

NOV 03 2015

NOT FOR PUBLICATION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-15-1044-TaDJu
)
FRANCISCO HERNANDEZ;) Bk. No. 10-43381
JACQUELINE HERNANDEZ,)
) Adv. No. 14-04144
Debtors.)

FRANCISCO HERNANDEZ;)
JACQUELINE HERNANDEZ,)
Appellants,)

v.) **MEMORANDUM***

WELLS FARGO BANK, N.A., a/k/a)
Wachovia Mortgage, A Division)
of Wells Fargo Bank, N.A.,)
f/k/a Wachovia Mortgage FSB,)
f/k/a World Savings Bank,)
Appellee.)

Argued and Submitted on October 23, 2015
at San Francisco, California

Filed - November 3, 2015

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

Honorable William J. Lafferty, III, Bankruptcy Judge, Presiding

Appearances: Mark W. Lapham argued for appellants Francisco
Hernandez and Jacqueline Hernandez; Robert A.
Bailey of Anglin Flewelling Rasmussen Campbell &
Trytten LLP argued for appellee Wells Fargo Bank,
N.A.

* 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(c)(2).

1 Before: TAYLOR, DUNN, and JURY, Bankruptcy Judges.
2

3 **INTRODUCTION**

4 Chapter 13¹ debtors Francisco Hernandez and Jacqueline
5 Hernandez appeal from a bankruptcy court order dismissing their
6 adversary proceeding pursuant to Civil Rule 12(b)(6).
7 Dismissal, based solely on the extreme deficiency of the
8 Debtors' opening brief on appeal, is appropriate. A merits
9 review also yields no basis for reversal. Accordingly, we
10 AFFIRM the bankruptcy court.

11 **FACTS²**

12 In 2005, the Debtors obtained a purchase money loan from
13 World Savings Bank, FSB. Their related obligation was evidenced
14 by a promissory note ("Note") and secured by a deed of trust
15 ("Trust Deed") creating a lien against real property located in
16 Concord, California (the "Property").

17 The Debtors filed a chapter 13 petition in 2010. Their
18 schedules reflected their ownership interest in the Property and
19 that it was subject to two liens. Only the first position lien
20 is at issue in this appeal; that lien secured a debt of
21

22 ¹ Unless otherwise indicated, all chapter and section
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
24 All "Rule" references are to the Federal Rules of Bankruptcy
25 Procedure. All "Civil Rule" references are to the Federal Rules
26 of Civil Procedure.

27 ² We exercise our discretion to take judicial notice of
28 documents filed in the adversary proceeding and in the
underlying bankruptcy case for factual context. See Atwood v.
Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9
(9th Cir. BAP 2003).

1 \$453,048.27 owed to Wachovia Mortgage ("Wachovia").

2 A chapter 13 plan was soon confirmed. The plan, a one page
3 form, provided for direct \$1,322 monthly payments to Wachovia
4 outside of the plan. Two weeks later, Wells Fargo Bank, N.A.,
5 a/k/a Wachovia Mortgage, a division of Wells Fargo Bank, N.A.
6 and f/k/a Wachovia Mortgage, FSB (collectively hereafter, "Wells
7 Fargo"), filed a proof of claim alleging a claim secured by the
8 Property. The Debtors did not object to the proof of claim.

9 A year and a half later, the Debtors defaulted on payments
10 under the Note; Wells Fargo moved for stay relief. Eventually,
11 the bankruptcy court entered an adequate protection order
12 ("APO") providing for additional monthly payments to Wells Fargo
13 in the amount of \$587.51, until the Debtors cured the post-
14 petition arrears of \$5,875.12. The APO was approved as to form
15 by Debtors' then counsel.

