untimeliness.

14 Finally, the Turners argue that issue or claim preclusion did
15 not apply to the Plan confirmation order or the Stay Relief Order.
16 We fail to see where the bankruptcy court applied either doctrine
17 in its decision to dismiss. It appears that the Turners do not
18 want to be precluded from raising the question of U.S. Bank's
19 beneficial interest under the DOT based on concessions made in the
20 Stay Relief Order – that U.S. Bank was authorized to foreclose its
21 "security interest" in the Residence. Notably, the Turners'
22 claims do not turn on statements made in the Stay Relief Order or
23 the Plan confirmation order with respect to U.S. Bank's (or any
24 other Defendant's) purported security interest in the Residence.

25 Turning now to the merits of the Turners' claims for Wrongful
26 Foreclosure, Breach of Express Contract and Violation of CAL. CIV.
27 CODE § 2923.5, we conclude that each fails to state a claim for
28 relief. To maintain a wrongful foreclosure claim, a plaintiff

1 must allege that: (1) defendants caused an illegal, fraudulent or
2 willfully oppressive sale of the property pursuant to a power of
3 sale in a deed of trust; (2) plaintiff suffered prejudice or harm;
4 and (3) plaintiff tendered the amount of the secured indebtedness
5 or was excused from tendering. Lona v. Citibank, N.A.,
6 202 Cal.App.4th 89, 104 (2011).

7 To state a breach of contract claim, a plaintiff must allege:
8 (1) the existence of a contract; (2) plaintiff's performance;
9 (3) defendant's breach; and (4) resulting damages to the
10 plaintiff. Oasis W. Realty, LLC v. Goldman, 51 Cal.4th 811, 821
11 (2011).

12 Finally, CAL. CIV. CODE § 2923.5 requires that, before a notice
13 of default may be filed, the "mortgage servicer, mortgagee,
14 trustee, beneficiary, or authorized agent" contact the borrower in
15 person or by phone to "assess" the borrower's financial situation
16 and "explore" options to prevent foreclosure. CAL. CIV. CODE
17 § 2923.5(a)(1) & (2).

18 These three claims essentially turn on whether the Turners
19 have standing to challenge the foreclosure based on alleged
20 deficiencies they claim occurred in the securitization process.
21 Specifically, the Turners contend the Assignment of the DOT by
22 Wells Fargo to Citigroup in May 2011 was void, because it was
23 transferred years after the Trust Pool had closed in 2005, which
24 violated the terms of the PSA. As a result, they contend,
25 CitiGroup was not the true beneficiary under the DOT and therefore
26 did not have authority to cause NBS to record the NOD or the NOS.
27 The Turners further contend the Second Assignment to U.S. Bank is
28 also void based on these same defects.

1 The legal basis for the Turners' claims for relief is state
2 law. When we must apply state law to resolve an issue and the
3 state's highest court has not yet addressed the issue, our job as
4 a federal court applying state law is to predict how the state's
5 highest court would resolve the issue. Hemmings v. Tidyman's
6 Inc., 285 F.3d 1174, 1203 (9th Cir. 2002). Unless we are
7 convinced the California Supreme Court would decide the issue
8 differently, we are obliged to follow the decisions of
9 California's intermediate appellate courts. Vestar Dev. II, LLC
10 v. Gen. Dynamics Corp., 249 F.3d 958, 960 (9th Cir. 2001).
11 However, as demonstrated by Jenkins and Glaski, California's
12 intermediate appellate courts are divided on the issue of whether
13 borrowers have standing to challenge assignments of their deeds of
14 trust based on an alleged violation of a pooling and servicing
15 agreement to which they were not a party.

16 The California Supreme Court has recently granted review from
17 an intermediate appellate court decision following Jenkins and
18 rejecting Glaski. See Yvanova v. New Century Mortg. Corp.,
19 226 Cal.App.4th 495 (2014), review granted & opinion de-published,
20 331 P.3d 1275 (Cal. Aug. 27, 2014). Subsequent to granting review
21 of Yvanova, the California Supreme Court also granted hearings in
22 Keshtgar v. U.S. Bank, N.A., 226 Cal.App.4th 1201 (2014), review
23 granted & opinion de-published, 334 P.3d 686 (Cal. Oct. 1, 2014),
24 and Mendoza v. JPMorgan Chase Bank, N.A., 228 Cal.App.4th 1020
25 (2014), review granted & opinion de-published, 337 P.3d 493 (Cal.
26 Nov. 12, 2014), both of which rejected Glaski. Briefing in
27 Keshtgar and Mendoza has been deferred pending consideration and
28 disposition of this issue in Yvanova, which has yet to be decided.

