

JUN 20 2017

NOT FOR PUBLICATION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. AZ-16-1005-LBJu
)
 CHRISTINA M. RAVAGO,) Bk. No. 13-16053-BMW
)
 Debtor.) Adv. No. 14-00066-BMW
)
)
)
 CHRISTINA M. RAVAGO,)
)
 Appellant,)
)
 v.) **MEMORANDUM***
)
 BANK OF AMERICA; RECONTRUST)
 COMPANY; LANDSAFE APPRAISAL)
 SERVICES; MICHAEL LEBSACK;)
 NATIONSTAR MORTGAGE LLC;)
 NATIONSTAR MORTGAGE HOLDINGS,)
 INC.,)
)
 Appellees.)

Argued and Submitted on May 18, 2017
at Phoenix, Arizona

Filed - June 20, 2017

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

Honorable Brenda Moody Whinery, Bankruptcy Judge, Presiding.

Appearances: Jana Happel of Southern Arizona Legal Aid, Inc.
argued for Appellant Christina M. Ravago; Andrea
McDonald Hicks argued for Appellees Bank of
America, Landsafe Appraisal Services, Michael
Lebsack and ReconTrust Company; Melissa Louise
Cizmorris of Akerman LLP argued for Appellees

*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.

1 Nationstar Mortgage Holdings, Inc. and Nationstar
2 Mortgage LLC.

3 Before: LAFFERTY, BRAND, and JURY, Bankruptcy Judges.
4

5 **INTRODUCTION**

6 During her chapter 13¹ bankruptcy, Debtor Christina M.
7 Ravago filed an adversary proceeding seeking damages against her
8 mortgage lender and related parties under various theories, all
9 of which were based on allegations that the defendants had
10 violated the terms of the National Mortgage Settlement ("NMS")²
11 by proceeding with a prepetition trustee's sale of her residence
12 while her application for a loan modification was under
13 consideration. The bankruptcy court dismissed all but one of
14 Debtor's claims without leave to amend, concluding that the NMS
15 did not create a private right of action for individual borrowers
16 to enforce its terms. We AFFIRM.
17
18

19 ¹Unless specified otherwise, all chapter and section
20 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
21 "Rule" references are to the Federal Rules of Bankruptcy
22 Procedure, and all "Civil Rule" references are to the Federal
23 Rules of Civil Procedure. "ARS" references are to the Arizona
24 Revised Statutes.

25 ²Under the NMS, which was finalized in 2012, five of the
26 country's largest mortgage servicers/banks (Ally/GMAC, Bank of
27 America, Citi, JP Morgan Chase, and Wells Fargo) agreed to
28 provide \$20 billion of mortgage-related relief to homeowners and
to abide by new servicing standards meant to address some of the
worst foreclosure abuses. Under the NMS, only state attorneys
general can sue for alleged noncompliance with its terms.
Penermon v. Wells Fargo Bank, N.A., 47 F. Supp. 3d 982, 993 n.2
(N.D. Cal. 2014).

1 **FACTS**

2 On July 17, 2013, Debtor's Tucson residence (the "Property")
3 was sold at a trustee's sale. Although Debtor acknowledged she
4 was in default and had notice of the sale, she believed that the
5 trustee's sale would be cancelled or postponed pending
6 consideration of her recently submitted loan modification
7 application.

8 On September 16, 2013, Debtor filed a chapter 13 petition.
9 Despite the fact that the Property had been sold and a trustee's
10 deed recorded, Debtor listed on her schedules both the Property
11 and a debt to Nationstar Mortgage LLC ("Nationstar") secured by
12 the Property. In her plan, which was confirmed December 31,
13 2015, Debtor proposed an ongoing monthly mortgage payment to
14 Nationstar and indicated that she intended to file an adversary
15 proceeding to challenge the trustee's sale and to bring "claims
16 relating to breach of contract; violation of FHA regulations;
17 etc." Debtor also listed on Schedule B a "[c]laim against Bank
18 of America, Nationstar, Recon[T]rust, House Appraiser [sic] for
19 wrongful foreclosure, violation of the National Mortgage
20 Settlement Agreement, breach of contract, etc. To be filed as
21 adversary proceeding."

22 On October 4, 2013, Debtor filed a proof of claim on behalf
23 of Nationstar, asserting a secured claim of \$90,000 and an
24 unsecured claim of \$20,000.³ On January 21, 2014, Debtor filed a
25 complaint against Appellees Bank of America, N.A. dba Bank of
26

27 ³Debtor later filed an amended claim that reduced the
28 unsecured portion of the debt.

1 America Home Loan Servicing ("B of A"), Nationstar Mortgage
2 Holdings, Inc., and Nationstar (collectively, "Nationstar
3 Defendants"), ReconTrust Company, N.A., Landsafe Appraisal
4 Services, Inc., and Michael Lebsack, an appraiser who conducted
5 an appraisal of the Property on behalf of B of A. The Complaint
6 pleaded seven causes of action: (1) an objection to the proof of
7 claim that Debtor had filed on behalf of Nationstar on grounds
8 that any debt owed to Nationstar was unenforceable; (2) violation
9 of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C.
10 § 1692 et seq., against ReconTrust and the Nationstar Defendants;
11 (3) violation of the Arizona Consumer Fraud Act ("ACFA"), ARS
12 § 44-1521 et seq., against the Nationstar Defendants; (4) common
13 law fraud against B of A and the Nationstar Defendants;
14 (5) negligent misrepresentation against Landsafe and Lebsack;
15 (6) tortious breach of the duty of good faith and fair dealing
16 against B of A and the Nationstar Defendants; and (7) filing
17 false documents under ARS § 33-420 against ReconTrust and the
18 Nationstar Defendants.⁴ Debtor sought monetary damages for each
19 cause of action except the claim objection.