16 In 2014, led by new counsel, the Debtors changed course and
17 commenced an adversary proceeding against Wells Fargo. Reduced
18 to its essence, the complaint challenged Wells Fargo's right to
19 enforce the Note. It alleged that chain of title had been
20 broken based on an unlawful assignment and that Wells Fargo had
21 failed to honor conditions precedent in the Trust Deed following
22 the Debtors' default. It also challenged the validity of the
23 APO in the absence of a modified chapter 13 plan. The complaint
24 stated five claims for relief: (1) fraudulent transfer under
25 § 548; (2) determination of the validity, priority, or extent of
26 the lien; (3) willful and malicious injury; (4) injunctive
27 relief; and (5) declaratory relief.

28 Wells Fargo moved to dismiss the complaint under Civil

1 Rule 12(b)(6) and filed a request for judicial notice attaching
2 documents that showed its connection to Wachovia and World
3 Savings Bank. The Debtors opposed.

4 At the hearing, the bankruptcy court granted the motion to
5 dismiss. It stated that a transfer fraudulent as to the Debtors
6 did not occur simply because of an internal transfer of assets
7 between World Savings, Wachovia, and Wells Fargo. It also
8 stated that the confirmed chapter 13 plan did not change Wells
9 Fargo's rights and remedies; upon the Debtors' default under the
10 Note, the bank was entitled to seek stay relief. Finally, the
11 bankruptcy court noted that a plan modification appeared
12 unnecessary in connection with the APO, but, in any event, the
13 Debtors failed to request this relief previously.

14 The bankruptcy court entered an order dismissing the
15 complaint with prejudice. The Debtors timely appealed.

16 **JURISDICTION**

17 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
18 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.
19 § 158.

20 **ISSUES³**

21 1. Whether the bankruptcy court erred in dismissing the
22 adversary complaint pursuant to Civil Rule 12(b)(6).
23

24 ³ As Wells Fargo noted in its responsive brief, the
25 Debtors identified seven issues on appeal. A majority of these
26 issues, however, were not addressed in the Debtors' opening
27 brief and, thus, are deemed waived. This includes, for example,
28 that the bankruptcy court erred when it took judicial notice of
Wells Fargo's documents evidencing the bank name change and
merger.

1 2. Whether the bankruptcy court abused its discretion in
2 dismissing the adversary complaint without leave to amend.

3 **STANDARDS OF REVIEW**

4 We review dismissal of an adversary proceeding under Civil
5 Rule 12(b)(6) de novo. See Johnson v. Fed. Home Loan Mortg.
6 Corp., 793 F.3d 1005, 1007 (9th Cir. 2015). A dismissal without
7 leave to amend is reviewed for abuse of discretion. Tracht Gut,
8 LLC v. Cnty. of Los Angeles Treasurer & Tax Collector
9 (In re Tracht Gut, LLC), 503 B.R. 804, 810 (9th Cir. BAP 2014).

10 A bankruptcy court abuses its discretion if it applies the wrong
11 legal standard, misapplies the correct legal standard, or if its
12 factual findings are illogical, implausible, or without support
13 in inferences that may be drawn from the facts in the record.
14 See TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832
15 (9th Cir. 2011) (citing United States v. Hinkson, 585 F.3d 1247,
16 1262 (9th Cir. 2009) (en banc)).

17 We may affirm on any basis supported by the record. Heers
18 v. Parsons (In re Heers), 529 B.R. 734, 740 (9th Cir. BAP 2015).

19 **DISCUSSION**

20 **A. The deficiency of the Debtors' opening brief warrants**
21 **dismissal of the appeal.**

22 Wells Fargo argues that blatant defects in the Debtors' opening
23 brief warrant summary affirmance or dismissal of the appeal. It
24 contends that the brief falls far short of compliance with the
25 Federal Rules of Bankruptcy Procedure and, importantly, hinders
26 its ability to appropriately respond.

