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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	NC-13-1615-KuPaJu
)		
ANTON ANDREW RIVERA and DENISE)	Bk. No.	14-54193*
ANN RIVERA,)		
)	Adv. No.	14-05108
Debtors.)		
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ANTON ANDREW RIVERA; DENISE)		
ANN RIVERA,)		
)		
Appellants,)		
)		
v.)	MEMORANDUM**	
)		
DEUTSCHE BANK NATIONAL TRUST)		
COMPANY, Trustee of Certificate))		
Holder of the WAMU Mortgage)		
Pass Through Certificate)		
Series 2005-AR6,)		
)		
Appellee.)		
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Argued and Submitted on October 23, 2014
at San Francisco, California

Filed - November 24, 2014

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

Honorable M. Elaine Hammond, Bankruptcy Judge, Presiding

*The bankruptcy case and adversary proceeding were originally pending in the Oakland Division of the United States Bankruptcy Court for the Northern District of California as bankruptcy case no. 12-49703 and adversary proceeding no. 13-04008. On October 15, 2014, the bankruptcy case and adversary proceeding were transferred to the San Jose Division and assigned new case numbers.

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

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Appearances: Ronald H. Freshman argued for appellants; Stefan Perovich of Keesal, Young & Logan argued for appellee.

Before: KURTZ, PAPPAS and JURY, Bankruptcy Judges.

INTRODUCTION

Chapter 13¹ debtors Anton and Denise Rivera appeal from an order dismissing their second amended complaint without leave to amend and dismissing their adversary proceeding with prejudice.

We have conducted a de novo review of the Riveras' second amended complaint against defendant Deutsche Bank National Trust Company, Trustee of Certificate-Holders of the WAMU Mortgage Pass Through Certificate Series 2005-AR6 ("DBNTC"). Based on our de novo review, we conclude that some of the Riveras' claims for relief contain sufficient factual allegations to state a plausible entitlement to recovery under a cognizable legal theory. Some of their claims do not. Accordingly, we AFFIRM IN PART, REVERSE IN PART, and REMAND for further proceedings.

FACTS

The Riveras' second amended complaint contained five causes of action, as follows: (1) to determine the extent and validity of DBNTC's lien; (2) for cancellation of written instruments; (3) for slander of title; (4) for violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, et seq.;

¹Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. All "Civil Rule" references are to the Federal Rules of Civil Procedure.

1 and (5) for violation of the Federal Truth In Lending Act.,
2 15 U.S.C. § 1641(g).²

3 According to the Riveras' second amended complaint, in 2004,
4 they refinanced their real property located in Bethel Island,
5 California, by obtaining a \$440,000 loan from Washington Mutual
6 Bank. In 2008, the Office of Thrift Supervision shut down
7 Washington Mutual and appointed the FDIC as receiver for
8 Washington Mutual. The FDIC as receiver for Washington Mutual
9 then entered into a purchase and assumption agreement with
10 JP Morgan Chase Bank pursuant to which Chase purchased some of
11 Washington Mutual's assets and assumed some of its liabilities.
12 In 2012, Chase (as Washington Mutual's successor in interest)
13 executed a corporate assignment of deed of trust, thereby
14 purporting to assign to DBNTC the deed of trust securing the
15 Riveras' \$440,000 loan.

16 Chase and DBNTC jointly filed a proof of claim in the
17 Riveras' bankruptcy case asserting that DBNTC is a secured
18 creditor and the holder of the Riveras' \$440,000 promissory note
19 and that Chase is DBNTC's servicing agent. The Riveras filed an
20 objection to that proof of claim asserting that neither DBNTC nor
21 Chase are entitled to enforce the note or to receive the payments
22 owed under the note and hence lack standing to file the proof of
23 claim.

24 _____
25 ²On DBNTC's motions, the bankruptcy court dismissed with
26 leave to amend both the Riveras' original complaint and their
27 first amended complaint. On appeal, the Riveras have not raised
28 any issues challenging either of these two dismissals, so our
review will be limited to the dismissal with prejudice of their
second amended complaint.