20 According to the general allegations of the complaint,
21 Debtor purchased the Property in September 2009. Debtor obtained
22 a loan for the purchase from KB Home Mortgages LLC; the note
23 representing the obligation was secured by a deed of trust
24

25 ⁴Causes of action 1, 4, and 5 are not at issue in this
26 appeal. The bankruptcy court disallowed the Nationstar claim
27 filed by Debtor because Nationstar did not oppose the objection
28 and, on appeal, Debtor has not assigned error to the dismissal of
the negligent misrepresentation claim or the common law fraud
claim.

1 against the Property. In January 2012 the note and deed of trust
2 were assigned to B of A. On April 30, 2012, B of A substituted
3 ReconTrust as the trustee under the deed of trust.

4 Debtor further alleged that nearly a year later, on
5 April 10, 2013, ReconTrust recorded a "Notice of Trustee's Sale
6 Arizona" indicating that a trustee's sale was scheduled for
7 July 17, 2013. Debtor contacted B of A to ask for help with her
8 payments and thereafter completed a loan modification application
9 and transmitted the application and supporting documentation to
10 B of A at a fax number provided by B of A. B of A sent Debtor a
11 letter dated May 21, 2013, informing her that her loan
12 modification application had been denied because B of A had not
13 received proper documentation within the required time frame.
14 The letter did not explain what documentation was missing but
15 stated that Debtor had 30 days to appeal.

16 The allegations continue: On May 30, 2013, before
17 expiration of the appeal period, Nationstar wrote to Debtor
18 informing her that, effective June 4, 2013, Nationstar "received
19 transfer of the loan." The letter also informed Debtor that any
20 pending loan modifications "will pick up where they left off and
21 will have all of your documentation" and provided information on
22 how to contact Nationstar. B of A did not notify Debtor of the
23 transfer. Debtor alleged on information and belief that
24 Nationstar "either did not inform ReconTrust of the change of
25 Beneficiary on the Deed of Trust, nor ratified without
26 notification of all other concerned parties, the Trustee's sale
27 date, thereby misleading RAVAGO that B of A no longer had the
28 right to continue with the Trustee's sale." Complaint, ¶ 24c.

1 Because B of A did not inform Debtor that the trustee's sale
2 would proceed even after B of A sold its beneficial interest in
3 the deed of trust to Nationstar, Debtor believed the trustee's
4 sale had been cancelled or stayed.

5 According to the complaint, a few days after she received
6 the May 30 letter from Nationstar, Debtor consulted a nonprofit
7 housing counseling service and, with their help, submitted a loan
8 modification application to Nationstar on June 10, 2013. Three
9 days later, Nationstar acknowledged receipt of the application
10 and assigned a Single Point of Contact to Debtor. The Single
11 Point of Contact person was changed twice thereafter by letters
12 dated June 15 and July 31, 2013 (after the trustee's sale). On
13 June 17, 2013, Nationstar sent a letter to Debtor informing her
14 that Nationstar would review and determine eligibility within
15 20-60 days (the "June 17 Letter"). Based on this representation,
16 Debtor believed Nationstar was considering her loan modification
17 application in lieu of proceeding with the trustee's sale. On
18 June 18, 2013, Nationstar requested additional documentation with
19 a deadline of July 19, 2013 (two days after the scheduled
20 trustee's sale). Debtor submitted the documentation prior to the
21 date of the scheduled trustee's sale.

22 Debtor further alleged that on June 18, 2013, B of A
23 executed an assignment of its deed of trust to Nationstar; that
24 document was recorded July 16, 2013. No copy of the assignment
25 was provided to Debtor.

26 On July 17, 2013, the Property was sold at a trustee's sale
27 to Carboneros Corporation for \$92,000. ReconTrust executed a
28 Trustee's Deed upon Sale granting the Property to Carboneros;

1 that document was recorded July 26, 2013; a corrected deed of
2 trust (correcting the grantee's name) was recorded August 20,
3 2013.

4 After the trustee's sale, on July 31, 2013, Nationstar sent
5 a letter to Debtor informing her that her Single Point of Contact
6 had changed again and informing her of a website she could
7 "contact" to obtain more information on workout solutions.

8 Debtor further alleged that the NMS entered into on
9 February 9, 2012 by the United States, 49 states, including
10 Arizona, and several mortgage lenders, including B of A, placed
11 restrictions on "dual tracking," the practice of a mortgage
12 servicer to continue foreclosure proceedings while a loan
13 modification application is pending. Other provisions of the NMS
14 address the treatment of pending loan modification applications
15 when servicing rights are transferred from a signatory to the NMS
16 to another servicer, i.e., the successor servicer is required to
17 accept and continue processing pending loan modification
18 requests. Debtor alleged, on information and belief, that B of A
19 had not informed Nationstar of the status of Debtor's loan
20 modification application; alternatively, she alleged that
21 Nationstar ignored any such communication from B of A.

22 On February 21, 2014, Defendants jointly moved to dismiss
23 the adversary proceeding under Civil Rule 12(b)(1) (applicable
24 via Rule 7012) for lack of subject matter jurisdiction and/or
25 because Defendants did not consent to the bankruptcy court's
26 entry of a final judgment; because Debtor waived claims relating
27 to the trustee's sale; and for failure to state a claim under
28 Civil Rule 12(b)(6). Debtor filed an opposition, and Defendants

1 filed replies. After several continuances, the hearing on the
2 motion to dismiss occurred on November 6, 2014. At that hearing,
3 the bankruptcy court took the matter under advisement; the court
4 issued its oral ruling at a hearing on June 11, 2015 and issued
5 an order December 29, 2015 denying the motion to dismiss the
6 first cause of action (objection to proof of claim no. 1),
7 disallowing claim no. 1, and granting the motion to dismiss
8 causes of action 2-7 with prejudice. Debtor timely appealed.