27 An appeal may be involuntarily dismissed based on an
28 appellant's failure to comply with the procedural rules

1 governing the presentation of briefs on appeal. See Christian
2 Legal Soc. Chapter of Univ. of Cal. v. Wu, 626 F.3d 483, 485
3 (9th Cir. 2010) (order); Williams v. Gerber Prods. Co., 552 F.3d
4 934, 937 (9th Cir. 2008); Sekiya v. Gates, 508 F.3d 1198, 1200
5 (9th Cir. 2007); see also N/S Corp. v. Liberty Mut. Ins. Co.,
6 127 F.3d 1145, 1146 (9th Cir. 1997) ("In order to give fair
7 consideration to those who call upon us for justice, we must
8 insist that parties not clog the system by presenting us with a
9 slubby mass of words rather than a true brief. Hence we have
10 briefing rules.").

11 We agree that the Debtors' opening brief, much like the
12 adversary complaint, is poorly written and largely nonsensical.
13 As pointed out by Wells Fargo, it also falls woefully short of
14 meeting the requirements of the Federal Rules of Bankruptcy
15 Procedure; this includes particularly Rule 8014(a), based on the
16 failures to incorporate: a jurisdictional statement; a concise
17 statement of the relevant standard of review for each issue
18 presented; a concise statement of the facts and procedural
19 history; and, in the "argument" section, if one is to be found
20 in the brief, citations to legal authority and the record that
21 are both correct and appropriate. The brief lacks these
22 necessary components.

23 The Debtors only cite to the record in arguing alleged bad
24 faith conduct by Wells Fargo or pointing out that they did not
25 challenge securitization. We note that the latter argument is
26 not particularly helpful, as there is no evidence in the record
27 that the Note and Trust Deed were ever part of a securitization
28 transaction.

1 Where the brief does contain citation to authority, in many
2 instances it is either improper or inaccurate. In an appeal to
3 the BAP, the governing procedural rules are Part VIII of the
4 Federal Rules of Bankruptcy Procedure and the BAP Rules; where
5 those rules are silent as to a particular matter of practice,
6 the Federal Rules of Appellate Procedure and the Ninth Circuit
7 Rules apply. See 9th Cir. BAP R. 8026-1. In neither instance
8 are the California Rules of Court applicable, as included in the
9 table of authorities. The standards of review on a motion to
10 dismiss an adversary complaint are found in federal law, not
11 state law. And, while certainly persuasive in certain contexts,
12 decisions of the California courts of appeal are not binding on
13 this Panel, particularly with respect to a controversial case,
14 which is currently pending indirect review by the California
15 Supreme Court.

16 The Debtors' brief contains many other mischaracterizations
17 and inaccuracies. Facially, the brief reflects obvious "copied
18 and pasted" provisions from other cases. It includes a
19 paragraph discussing the Fair Debt Collection Practices Act
20 (FDCPA), 15 U.S.C. § 1692 et seq.; the adversary complaint,
21 however, did not allege an FDCPA claim. And the table of
22 authorities refers to rules and statutes that are not referenced
23 to or otherwise discussed in the body of the brief.

24 The Debtors' blatant disregard of the briefing rules is not
25 only irritating; here, it prevents us from ascertaining with any
26 degree of certainty their arguments on appeal. Instead, we are
27 left to speculate as to the substance of their arguments. Thus,
28 our exercise of discretion to strike the brief and dismiss the

1 appeal is warranted.

2 Dismissal of an appeal based on a deficient brief,
3 admittedly, is a harsh result, "especially as its application
4 could, if unwisely applied, leave a meritorious appellant
5 without a legal remedy when the fault lies solely with his or
6 her counsel." Sekiya v. Gates, 508 F.3d at 1200. Here, insofar
7 as we can surmise the Debtors' arguments on appeal, we are
8 convinced that their claims lack merit; they do not "cry out"
9 for reversal of the bankruptcy court's decision to dismiss the
10 adversary complaint without leave to amend. See N/S Corp.,
11 127 F.3d at 1146. Thus, even if we review the merits of the
12 appeal, we are satisfied that the bankruptcy court did not
13 commit error when it dismissed the adversary complaint without
14 leave to amend.