1 Thus, we are tasked with deciding the case before us based on
2 our prediction of how the California Supreme Court will rule. See
3 Hemmings, 285 F.3d at 1203. The Turners rely on Glaski to
4 challenge the assignments of their DOT and Defendants' right to
5 foreclose. They do not challenge the legality of the
6 securitization process in general, instead, they focus on the late
7 transfer of the Assignment to CitiGroup in 2011, argue that this
8 late transfer violated the PSA, and contend that this late
9 transfer provides an adequate basis for their contention of
10 impropriety in the foreclosure process.

11 In Glaski, the appellate court held that under New York trust
12 law, which governed the securitized trust, the postclosing date
13 transfer of the borrowers' note and deed of trust to the trust
14 violated its pooling and servicing agreement and was void, rather
15 than merely voidable. Therefore, based on the void assignment,
16 the borrower had standing to challenge foreclosure.

17 218 Cal.App.4th at 1094-97. In so holding, the Glaski court
18 relied primarily on an unpublished New York decision, Wells Fargo
19 Bank, N.A. v. Erobobo, 972 N.Y.S.2d 147 (Sup. Ct. 2013). However,
20 a New York appellate court recently reversed Erobobo in the
21 published decision of Wells Fargo Bank, N.A. v. Erobobo, 127
22 A.D.3d 1176 (N.Y. App. Div. 2015). The appellate court held that
23 the mortgage borrower did not have standing to challenge the
24 validity of the note and mortgage assignments based on any
25 purported noncompliance with certain provisions of the trust's
26 pooling and servicing agreement. We believe Erobobo's reversal
27 directly affects the validity of Glaski.

28 We predict the California Supreme Court will follow Jenkins,

1 so we will follow it as well and hold that the Turners lack
2 standing to challenge assignments of their Note and DOT based on
3 an alleged violation of the PSA. See Rivera v. Deutsche Bank
4 Nat'l Trust Co. (In re Rivera), 2014 WL 6675693, at *8 (9th Cir.
5 BAP Nov. 24, 2014) (reaching same conclusion on this issue).

6 In Jenkins, the plaintiff-borrower alleged that
7 irregularities in the securitization process which violated the
8 trust's pooling and servicing agreement resulted in extinguishment
9 of any security interest in her home. 216 Cal.App.4th at 511.
10 The court found that the borrower lacked standing to challenge
11 purported violations of the investment trust's pooling and
12 servicing agreement. Id. at 514-15. It reasoned that the
13 relevant parties to the pooling process were the holders
14 (transferors) of the promissory notes and third party acquirers
15 (transferees) of the notes, not the borrower, who was an unrelated
16 third party to the securitization. Id. at 515. Even if the
17 transfers or assignments were invalid, the borrower was not
18 injured because she remained obligated under the note. Id. The
19 only injured party would be one who incorrectly believed it held a
20 beneficial interest in the note. Id. Accordingly, the borrower's
21 complaint was properly dismissed without leave to amend. Id. at
22 503, 517.⁹

23 Federal courts within the Ninth Circuit (and the Ninth
24 Circuit in an unpublished decision) have generally rejected the
25

26 ⁹ The California Court of Appeal for the Second District has
27 adopted the holding in Jenkins and declined to follow Glaski,
28 stating that the "vast majority" of courts analyzing Glaski have
found it unpersuasive. Kan v. Guild Mortg. Co., 230 Cal.App.4th
736, 742-744 (2014).