9 **JURISDICTION**

10 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
11 §§ 1334 and 157(b) (2) (B) and (O). We have jurisdiction under
12 28 U.S.C. § 158.

13 **ISSUES**

14 1. Did the Nationstar Defendants waive their objection to
15 the bankruptcy court's entry of a final judgment in the adversary
16 proceeding?

17 2. Did the bankruptcy court err in dismissing Debtor's
18 second cause of action for violation of the Fair Debt Collection
19 Practices Act?

20 3. Did the bankruptcy court err in dismissing Debtor's
21 third cause of action for violation of the AFCA?

22 4. Did the bankruptcy court err in dismissing Debtor's
23 sixth cause of action for tortious breach of the duty of good
24 faith and fair dealing?

25 5. Did the bankruptcy court err in dismissing Debtor's
26 seventh cause of action for filing false documents under
27 ARS § 33-420?

28 6. Did Debtor waive any argument that the bankruptcy court

1 abused its discretion in dismissing Debtor's Complaint with
2 prejudice?

3 STANDARD OF REVIEW

4 We review de novo whether the bankruptcy court had authority
5 to enter a final judgment. Hasse v. Rainsdon (In re Pringle),
6 495 B.R. 447, 455 (9th Cir. BAP 2013). We also review de novo
7 the bankruptcy court's order granting a motion to dismiss for
8 failure to state a claim under Civil Rule 12(b)(6). Movsesian v.
9 Victoria Versicherung AG, 670 F.3d 1067, 1071 (9th Cir. 2012)
10 (en banc). Under de novo review, we look at the matter anew, as
11 if it had not been heard before, and as if no decision had been
12 rendered previously, giving no deference to the bankruptcy
13 court's determinations. Freeman v. DirecTV, Inc., 457 F.3d 1001,
14 1004 (9th Cir. 2006).

15 The bankruptcy court's dismissal of a complaint without
16 leave to amend is reviewed for abuse of discretion. Tracht Gut,
17 LLC v. County of Los Angeles Treasurer & Tax Collector
18 (In re Tracht Gut, LLC), 503 B.R. 804, 810 (9th Cir. BAP 2014).
19 A bankruptcy court abused its discretion if it applied the wrong
20 legal standard or its findings were illogical, implausible or
21 without support in the record. TrafficSchool.com, Inc. v.
22 Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011).

23 DISCUSSION

24 **A. The Nationstar Defendants impliedly consented to the** 25 **bankruptcy court's entry of a final judgment.**

26 The Nationstar Defendants assert on appeal that the
27 bankruptcy court lacked authority to enter a judgment in the
28

1 adversary proceeding because it was not a core proceeding.⁵ In
2 the bankruptcy court, the Nationstar Defendants expressly
3 objected to the bankruptcy court's entry of a final judgment but
4 simultaneously moved to dismiss the complaint, i.e., for entry of
5 a final judgment in favor of Defendants. Although these
6 conflicting assertions do not necessarily add up to a waiver of
7 the Nationstar Defendants' objection to the bankruptcy court's
8 authority to enter a final judgment, the Nationstar Defendants
9 did not cross-appeal the bankruptcy court's entry of a final
10 judgment, nor did they elect to appeal to an Article III court,
11 opting instead to submit to the jurisdiction of this Panel.
12 Under these circumstances, the Nationstar Defendants impliedly
13 consented to entry of a final judgment by the bankruptcy court.
14 See In re Pringle, 495 B.R. at 458-60 (once the tribunal's
15 authority to enter a final judgment is put at issue, further
16 purposeful proceeding in the forum indicates consent), citing
17 Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins.
18 Agency, Inc.), 702 F.3d 553, 569 (9th Cir. 2012), aff'd, Exec.
19 Benefits Ins. Agency v. Arkison, ___ U.S. ___, 134 S. Ct. 2165
20 (2014). See also Wellness Int'l Network, Ltd. v. Sharif, ___
21 U.S. ___, 135 S. Ct. 1932, 1947-48 (2015) (holding that consent
22

23
24 ⁵The caption to the jurisdiction discussion in the
25 Nationstar Defendants' brief is "This Court Does Not Have Subject
26 Matter Jurisdiction Over These Claims Because the Property was
27 Sold Prior to the Bankruptcy and was Not Part of the Estate."
28 However, the body of the discussion focuses on the court's
authority to enter a final judgment and does not address subject
matter jurisdiction. As we have previously noted, subject matter
jurisdiction and authority to enter a final judgment are distinct
matters. In re Pringle, 495 B.R. 455.

1 to bankruptcy court adjudication of non-core claims may be
2 implied, so long as it is knowing and voluntary).

3 **B. Standard on Motion to Dismiss**

4 A motion to dismiss under Civil Rule 12(b)(6) challenges the
5 sufficiency of the allegations set forth in a complaint and may
6 be based on either a lack of a cognizable legal theory or
7 sufficient facts alleged under a cognizable legal theory.

8 Johnson v. Riverside Healthcare Sys., LP, 534 F.3d 1116, 1121

9 (9th Cir. 2008). The court's review is limited to the

10 allegations of material facts set forth in the complaint, which
11 must be read in the light most favorable to the non-moving party
12 and, together with all reasonable inferences therefrom, must be
13 taken as true. Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir.
14 1998).