15 **B. The bankruptcy court's dismissal of the adversary complaint**
16 **under Civil Rule 12(b) (6) was not erroneous.**

17 A motion to dismiss under Civil Rule 12(b) (6) (incorporated
18 into adversary proceedings by Rule 7012(b)) challenges the
19 sufficiency of the allegations set forth in a complaint and "may
20 be based on either a lack of [: (1)] a cognizable legal theory
21 or . . . [(2)] sufficient facts alleged under a cognizable
22 legal theory." Johnson v. Riverside Healthcare Sys., LP,
23 534 F.3d 1116, 1121 (9th Cir. 2008) (internal quotation marks
24 and citation omitted). The court's review is limited to the
25 allegations of material facts set forth in the complaint, which
26 must be read in the light most favorable to the non-moving
27 party, and together with all reasonable inferences therefrom,
28 must be taken as true. Pareto v. Fed. Dep't Ins. Corp.,

1 139 F.3d 696, 699 (9th Cir. 1998).

2 Consistent with Civil Rule 8(a)(2), the factual allegations
3 in the complaint must state a claim for relief that is facially
4 plausible. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); see
5 also Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). Thus,
6 based on the Iqbal/Twombly rubric, the bankruptcy court must
7 first identify bare assertions that “do nothing more than state
8 a legal conclusion—even if that conclusion is cast in the form
9 of a factual allegation,” and discount them from an assumption
10 of truth. See Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th
11 Cir. 2009). Then, if there remain well-pleaded factual
12 allegations, the bankruptcy court should assume their truth and
13 determine whether the allegations “and reasonable inferences
14 from that content” give rise to a plausible claim for relief.
15 Id. “[D]etermining whether a complaint states a plausible claim
16 is context-specific, requiring the reviewing court to draw on
17 its experience and common sense.” 556 U.S. at 679.

18 Fraud claims are subject to a heightened pleading standard.
19 See Fed. R. Civ. P. 9(b) (incorporated into adversary
20 proceedings by Rule 7009). Civil Rule 9(b) provides that “[i]n
21 alleging fraud or mistake, a party must state with particularity
22 the circumstances constituting fraud or mistake.” Fed. R. Civ.
23 P. 9(b). Thus, a complaint alleging fraud must satisfy both
24 Civil Rules 8 and 9. Cafasso, U.S. ex rel. v. Gen. Dynamics C4
25 Sys., Inc., 637 F.3d 1047, 1055 (9th Cir. 2011). Ultimately,
26 “the court reviews all allegations holistically, rather than in
27 isolation, to determine if a complaint is well-pleaded.” Petrie
28 v. Elec. Game Card, Inc., 761 F.3d 959, 970 (9th Cir. 2014).

1 Here, the adversary complaint contains allegations that the
2 APO violated the confirmed chapter 13 plan. That is incorrect.
3 The plan expressly provided for direct payments to Wells Fargo,
4 outside of the plan; the APO is consistent with this plan
5 provision. Moreover, we reject the suggestion that the APO
6 lacked validity in the absence of a modified chapter 13 plan.
7 Wells Fargo was entitled to seek payments from the Debtors
8 following plan confirmation and to pursue stay relief upon their
9 default; the confirmed plan neither changed the Debtors'
10 obligation to Wells Fargo under the Note nor fixed the amount of
11 the monthly payment. If anything, the APO was an accommodation
12 allowing the Debtors to cure yet another default; a formal plan
13 modification was not required.

14 Consistent with this determination, we also reject the
15 Debtors' argument that Wells Fargo violated the automatic stay
16 by seeking payments from them without first pursuing plan
17 modification. The Debtors belatedly challenged Wells Fargo's
18 right to payment on the Note - notwithstanding that they never
19 objected to Wells Fargo's proof of claim, that the confirmed
20 plan identified Wachovia as the first position lien holder, and,
21 importantly, that they acquiesced to entry of the APO. But
22 their last ditch effort to thwart Wells Fargo's exercise of
23 rights conferred by pre-petition contract and post-petition
24 agreement and claim, must fail; the automatic stay did not bar
25 Wells Fargo's request that the Debtors honor their own plan.