1 holding in Glaski, noting that it is a minority view. See Davies
2 v. Deutsche Bank Nat'l Trust Co. (In re Davies), 565 F. App'x.
3 630, 633 (9th Cir. Mar. 24, 2014) (citing Jenkins and Flores v. EMC
4 Mortg. Co., 997 F. Supp. 2d 1088 (E.D. Cal. 2014) (collecting
5 cases) and concluding that the California Supreme Court would
6 follow "the weight of authority" holding that borrowers, who are
7 not parties to pooling and servicing agreements, cannot challenge
8 them); Sanders v. Sutton Funding, LLC, 2014 WL 2918590, at *5
9 (S.D. Cal. June 26, 2014) (citing several federal cases to show
10 that "every other federal district court in California has also
11 disavowed Glaski"); Lanini v. JPMorgan Chase Bank, 2014 WL
12 1347365, at *5 (E.D. Cal. Apr. 4, 2014) (declining to follow
13 Glaski, noting that district courts in the Ninth Circuit have
14 sided with Jenkins); Snell v. Deutsche Bank Nat'l Trust Co.,
15 2014 WL 325147, at *5 (E.D. Cal. Jan. 29, 2014) (rejecting the
16 reasoning in Glaski and stating that "[u]ntil either the
17 California Supreme Court, the Ninth Circuit, or other appellate
18 courts follow Glaski or address the discrepancy between Glaski and
19 Jenkins, this Court will continue to follow the Jenkins rule.");
20 Apostol v. CitiMortgage, Inc., 2013 WL 6328256, *7 (N.D. Cal.
21 Nov. 21, 2013) ("[C]ourts in this District have expressly rejected
22 Glaski and adhered to the majority view that individuals who are
23 not parties to a PSA cannot base wrongful foreclosure claims on
24 alleged deficiencies in the PSA/securitization process."); Dahnken
25 v. Wells Fargo Bank, N.A., 2013 WL 5979356, at *2 (N.D. Cal.
26 Nov. 8, 2013); Sandri v. Capital One, N.A. (In re Sandri),
27 501 B.R. 369, 374 (Bankr. N.D. Cal. 2013) (borrower lacked standing
28 to challenge foreclosure based on alleged violations of the

1 pooling and servicing agreement and stating that Glaski "is an
2 outlier" and "is inconsistent with the majority line of cases and
3 is based on a questionable analysis of New York trust law."). But
4 see Cheung v. Wells Fargo Bank, N.A., 2013 WL 6017497, at *4
5 (N.D. Cal. Sept. 25, 2013) (issued one month after Glaski and
6 reaching same result as Glaski, but not citing it).

7 Other federal courts in California, prior to Glaski and
8 Jenkins, have determined that borrowers lack standing to challenge
9 assignments based on alleged violations of a pooling and servicing
10 agreement. See Sami v. Wells Fargo Bank, 2012 WL 967051, at *6
11 (N.D. Cal. Mar. 21, 2012) ("To the extent Plaintiff bases her
12 claims on the theory that Wells Fargo allegedly failed to comply
13 with the terms of the PSA, the court finds that she lacks standing
14 to do so because she is neither a party to, nor a third party
15 beneficiary of, that agreement."); Junger v. Bank of Am., 2012 WL
16 603262, at *3 (C.D. Cal. Feb. 24, 2012) (holding that plaintiff
17 lacked standing to challenge securitization process because he was
18 not a party to the pooling and servicing agreement); Bascos v.
19 Fed. Home Loan Mortg. Corp., 2011 WL 3157063, at *6 (C.D. Cal.
20 July 22, 2011) ("To the extent Plaintiff challenges the
21 securitization of his loan because Freddie Mac failed to comply
22 with the terms of its securitization agreement, Plaintiff has no
23 standing to challenge the validity of the securitization of the
24 loan as he is not an investor of the loan trust.").

25 Courts outside of the Ninth Circuit applying other states'
26 nonjudicial foreclosure laws have reached similar conclusions.
27 Rajamin v. Deutsche Bank Nat'l Trust Co., 757 F.3d 79, 90 (2d.
28 Cir. 2014) (rejecting Glaski as inconsistent with New York law and

1 other courts' interpretation of New York law, including Erobobo);
2 Correia v. Deutsche Bank Nat'l Trust Co. (In re Correia), 452 B.R.
3 319, 324-25 (1st Cir. BAP 2011) (debtors lacked standing to raise
4 violations of a pooling and servicing agreement).