15 The factual allegations in the complaint must state a claim
16 for relief that is facially plausible. Ashcroft v. Iqbal,
17 556 U.S. 662, 678 (2009); see also Bell Atl. Corp. v. Twombly,
18 550 U.S. 544 (2007). "[D]etermining whether a complaint states a
19 plausible claim is context-specific, requiring the reviewing
20 court to draw on its experience and common sense." Iqbal,
21 556 U.S. at 679. The Court need not "accept as true a legal
22 conclusion couched as a factual allegation." Iqbal, 556 U.S. 662
23 at 678.

24 "[W]here a complaint includes allegations of fraud, Federal
25 Rule of Civil Procedure 9(b) requires more specificity including
26 an account of the time, place, and specific content of the false
27 representations as well as the identities of the parties to the
28 misrepresentations." Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th

1 Cir. 2007) (citation and internal quotations omitted).

2 **C. The bankruptcy court did not err in dismissing the second**
3 **cause of action for violation of the FDCPA.**

4 Under the FDCPA, "[a] debt collector may not use any false,
5 deceptive, or misleading representation or means in connection
6 with the collection of any debt." 15 U.S.C. § 1692e. A "debt
7 collector" is defined as any person (1) "who uses any
8 instrumentality of interstate commerce or the mails in any
9 business the principal purpose of which is the collection of any
10 debts," or (2) "who regularly collects or attempts to collect,
11 directly or indirectly, debts owed or due or asserted to be owed
12 or due another." 15 U.S.C. § 1692a(6).

13 Thus, to state a claim under the FDCPA, a plaintiff must
14 allege facts showing that the defendant fits one of the
15 definitions of "debt collector" and that the defendant used
16 false, deceptive, or misleading representations in connection
17 with the collection of a debt. Here, Debtor alleged:

18 60. Defendants NATIONSTAR, NATIONSTAR, LLC, and
19 RECONTRUST, and each of them, are debt collectors as
20 defined by the FDCPA, collecting debts owed for the
owners of the note as a regular and normal part of
their business.

21 61. Defendants, and each of them, use various
22 modes of interstate commerce to effectuate such debt
collection activities.

23 62. Defendants, and each of them, have used the
24 mails to directly communicate with Plaintiff with
regard to collection of the mortgage note and of the
25 security interest thereon.

26 63. By communicating with RAVAGO by mail before
the document recording the transfer of the Deed of
Trust and mortgage note by BoA on June 18, 2013,
27 NATIONSTAR and/or NATIONSTAR, LLC misrepresented the
nature and amount of the debt owed, as no document had
28 been recorded nor any assignment communicated to RAVAGO

1 to show that NATIONSTAR or NATIONSTAR, LLC had any
2 right to collect the note, thereby misrepresenting the
nature and amount of the debt owed.

3 64. By communicating via the mails and telephone
4 from April through July, 2013, regarding the trustee
5 sale, NATIONSTAR, NATIONSTAR LLC., and RECONTRUST, and
6 each of them, communicated about an action that they
were not legally entitled to take, as the trustee sale
was not legally allowed to be taken pursuant to the
Attorney General's Settlement [NMSA] and Arizona Law.

7 **1. The Nationstar Defendants were not debt collectors**
8 **under FDCPA.**

9 Although the Complaint alleged that both ReconTrust and the
10 Nationstar Defendants were liable for violations of the FDCPA, on
11 appeal, Debtor challenges the dismissal only as it pertains to
12 the Nationstar Defendants. Thus, we limit our analysis to those
13 defendants.

14 The allegation that the Nationstar Defendants collect "debts
15 owed for the owners of the note as a regular and normal part of
16 their business" is insufficient to permit an inference that the
17 Nationstar Defendants are debt collectors as defined by the FDCPA
18 or that they were acting as such when they were communicating
19 with the Debtor. Paragraph 24 of the Complaint alleged that
20 Nationstar wrote to the Debtor informing her that it had
21 "received transfer of the loan" effective June 4, 2013 and that
22 Debtor thereafter began working with Nationstar to obtain a loan
23 modification. The Complaint further alleged, at paragraph 35,
24 that B of A formally assigned the deed of trust to Nationstar on
25 June 18, 2013.

26 These allegations lead to the inference that as of June 4,
27 2013, Nationstar was acting on its own behalf in its efforts to
28 collect on the note and deed of trust. Accordingly, Nationstar

1 was acting as a creditor and not a debt collector. See Henson v.
2 Santander Consumer USA Inc., ___ S. Ct. ___, 2017 WL 2507342, at
3 *3 (Jun. 12, 2017) (entities that purchase debts originated by
4 others and then seek to collect those debts on their own behalf
5 are not "debt collectors" under the FDCPA). See also Schlegel v.
6 Wells Fargo Bank, NA, 720 F.3d 1204, 1208-10 (9th Cir. 2013).
7 Debtor contends that Nationstar was a debt collector under the
8 FDCPA because her loan was in default when it was assigned to
9 Nationstar. Debtor references 15 U.S.C. § 1692a(6)(F), which
10 excepts from the definition of debt collector "any person
11 collecting or attempting to collect any debt owed or due or
12 asserted to be owed or due another to the extent such activity
13 . . . (iii) concerns a debt **which was not in default** at the time
14 it was obtained by such person[.]" (emphasis added). Debtor also
15 cites Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir.
16 1985), in which the court noted that "[t]he legislative history
17 of section 1692a(6) indicates conclusively that a debt collector
18 does not include the consumer's creditors, a mortgage servicing
19 company, or an assignee of a debt, **as long as the debt was not in**
20 **default at the time it was assigned.**" (emphasis added). Debtor
21 reads these authorities as supporting the conclusion that if a
22 debt is in default when it is assigned, the assignee is a debt
23 collector.