26 The Debtors also largely complain that the bankruptcy court
27 did not address the adversary complaint on a claim by claim
28 basis. The record shows, however, that the bankruptcy court

1 adequately explained its reasoning for dismissing the complaint
2 at the hearing; it was not required to address each implausible
3 claim on a separate and detailed basis to the extent the Debtors
4 claim.

5 **1. "Fraudulent Transfer" claim**

6 The adversary complaint identifies the first claim in a
7 heading as "Fraudulent Transfer (FRBP 7001(1) §§ 548))."
8 Section 548 provides for the avoidance of a fraudulent transfer
9 of debtor's property made within two years prior to the date of
10 the petition. A chapter 13 debtor has standing, concurrently
11 with the trustee, to exercise the avoiding powers under the
12 Bankruptcy Code. Getsey v. Eiler (In re Cohen), 305 B.R. 886,
13 899 (9th Cir. BAP 2004).

14 The first claim fails for several reasons. First, the
15 adversary complaint does not allege particular facts as to a
16 fraudulent transfer, either under the Bankruptcy Code or
17 California law. Instead, it alleges that Wells Fargo committed
18 breach of contract based on an alleged breach of the Trust Deed.
19 There are vague allegations of conspiracy, misrepresentations,
20 violations of state and federal law, bad faith, and unlawful
21 acts - but nothing more.

22 Second, a lender's name changes and subsequent merger does
23 not result in actions constituting a "transfer" within the
24 meaning of § 548. In support of its motion to dismiss, Wells
25 Fargo submitted evidence showing that in 2007, World Savings
26 Bank, FSB changed its name to Wachovia Mortgage, FSB; then, in
27 2009, Wachovia Mortgage, FSB was "converted" to Wells Fargo Bank
28 Southwest, N.A., which then merged into Wells Fargo Bank, N.A.

1 The creditor's name changes did not constitute transfer(s) of an
2 estate asset and, thus, were not subject to § 548.

3 Third, even if the adversary complaint contained a proper
4 § 548 claim - which we determine it did not - it appears that
5 any such claim was time-barred by the two-year § 546(a) statute
6 of limitations, applicable to § 548 avoidance actions. The
7 Debtors commenced the adversary proceeding in October 2014 -
8 more than two years after the petition was filed.

9 The adversary complaint failed to plead a plausible
10 fraudulent transfer claim. Thus, the bankruptcy court properly
11 dismissed the first claim.

12 **2. "Validity, Priority or Extent of Lien" claim**

13 Citing California Code of Civil Procedure ("CCP")
14 § 526(a)(1), the adversary complaint alleges that the Debtors
15 are "entitled to the relief demanded [therein] including the
16 restraining and enjoining the continuance of seeking to
17 foreclose on the Property. [Wells Fargo has] intentionally
18 violated the Automatic Stay and abuse[d] the provisions of the"
19 APO. Then, citing to CCP § 526(a)(2), it further alleges that
20 "the continuance of foreclosure proceedings during this
21 litigation could produce irreparable harm to the [Debtors]
22 consisting of the loss of" the Property.

23 California law permits a court to issue an injunction
24 where: (1) "it appears by the complaint that the plaintiff is
25 entitled to the relief demanded, and the relief, or any part
26 thereof, consists in restraining the commission or continuance
27 of the act complained of, either for a limited period or
28 perpetually;" or (2) "it appears by the complaint or affidavits

1 that the commission or continuance of some act during the
2 litigation would produce waste, or great or irreparable injury,
3 to a party to the action." Cal. Civ. Proc. Code
4 § 526(a)(1)-(2).