5 In addition to the Turners' lack of standing, their claim for
6 wrongful foreclosure also fails because they did not articulate
7 any prejudice as a result of Defendants' purported lack of
8 authority to commence the foreclosure process. Siliga v. Mortg.
9 Elec. Registration Sys., Inc., 219 Cal.App.4th 75, 85 (2013);
10 Fontenot v. Wells Fargo Bank, N.A., 198 Cal.App.4th 256, 272
11 (2011) (to recover on a wrongful foreclosure claim borrower must
12 demonstrate that alleged imperfection in the foreclosure process
13 was prejudicial). No prejudice exists where the borrower is in
14 default and cannot show that the allegedly improper assignment
15 interfered with the borrower's ability to pay or that the original
16 lender would not have foreclosed under the circumstances. Dick v.
17 Am. Home Mortg. Servicing, Inc., 2013 WL 5299180, at *4-5
18 (E.D. Cal. Sept. 18, 2013); In re Sandri, 501 B.R. at 376; Siliga,
19 219 Cal.App.4th at 85; Fontenot, 198 Cal.App.4th at 272. See also
20 Simmons v. Aurora Bank, FSB, 2013 WL 5508136, at *2 (N.D. Cal.
21 Sept. 30, 2013) (defects in transfers do not injure the borrower
22 because even if there were defects in the assignment of the deed
23 of trust, that assignment would not change borrower's obligation
24 to pay); accord Apostol, 2013 WL 6328256, at *7.

25 The assignment of the Turners' Note and DOT did not change
26 the Turners' obligations to pay. It is undisputed that the
27 Turners were in default under the Note when the NOD was recorded.
28 It is also undisputed that they made no payments on the Note in

1 accordance with Debtor's confirmed Plan. Although the Turners
2 alleged it "was unclear who the true holder of the beneficial
3 interest in Plaintiff's mortgage was given the void assignment of
4 the [DOT]," that allegation fails to support any alleged
5 prejudice. Further, the Turners never alleged that they did not
6 know who to pay or that any payments made were not credited to
7 their account. They have also not alleged that they cured the
8 arrearage or paid the debt in full. Finally, the Turners have
9 never alleged that any third party has come forward attempting to
10 enforce the debt, making their claim yet more implausible. See
11 Bernardi v. JPMorgan Chase Bank, N.A., 2012 WL 33894, at *2
12 (N.D. Cal. Jan. 6, 2012).

13 Initiation of the foreclosure process was proximately caused
14 by the Turners' default, not the acts of Defendants. The Turners
15 have not shown any economic injury or loss of property as a result
16 of any alleged defects in the assignment and/or securitization
17 process, especially since they have lived in the Residence rent
18 free for the past three-plus years. Moreover, they failed to
19 allege any plausible causal link between the harm they alleged and
20 Defendants' alleged misconduct. To the extent they contend NBS
21 lacked authority to record the NOD because NBS was "not appointed"
22 as trustee until three months after the NOD was recorded in
23 February 2012, we reject that argument. The SOT substituting NBS
24 as trustee was executed on January 23, 2012; it was recorded on
25 May 2, 2012. California law does not require a substitution of
26 trustee to be recorded for it to be effective, only that it be
27 executed. In re Cedano, 470 B.R. at 532. CAL. CIV. CODE § 2934a(b)
28 contemplates that, as long as the borrower has notice, the

1 foreclosure process may proceed where the substitution of trustee
2 is executed but not recorded until after the notice of default is
3 recorded. Ram v. OneWest Bank, FSB, 234 Cal.App.4th 1, 13 (2015).
4 Therefore, NBS had the right to issue the NOD.

5 The Turners alleged nothing unlawful about the foreclosure
6 process beyond the alleged deficient assignment and securitization
7 they contend precluded any Defendant from having an interest in
8 the Residence. Accordingly, the bankruptcy court did not err in
9 dismissing the Turners' claim for wrongful foreclosure.