1 The Riveras' second amended complaint refers to and attaches
2 as an exhibit a copy of the deed of trust the Riveras signed in
3 order to secure the \$440,000 loan. In turn, the deed of trust
4 refers to the promissory note the Riveras signed in exchange for
5 the \$440,000 loan. A copy of the note is not attached to the
6 second amended complaint, but it is referenced in the complaint
7 at paragraphs 52-53. Paragraphs 50-53 focus on the proof of
8 claim DBNTC and Chase filed in the Riveras' bankruptcy case. The
9 Riveras do not dispute that the copy of the note attached to the
10 proof of claim is a copy of the note they signed, but they do
11 challenge the authenticity, reliability and validity of the
12 endorsement stamped on the last page of the note - an undated
13 endorsement in blank purportedly signed by Leta Hutchinson as
14 Assistant Vice President for Washington Mutual Bank.

15 The Riveras allege that the endorsement on the note is
16 suspect for two reasons. First, they allege that, in an SEC
17 filing disclosing information about the mortgage securitization
18 trust for which DBNTC is trustee, the filing states that the
19 mortgage notes pooled into the trust would not be endorsed and
20 negotiated to the trust. And second, the Riveras allege that,
21 after the FDIC's 2008 asset sale to Chase, Leta Hutchinson became
22 an officer of Chase. The Riveras in essence infer from the
23 above-referenced allegations that the Hutchinson endorsement is a
24 sham: (1) that Hutchinson did not actually endorse the Riveras'
25 note until 2012 - around the time Chase executed the assignment
26 of the deed of trust; and (2) that, in 2012, Hutchinson no longer
27 was an officer of the shut down Washington Mutual Bank and hence
28 no longer had any authority to endorse the note on behalf of

1 Washington Mutual.

2 According to the Riveras, there were fatal problems not only
3 with the endorsement of the note, but also with the transfer of
4 Washington Mutual's rights in the loan and the security. The
5 Riveras' second amended complaint pled alternate theories. In
6 the first theory, the Riveras alleged that Chase's purported
7 transfer of the security to the trust - by way of the 2012
8 corporate assignment of deed of trust - was void because Chase's
9 purported 2012 assignment occurred seven years after the trust
10 pool was supposed to close, as specified in the pooling and
11 servicing agreement governing the securitization trust. Relying
12 on Glaski v. Bank of Am., N.A., 218 Cal.App.4th 1079, 1083
13 (2013), the Riveras reason that Chase's attempted assignment was
14 void because the assignment violated the trust's terms.

15 In the second theory, the Riveras allege that Chase could
16 not convey to DBNTC any interest in the loan or the security
17 because Chase never acquired from Washington Mutual any interest
18 in the loan or security. The Riveras have offered two potential
19 explanations for this theory. First, they posit that the FDIC's
20 2008 asset sale to Chase did not include Washington Mutual's
21 rights with respect to the Rivera loan and security. And second,
22 they posit that, because the note never was properly negotiated
23 or otherwise properly transferred to Chase, neither Chase nor
24 DBNTC ever acquired any valid right in the loan or the security.³

25
26 ³The Riveras admit in their opening appeal brief that their
27 legal argument - the one regarding the assignment of the security
28 - is new. See Aplt. Opn. Br. at pp. 16-17. Ordinarily, we will
(continued...)

1 In short, the Riveras' second amended complaint disputes
2 every link in the chain of title through which DBNTC claims to
3 have acquired the right to enforce the Riveras' note and deed of
4 trust. The Riveras contend that neither Washington Mutual nor
5 the FDIC as the receiver for Washington Mutual ever conveyed any
6 valid interest in these rights to Chase or DBNTC and that Chase
7 never conveyed any valid interest in these rights to DBNTC.

8 The Riveras filed their chapter 13 bankruptcy case in
9 December 2012. Within weeks, they commenced their adversary
10 proceeding against DBNTC seeking declaratory relief and to
11 determine the extent and validity of DBNTC's claimed lien against
12 their property. The Riveras' complaint also sought, among other
13 things, damages based upon DBNTC's alleged recordation of "false
14 documents" and damages based on DBNTC's alleged violation of
15 15 U.S.C. § 1641(g) ("TILA Claim").