5 As Wells Fargo stated in its motion to dismiss (and
6 reiterates on appeal), there was no foreclosure proceeding
7 against the Property. In any event, the Debtors cannot
8 preemptively challenge a foreclosure proceeding. In California,
9 nonjudicial foreclosure is governed exclusively by the
10 California Civil Code. See Gomes v. Countrywide Home Loans,
11 Inc., 192 Cal. App. 4th 1149, 1155 (2011). And, the statutory
12 scheme does not permit a party to offensively challenge a
13 foreclosure sale. See id. ("[N]owhere does the statute provide
14 for a judicial action to determine whether the person initiating
15 the foreclosure process is indeed authorized, and we see no
16 ground for implying such an action.").

17 Even if the Debtors could challenge a prospective
18 foreclosure proceeding, the adversary complaint does not show
19 that the Debtors are entitled to the relief requested therein or
20 that Wells Fargo's acts would cause them irreparable injury. As
21 stated, the adversary complaint does not plead facts giving rise
22 to a plausible fraudulent transfer claim. It is also unclear
23 how alleged violations of the automatic stay and the APO relate
24 to a claim to determine the validity, priority, or extent of
25 Wells Fargo's lien.

26 To the extent the Debtors seek to enjoin Wells Fargo from
27 seeking payment under the Note or exercising its rights and
28 remedies thereunder, we reject any such suggestion. Following

1 their post-confirmation default, Wells Fargo was entitled to
2 seek payments from the Debtors pursuant to the APO. Other than
3 vague accusations, the adversary complaint fails to state with
4 particularity how Wells Fargo violated the provisions of the
5 APO.

6 The adversary complaint failed to plead facts giving rise
7 to a plausible claim. Thus, the bankruptcy court properly
8 dismissed the second claim.

9 **3. "Willful and Malicious Injury" claim**

10 The adversary complaint identifies the third claim in a
11 heading titled "Willful and malicious injury (FRBP 7001(6))."
12 Rule 7001(6), however, relates to a nondischargeability
13 proceeding.

14 Citing California Civil Code ("CC") § 3412, the adversary
15 complaint alleges that, based on the Debtors' information and
16 belief, the "written instruments affecting [the Property] have
17 become a nullity and that if left outstanding they could cause
18 injury to [the Debtors], or may be used vexatiously against
19 them." It states that the Debtors seek cancellation of the Note
20 and Trust Deed based on Wells Fargo's fraudulent activity.
21 Otherwise, it alleges, Wells Fargo will be unjustly enriched as
22 it does not have a right to payment on the Note.

23 CC § 3412 provides that a court may order cancellation of
24 an invalid written instrument that is void or voidable. As
25 stated, the adversary complaint does not plead facts giving rise
26 to a plausible fraudulent transfer claim. Nor does it allege
27 other grounds supporting a plausible challenge to Wells Fargo's
28 lien. Given that the adversary complaint does not allege a

1 plausible quiet title claim, the bankruptcy court properly
2 dismissed the third claim.

3 **4. "Injunctive Relief" claim**

4 Citing "CC § 2934(a) (1)," the adversary complaint next
5 alleges that non-judicial foreclosure is invalid when "the
6 trustee under the original deed of trust allegedly acting on
7 behalf of the encumbrancer of [the Debtors'] real property is
8 not properly substituted with a 'recorded' document." As "all
9 beneficiaries, known and unknown, did not effectively execute
10 the Substitution of Trustee . . . any trustee's sale is void."

11 CC § 2934 does not contain subsections. It provides that
12 an assignment of the beneficial interest under a deed of trust
13 may be recorded and the effects of recordation on priority.

14 The adversary complaint does not identify the requested
15 injunctive relief. Notwithstanding, the claim is not
16 justiciable. As stated, Wells Fargo never commenced the
17 foreclosure process against the Property. The bankruptcy court
18 could not grant relief based upon an event that had yet to
19 occur, nor could it issue an advisory opinion on an unripe
20 issue. And, as noted, the Debtors are precluded from
21 preemptively challenging a foreclosure proceeding. See Gomes,
22 192 Cal. App. 4th at 1155.