10 The Turners' claim for breach of express contract also fails.
11 Here, the Turners alleged that Defendants breached the PSA by
12 assigning the DOT to Citigroup after the Trust Pool had closed.
13 For the reasons stated above, the Turners lack standing to assert
14 such a claim. The Turners also alleged that Defendants breached
15 Sections 22 and 24 of the DOT, which describes the rights and
16 responsibilities of the lender in the event of the borrower's
17 default and the procedures for substitution of trustees. This
18 claim is based on the Turners' erroneous conclusion that U.S. Bank
19 had no authority to invoke the power of sale based on void
20 assignments and the erroneous conclusion that NBS had no authority
21 as trustee to issue the NOD because the SOT was not recorded until
22 after the fact. Because the Turners did not adequately plead that
23 U.S. Bank does not hold a beneficial interest in the DOT or that
24 NBS could not issue the NOD, they have failed to sufficiently
25 allege breach. Furthermore, the Turners cannot show any damages
26 caused by Defendants' alleged breach of the DOT; the foreclosure
27 process started because of their undisputed default. Accordingly,
28 the bankruptcy court did not err in dismissing the Turners' claim

1 for breach of express contract.

2 Finally, the Turners did not state a viable claim for
3 violation of CAL. CIV. CODE § 2923.5. They alleged that CitiGroup
4 failed to comply with the statute because it was never the holder
5 of the beneficial interest in the DOT due to the void Assignment
6 by Wells Fargo in May 2011, a claim which we reject for the same
7 reasons discussed above; the Turners lack standing to assert a
8 claim for defective assignments. In their opposition to the
9 Motion to Dismiss, however, the Turners claimed they were never
10 contacted by anyone to discuss options to foreclosure before the
11 NOD was recorded. While this allegation taken as true can
12 establish a claim for violation of CAL. CIV. CODE § 2923.5, a
13 plaintiff's memorandum in opposition to a Civil Rule 12(b) (6)
14 motion cannot serve to supplement or amend the complaint. See
15 Gomez v. Ill. State Bd. of Educ., 811 F.2d 1030, 1039 (7th Cir.
16 1987). Even if it could, it does not follow, as the Turners have
17 alleged, that all subsequent foreclosure proceedings based on the
18 NOD were invalid and void.

19 The remedy for failure to comply with CAL. CIV. CODE § 2923.5
20 is limited to a one-time postponement of an impending foreclosure.
21 In re Cedano, 470 B.R. at 533 (citing multiple cases);
22 In re Sandri, 501 B.R. at 378. Considering that no sale has
23 occurred despite the NOS having been filed nearly three years ago,
24 and because the NOD may need to be recorded again (if it has not
25 been already), the Turners could not be afforded any effective
26 remedy that they have not already received. The bankruptcy court
27 did not err in dismissing the Turners' claim for violation of CAL.
28 CIV. CODE § 2923.5.

C. The bankruptcy court did not abuse its discretion in denying the Turners leave to amend the complaint.

If a court dismisses a complaint for failing to state a claim, the court may grant leave to amend. Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000). Generally, when a viable claim may be pled, the court should freely grant leave to amend. Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1058 (9th Cir. 2011). However, a court has discretion to deny leave to amend if "amendment would be futile," such as if a plaintiff's claims "are factually and legally implausible." Zadrozny, 720 F.3d at 1173 (citation and internal quotation marks omitted).

12 The Turners contend in their statement of issues on appeal
13 that the bankruptcy court abused its discretion in dismissing
14 their complaint without leave to amend. However, they did not
15 articulate any specific argument as to how the bankruptcy court
16 abused its discretion in not granting leave to amend. Thus, we
17 may consider this issue abandoned. *In re Branam*, 226 B.R. at 55.

18 Nonetheless, even if we were to consider it, we perceive no
19 abuse of discretion by the bankruptcy court. We recognize that
20 the Turners had no prior opportunity to amend their complaint and
21 that dismissal without leave to amend can be harsh. However,
22 because they lack standing to assert the claims they have argued
23 on appeal, and could never plead facts establishing causation
24 and/or damages as a result of Defendants' alleged wrongful acts in
25 any event, any such amendment in this case would be futile; all of
26 their claims fail as a matter of law. Zadrozny, 720 F.3d at 1173.

VI. CONCLUSION

For the foregoing reasons, we AFFIRM.