24 However, the FDCPA defines a "creditor" as "any person who
25 offers or extends credit creating a debt or to whom a debt is
26 owed, but such term does not include any person to the extent
27 that he receives an assignment or transfer of a debt in default
28 **solely for the purpose of facilitating collection of such debt**

1 **for another.”** 15 U.S.C. § 1692a(4) (emphasis added). Given the
2 allegation that Nationstar informed Debtor that it had “received
3 transfer of the loan” effective June 4, 2013, the only inference
4 to be drawn is that Nationstar acted on its own behalf, i.e., as
5 a creditor, in its subsequent collection efforts, despite the
6 facts that the loan was in default and the deed of trust was not
7 formally assigned until June 18, 2013 and recorded on July 16,
8 2013.

9 Even if Nationstar was acting as a servicer before B of A
10 formally assigned the deed of trust, mortgage servicers are not
11 “debt collectors” under the FDCPA. Mansour v. Cal-Western
12 Reconveyance Corp., 618 F. Supp. 2d 1178, 1182 (D. Ariz. 2009)
13 (citing Perry, 756 F.2d at 1208; Hulse v. Ocwen Fed. Bank, 195 F.
14 Supp. 2d 1188, 1204 (D. Or. 2002)).⁶

15 **2. The allegations of the Complaint do not support an**
16 **inference that the Nationstar Defendants made false,**
17 **deceptive, or misleading representations.**

18 According to the Complaint, Nationstar Defendants’ deceptive
19 conduct consisted of misrepresenting “the nature and amount of
20 the debt owed” by communicating with Debtor before B of A had
21 assigned the deed of trust to Nationstar because, until the
22 assignment, Nationstar had no right to collect on the note and
23

24 ⁶The Ninth Circuit Court of Appeals has recently held that
25 an entity is not a “debt collector” for purposes of the FDCPA if
26 its only role in the debt collection process is the enforcement
27 of a security interest, i.e., a nonjudicial foreclosure. Ho v.
28 ReconTrust Co., NA, No. 10-56884, 2016 WL 9019610, at *4 (9th
Cir. May 22, 2017). The Circuit noted, however, that if an
entity that enforces a security interest engages in activities
that constitute debt collection, it is a debt collector. Id.

1 because the trustee's sale was not legally allowed to go forward
2 pursuant to the NMS and "Arizona law."

3 The NMS does not create a private right of action for
4 enforcement of its terms. See, e.g., Jurewitz v. Bank of
5 America, 938 F. Supp. 2d 994, 997-98 (S.D. Cal. 2013); Rehbein v.
6 CitiMortgage, Inc., 937 F. Supp. 2d 753, 760-62 (E.D. Va. 2013).
7 Debtor does not dispute this, but seems to contend that the NMS
8 created a duty to disclose that the foreclosure was still going
9 forward despite the fact that a loan modification was in process.
10 However, nothing in the allegations of the Complaint suggest that
11 Nationstar LLC made any affirmative misrepresentations or failed
12 to disclose material facts in violation of federal or state law.
13 At oral argument, Debtor's counsel asserted that even if the NMS
14 did not create a duty to disclose, the June 17 Letter to Debtor
15 informing her that Nationstar would determine her eligibility for
16 a loan modification within 20-60 days was misleading because the
17 trustee's sale was set to occur in less than 60 days. However,
18 the Complaint did not allege that the June 17 Letter was the
19 basis for the FDCPA claim. While it is unfortunate that Debtor
20 made the assumption that the foreclosure sale was stayed or
21 cancelled, the Complaint does not plausibly allege that
22 Nationstar had an actionable legal duty to clarify that subject
23 with Debtor.

24 **D. The bankruptcy court did not err in dismissing the third**
25 **cause of action for violation of the ACFA.**

26 Under the ACFA:

27 The act, use or employment by any person of any
28 deception, deceptive or unfair act or practice, fraud,
false pretense, false promise, misrepresentation, or

1 concealment, suppression or omission of any material
2 fact with intent that others rely on such concealment,
3 suppression or omission, in connection with the sale or
4 advertisement of any merchandise whether or not any
5 person has in fact been misled, deceived or damaged
6 thereby, is declared to be an unlawful practice.

7 ARS § 14-1522.

8 To state a claim under the ACFA, a plaintiff must allege
9 (1) a false promise or representation; (2) made in connection
10 with the sale of merchandise; and (3) resulting and proximate
11 injury. Loomis v. U.S. Bank Home Mortg., 912 F. Supp. 2d 848,
12 856 (D. Ariz. 2012). The claim must be pleaded with
13 particularity. Id.; Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097,
14 1103 (9th Cir. 2003) (noting that Rule 9(b)'s particularity
15 requirement applies to state law causes of action brought in
16 federal court). Loan transactions constitute a sale within the
17 meaning of the ACFA, Loomis, 912 F. Supp. 2d at 856, and
18 "merchandise" includes services, ARS 44-1521(5); Haisch v.
19 Allstate Ins. Co., 5 P.3d 940, 944 (Ariz. Ct. App. 2000)

20 An omission of a material fact made with the intent that the
21 plaintiff rely on the omission is an unlawful practice under the
22 ACFA, Horne v. AutoZone, Inc., 275 P.3d 1278, 1281 (Ariz. 2012)
23 (en banc), but a failure to disclose may be fraudulent only if
24 the defendant had a duty to disclose. Loomis, 912 F. Supp. 2d at
25 856-67. The ACFA imposes an actionable duty "to refrain from a
26 deceptive act or practice or an omission of any material fact
27 with intent that others rely thereon." AutoZone, 275 P.3d at
28 1281 (citing ARS § 44-1522(A); internal quotations omitted).