23 Given that the fourth claim for relief failed to state a
24 claim upon which relief could be granted, the bankruptcy court
25 properly dismissed it.

26 **5. "Declaratory Relief" claim**

27 Finally, the adversary complaint identifies the fifth claim
28 in a heading titled "declaratory relief (FRBP 7001(9))." It

1 alleges that the proceeding "is an action for declaratory
2 relief" pursuant to CCP § 1060 and that Wells Fargo "commenced
3 an illegal foreclosure action" on the Property. Contradicting
4 this allegation, it then alleges that Wells Fargo "will
5 **subsequently** schedule a Trustee's (foreclosure) Sale of the
6 Property (or will commit an illegal and fraudulent Trustee's
7 Sale)" and, thus, the Debtors seek a declaration of their rights
8 so that they "do not continue to suffer at the hands" of Wells
9 Fargo. Emphasis added.

10 CCP § 1060 provides for a right of action to "[a]ny person
11 interested under a written instrument, excluding a will or a
12 trust, or under a contract, . . . in cases of actual controversy
13 relating to the legal rights and duties of the respective
14 parties" Cal. Civ. Proc. Code § 1060.

15 Here, the fifth claim fails for the same reasons as the
16 fourth; the claim is not justiciable. And, again, the Debtors
17 are precluded from preemptively challenging a foreclosure
18 proceeding. See Gomes, 192 Cal. App. 4th at 1155. There is no
19 question that the Debtors' obligations under the Note and Trust
20 Deed continued post-petition and after plan confirmation.

21 Instead, the allegations made in connection with this claim
22 are blatantly duplicated from another case. The adversary
23 complaint challenges whether "American" is the present holder in
24 due course or trust deed beneficiary. And it refers to a
25 substitution of trustee recorded in Sacramento County on
26 November 2, 2010, which "purported" substitution of Alliance
27 Title Co. as trustee of the deed of trust dated November 14,
28 2007. The Debtors' challenge involved Wells Fargo, not

1 "American." The Trust Deed was executed in 2005, not in 2007.
2 And the trustee under the Trust Deed was Golden West Savings
3 Association Service Co., not Alliance Title Co.

4 Again, given that the fifth claim for relief failed to
5 state a claim upon which relief could be granted, the bankruptcy
6 court properly dismissed it.

7 **C. The bankruptcy court did not abuse its discretion by**
8 **dismissing the adversary complaint without leave to amend.**

9 Dismissal of a complaint under Civil Rule 12(b)(6) is done
10 typically without prejudice, giving the plaintiff an opportunity
11 to amend. The bankruptcy court, however, may dismiss an
12 adversary complaint with prejudice upon determining that any
13 amendment would be futile. In re Tracht Gut, LLC, 503 B.R. at
14 815. There is no abuse of discretion if it is clear that the
15 adversary complaint is beyond rescue by an amendment.

16 That is the case here. The bankruptcy court determined
17 that dismissal without leave to amend was warranted, as it did
18 not believe that a transfer of assets resulting from a bank name
19 change and merger constituted a § 548 fraudulent transfer. Nor
20 did it believe that Wells Fargo committed a violation of the
21 stay or that the APO or plan confirmation changed the calculus.

22 At oral argument, Debtors' counsel had no response to what
23 potential amendment could be made to the adversary complaint.
24 On this record and for the reasons already discussed, the
25 bankruptcy court did not abuse its discretion in determining
26 that leave to amend was not warranted. And, to the extent we
27 can discern any other alleged basis for asserted relief, it is
28 inconsistent with the Debtors' schedules, position in their

1 plan, and the APO and seeks a result unavailable under the
2 relevant law.

3 **CONCLUSION**

4 Based on the foregoing, we AFFIRM the bankruptcy court.
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28