Debtor alleged in the Complaint that:

68. Pursuant to the NMSA, Defendants were required

1 to stop foreclosure proceedings while a loan
2 modification application was pending.

3 69. Defendant BoA acknowledges and advertises on
4 their website . . . that they are required to suspend
foreclosure activities under certain circumstances
which would be similar to RAVAGO' [sic] circumstances.

5 70. NATIONSTAR has stated to the Attorney Generals
6 of Arizona and of California that they would comply
with the National Mortgage Settlement Standards for any
loans transferred to them by BoA.

7 71. Defendants intentionally made a
8 misrepresentation in concealing the fact to RAVAGO that
9 foreclosure proceedings would not be suspended pending
a loan modification application.

10 72. Defendants' actions were done by evil hands
11 guided by evil minds.

12 73. Defendants intended that others, including
13 RAVAGO, rely upon such misrepresentation and
concealment of the fact that NATIONSTAR and/or
NATIONSTAR, LLC would comply with the NMSA standards.

14 74. RAVAGO suffered damages as a result of the
15 reliance on Defendants' misrepresentation and
16 concealment, in that she lost her home to foreclosure,
and was required to expend time and funds in moving,
and other purposes[.]

17 75. RAVAGO has suffered other damages in an amount
18 to be proven at trial.

19 The bankruptcy court dismissed this claim because the NMS
20 does not provide for a private right of action and thus does not
21 confer a duty to disclose, and because Debtor had alleged no
22 other source of a duty to disclose. Debtor argues on appeal that
23 the ACFA itself imposes the duty, but the duty to refrain from
24 deceptive practices still requires a defendant to have breached a
25 duty to disclose in the first instance. Here, Debtor conceded
26 she was in default and had notice of the trustee's sale. She did
27 not allege that she was promised that the foreclosure sale would
28 be stayed or cancelled. Nor did she allege that she was aware of

1 the NMS or the representations on B of A's website before the
2 trustee's sale, and her counsel conceded as much at oral
3 argument. Such allegations would be necessary to establish that
4 the cited representations and concealment of the fact that the
5 foreclosure was not suspended were the proximate cause of her
6 damages.

7 Finally, Debtor did not plead this claim with particularity,
8 which requires that she allege all of the circumstances of the
9 alleged fraud, "including the who, what, when, where and how of
10 the misconduct charged." Vess, 317 F.3d at 1106. With respect
11 to B of A, Debtor alleged only that B of A has misleading
12 information on its website. With respect to the Nationstar
13 Defendants, she alleged only that they represented to the
14 attorneys general of Arizona and California that they would
15 comply with the NMS for any loans transferred to them by B of A;
16 other than that, the allegations establish only that Nationstar
17 personnel were working with her on a loan modification without
18 mentioning the fact that the trustee's sale was still going
19 forward.⁷

20 **E. The bankruptcy court did not err in dismissing the sixth**
21 **cause of action for tortious breach of duty of good faith**
22 **and fair dealing.**

23 In Arizona, an implied covenant of good faith and fair
24

25 ⁷On appeal, Debtor notes that lenders and servicers are now
26 prohibited under RESPA from continuing foreclosure proceedings
27 while a loan modification is under consideration (with some
28 exceptions). 12 C.F.R. 1024.41(g). Even if this regulation
would have applied to Debtor's circumstances, it did not become
effective until January 10, 2014.

1 dealing is part of every contract. Wells Fargo Bank v. Arizona
2 Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust
3 Fund, 38 P.3d 12, 28 (Ariz. 2002) (en banc), as corrected
4 (Apr. 9, 2002). "The implied covenant of good faith and fair
5 dealing prohibits a party from doing anything to prevent other
6 parties to the contract from receiving the benefits and
7 entitlements of the agreement." Id. A party may breach its duty
8 of good faith and fair dealing without breaching an express term
9 of the contract. Snyder v. HSBC Bank, USA, N.A., 913 F. Supp. 2d
10 755, 772 (D. Ariz. 2012).

11 "A party may bring an action in tort claiming damages for
12 breach of the implied covenant of good faith, but only where
13 there is a special relationship between the parties arising from
14 elements of public interest, adhesion, and fiduciary
15 responsibility." Id. (citations and internal quotations
16 omitted). Such relationships include common carrier and
17 passenger, innkeeper and guest, physician and patient, attorney
18 and client, and insurer and insured. Rawlings v. Apodaca,
19 726 P.2d 565, 575 (Ariz. 1986) (en banc).

20 With respect to this cause of action, the Complaint alleged:

21 95. RAVAGO is, and at all times relevant to this
22 complaint, a citizen of the State of Arizona, one of
23 the States those Defendants made promises through the
24 NMSA to.

25

26 97. Defendant BoA, as a signatory to the NMSA, has
27 placed the actions of servicing and owning mortgages
28 and foreclosures in the public interest, in that they
made a public promise to refrain from certain practices
with 49 Attorneys General suing BoA on behalf of the
people of those states.

98. Defendant NATIONSTAR AND NATIONSTAR, LLC have

1 placed the actions of servicing and owning mortgages in
2 the public interest, as they have publically [sic]
3 declared that they would comply with the NMSA for any
4 loans transferred to it from BoA and are required to
5 comply with the NMSA as a result of RAVAGO's loan
6 modification application status at the time of its
7 acquisition of RAVAGO's DOT.

8 99. By ignoring the NMSA Article IV.B.6,
9 preventing "dual tracking" by continuing with the
10 Trustee's sale after RAVAGO submitted her application
11 to BoA and NATIONSTAR and/or NATIONSTAR, LLC,
12 Defendants, and each of them, acted to impair the right
13 of RAVAGO to receive the benefits of a fair loan
14 modification application process.

15 100. Defendant BoA had the power to suspend and
16 cease foreclosure activities and did not do so while
17 processing RAVAGO's loan modification application.

18 101. Defendant NATIONSTAR/NATIONSTAR, LLC had the
19 power to suspend and cease foreclosure activities and
20 did not do so while processing RAVAGO's loan
21 modification application.

22 102. BoA and NATIONSTAR and/or NATIONSTAR
23 intentionally ignored the duties required by the NMSA,
24 and intentionally continued to pursue a Trustee's sale
25 on PROPERTY.

26 103. BoA and NATIONSTAR and/or NATIONSTAR never
27 intended to offer RAVAGO a loan modification at any
28 time.

104. Defendants' actions were done by evil hands
guided by evil minds.

105. As a result of Defendants, and each of their,
actions, RAVAGO suffered damages in an amount to be
proven at trial.

It is not clear from the Complaint what contract was at
issue. In her opening brief, Debtor clarified that the relevant
contract was the agreement to consider a loan modification. The
bankruptcy court dismissed this claim because Debtor did not
allege that Defendants had a contractual duty to offer or
consider a loan modification or that she had a right to a loan
modification pursuant to the deed of trust or other loan

1 documents. On appeal, Debtor attempts to clarify her
2 allegations, stating that she did not claim she was entitled to a
3 loan modification, but that "the implied duty of good faith
4 entitled her to fair treatment when Defendants agreed to consider
5 her application." However, in the absence of an enforceable
6 contract to offer or consider a loan modification, there can be
7 no implied duty of good faith and fair dealing. And because the
8 NMS did not create a private right of action for a failure to
9 stay foreclosure proceedings while a loan modification was being
10 considered, there is simply no legal basis for Debtor's claim.

11 Moreover, to recover tort damages for a breach of the
12 implied covenant of good faith and fair dealing, there must be a
13 "special relationship" between the parties to the contract. The
14 Complaint does not allege facts supporting a plausible inference
15 that there was a special relationship "arising from elements of
16 public interest, adhesion, and fiduciary responsibility." As a
17 matter of law, a lender and borrower are not fiduciaries (unless
18 the lender also provides financial advice upon which the borrower
19 relies). McAlister v. Citibank (Ariz.), a Subsidiary of
20 Citicorp, 829 P.2d 1253, 1258 (Ariz. Ct. App. 1992). Nor does a
21 difference in bargaining power alone establish a special
22 relationship for purposes of the implied covenant of good faith
23 and fair dealing. Id.

24 The Complaint alleged that the public interest is implicated
25 because in the NMS the Defendants publicly promised that they
26 would not dual track. However, because the NMS does not create a
27 private right of action, it cannot form the basis for a "special
28 relationship" between a lender and an individual borrower for

1 purposes of the implied covenant of good faith and fair dealing.

2 Debtor cites Quintana v. Bank of Am., No. CV 11-2301-PHX,
3 2014 WL 690906, at *6 (D. Ariz. Feb. 24, 2014), in which the
4 U.S. District Court for the District of Arizona ruled that a
5 plaintiff's allegations that B of A represented that it would
6 consider her for a modification but did not was sufficient to
7 survive a motion to dismiss. However, in that case, the question
8 of whether a special relationship existed between the parties was
9 not raised by the parties or analyzed by the court. The court in
10 Quintana found the allegations of the complaint sufficient
11 because the note and deed of trust at issue allowed for
12 modifications, and plaintiff had alleged that B of A's employees
13 represented to plaintiff that B of A would consider her
14 application for a loan modification, but B of A did not do so.
15 Accordingly, Quintana does not help Debtor.

16 **F. The bankruptcy court did not err in dismissing the seventh**
17 **cause of action for recording false documents under**
18 **ARS § 33-420.**

19 Under ARS § 33-420(A),

20 A person purporting to claim an interest in, or a lien
21 or encumbrance against, real property, who causes a
22 document asserting such claim to be recorded in the
23 office of the county recorder, knowing or having reason
24 to know that the document is forged, groundless,
25 contains a material misstatement or false claim or is
26 otherwise invalid is liable to the owner or beneficial
27 title holder of the real property for the sum of not
28 less than five thousand dollars, or for treble the
actual damages caused by the recording, whichever is
greater, and reasonable attorney fees and costs of the
action.

27 To state a claim under this provision, the plaintiff must
28 allege (1) that the document is forged, groundless, contains a

1 misstatement or false claim or is otherwise invalid and (2) that
2 the misstatement or false claim was material to her. See Sitton
3 v. Deutsche Bank Nat'l Trust Co., 311 P.3d 237, 243 (Ariz. Ct.
4 App. 2013).

5 The Complaint alleged, with respect to this cause of action:

6 2. Defendants RECONTRUST, NATIONSTAR and/or
7 NATIONSTAR LLC, and each of them, knew that they had no
8 authority to record the Trustee's Deed sequence number
9 20132070170 at the Pima County Recorder, as they had
10 not instituted the Trustee's sale, had no authority
11 under the NMSA, nor had any authority under Arizona
12 agency law to complete the Trustee's sale.

13 3. More than twenty days before the filing of this
14 complaint RAVAGO has requested several times in writing
15 that RECONTRUST, NATIONSTAR and/or NATIONSTAR LLC
16 correct its actions in allowing the Trustee's Deed to
17 be effective by vacating its sale and the Trustee's
18 Deed. Defendants refused to take corrective action.

19 4. As a result, RAVAGO has lost her home to a
20 false Trustee's sale.

21 The bankruptcy court dismissed this claim because Debtor had
22 not alleged that the trustee's sale was not conducted in
23 accordance with the procedures established under Arizona law for
24 trustee's sales, ARS §§ 33-801 through 821. Under those
25 statutes, any defense or objection to the sale is waived unless
26 raised before the sale occurs. ARS § 33-811(C); BT Capital, LLC
27 v. TD Service Co. of Arizona, 275 P.3d 598, 600 (Ariz. 2012)
28 (en banc). ARS § 33-811(C) provides:

The trustor, its successors or assigns, and all persons
to whom the trustee mails a notice of a sale under a
trust deed pursuant to § 33-809 shall waive all
defenses and objections to the sale not raised in an
action that results in the issuance of a court order
granting relief pursuant to rule 65, Arizona rules of
civil procedure, entered before 5:00 p.m. mountain
standard time on the last business day before the
scheduled date of the sale. A copy of the order, the
application for the order and the complaint shall be
delivered to the trustee within twenty-four hours after

1 entering the order.

2 On appeal, Debtor correctly points out that an action for
3 damages under ARS § 33-420 is not necessarily waived by failure
4 to object to the sale before it occurs. "[F]ailure to enjoin a
5 trustee's sale does not waive claims for monetary awards under
6 § 33-420(A). Section 33-811(C) contemplates the waiver of
7 'defenses and objections to the sale' only, and nothing in
8 § 33-420(A) provides a defense to a sale or makes recovery
9 contingent upon a sale." Sitton, 311 P.3d at 240. However,
10 where the plaintiff's claim necessarily depends upon a
11 determination that the sale was improper, as it does here, the
12 trustee's deed cannot be a false document. Glava v. JPMorgan
13 Chase Bank, N.A., No. 1 CA-CV 13-0719, 2015 WL 849685, at *3
14 (Ariz. Ct. App. Feb. 26, 2015); see also Madison v. Groseth,
15 279 P.3d 633, 638 (Ariz. Ct. App. 2012) (holding that tort claims
16 based on an improper trustee's sale were waived under
17 ARS § 33-811(C)). The court in Glava distinguished Sitton:

18 Unlike Sitton, where the false recording claims were
19 based upon alleged misstatements and other defects in
20 documents that existed irrespective of the subsequent
21 trustee's sale . . . , the complained of document in
22 this case only becomes false if the trustee's sale was
23 improper. Therefore, the trial court properly found
24 that claim had been waived.

25 Glava, 2015 WL 849685, at *3.

26 As in Glava, Debtor's underlying theory, as set forth in
27 paragraph 2 of the allegations relating to this cause of action,
28 and conceded in the bankruptcy court, is that the trustee's sale
itself was invalid. Accordingly, the bankruptcy court did not
err in dismissing this claim.

Debtor argues that the bankruptcy court erred because it

1 assumed that Debtor could have filed an objection to the sale
2 before it was scheduled. Debtor contends that she could not have
3 known that Nationstar was the beneficiary under the deed of trust
4 until the day before the sale when the assignment was recorded.
5 The logic of this argument is difficult to discern and is
6 inconsistent with allegations that ReconTrust had noticed the
7 trustee's sale in April 2013 and that Nationstar had notified
8 Debtor that B of A had transferred the loan to it effective
9 June 4, 2013. Debtor also argues that if B of A had initially
10 authorized the trustee's sale, the sale was invalid because at
11 the time of the sale B of A had no interest in the Property.
12 However, this argument is simply another attack on the validity
13 of the sale. As such, it has been waived.

14 **G. Debtor has waived any argument that the bankruptcy court**
15 **abused its discretion in dismissing the Complaint with**
16 **prejudice.**

17 In her pleadings in the bankruptcy court, Debtor asked the
18 court to permit her to amend the Complaint if Defendants' motion
19 to dismiss was granted. However, her counsel did not pursue that
20 argument at the hearing on the motion to dismiss, and the
21 bankruptcy court thereafter dismissed the second through seventh
22 causes of action with prejudice. Although the bankruptcy court
23 did not make specific findings as to its reasons for denying
24 leave to amend, it did find that there was no authority to
25 support the proposition that the NMS could be a basis for a duty
26 of care. Given that all of the dismissed causes of action were
27 premised upon alleged breaches of duties created by the NMS, it
28 appears that the bankruptcy court concluded that amendment would

1 be futile.

2 On appeal, Debtor did not assign error to the bankruptcy
3 court's denial of leave to amend or propound any argument as to
4 how the Complaint could be amended to state a cause of action.
5 Therefore, the issue is waived. See Meehan v. County of Los
6 Angeles, 856 F.2d 102, 105 n.1 (9th Cir. 1988) (issue not briefed
7 by a party is deemed waived); see also Jodoin v. Samayoa
8 (In re Jodoin), 209 B.R. 132, 143 (9th Cir. BAP 1997) (Panel does
9 not normally consider matters not specifically and distinctly
10 argued in appellant's opening brief).

11 **CONCLUSION**

12 For the reasons set forth above, the bankruptcy court had
13 authority to enter a final judgment in the adversary proceeding
14 and did not err in dismissing Debtor's second, third, sixth and
15 seventh causes of action with prejudice.

16 Accordingly, we AFFIRM.