16 After the bankruptcy court twice dismissed the Riveras'
17 complaint with leave to amend, and after the Riveras twice
18 amended their complaint, the court heard DBNTC's motion to
19 dismiss the Riveras' second amended complaint. The court ruled
20 at the hearing that the second amended complaint did not state a
21

22 ³(...continued)

23 not consider issues raised for the first time on appeal. Scovis
24 v. Henrichsen (In re Scovis), 249 F.3d 975, 984 (9th Cir. 2001).
25 However, we have discretion to do so when: "the issue is purely
26 one of law, does not affect or rely upon the factual record
27 developed by the parties, and will not prejudice the party
28 against whom it is raised." Dream Palace v. Cnty. of Maricopa,
384 F.3d 990, 1005 (9th Cir. 2003). Here, we will exercise our
discretion to consider the Riveras' additional argument. Because
this is an appeal from a Civil Rule 12(b)(6) dismissal, the
parties have not yet developed any factual record.

1 valid claim for relief. In so ruling, the court acknowledged
2 that the second amended complaint sought to challenge DBNTC's
3 claim that it is the holder of the Riveras' note and was entitled
4 to enforce the note. But the court held that California law did
5 not require DBNTC to establish its status as holder of the note
6 or as a person entitled to enforce the note in order to conduct a
7 nonjudicial foreclosure of the property, citing Gomes v.
8 Countrywide Home Loans, Inc., 192 Cal.App.4th 1149 (2011). The
9 court further held that the Riveras lacked standing to challenge
10 the validity of the assignment between Chase and DBNTC because
11 the Riveras were not a party to that assignment, citing Dick v.
12 Am. Home Mortg. Servicing, Inc., 2013 WL 5299180 (E.D. Cal.
13 2013). Finally, the court held that the Riveras had not alleged,
14 as required, that any defects in the foreclosure process had
15 prejudiced the Riveras by interfering with their ability to make
16 payments owed on the loan, or that the original lender would not
17 have initiated foreclosure proceedings, citing Fontenot v. Wells
18 Fargo Bank, N.A., 198 Cal.App.4th 256 (2011).

19 Based on these holdings, the bankruptcy court determined
20 that the Riveras' first through fourth claims for relief all
21 should be dismissed because these claims all hinged on the
22 Riveras' defective challenge to DBNTC's disputed status as the
23 holder of the note or the person entitled to enforce the note.
24 As for the Riveras' fifth claim - their TILA claim - it is not
25 entirely clear why the court ruled that this claim should be
26 dismissed. In spite of the Riveras' allegations that they never
27 received notice of the purported change in owners of their home
28 loan as required under 15 U.S.C. § 1641(g), the court appears to

1 have concluded that the Riveras had sufficient actual knowledge
2 of the change in ownership, as reflected in the Riveras' court
3 filings, so that they were not entitled to any recovery on
4 account of 15 U.S.C. § 1641(g).

5 Finally, because the Riveras already had been given three
6 prior opportunities to file their complaint against DBNTC and had
7 not yet been able to state a viable claim for relief, the court
8 ruled that the complaint would be dismissed without leave to
9 amend and that the entire adversary proceeding would be dismissed
10 with prejudice.

11 The bankruptcy court entered its final dismissal order on
12 December 10, 2013, and the Riveras timely filed their notice of
13 appeal on December 23, 2013.

14 JURISDICTION

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

18 ISSUE

19 Did the bankruptcy court err when it dismissed the claims
20 for relief stated in the Riveras' second amended complaint?

21 STANDARDS OF REVIEW

22 We review de novo the bankruptcy court's Civil Rule 12(b)(6)
23 dismissal. Barnes v. Belice (In re Belice), 461 B.R. 564, 572
24 (9th Cir. BAP 2011).

25 CIVIL RULE 12(b)(6) STANDARDS AND JUDICIAL NOTICE STANDARDS

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

1 Therefore, we apply the same standards to Civil Rule 12(b)(6)
2 dismissal motions that all other federal courts are required to
3 apply. In re Belice, 461 B.R. at 572-73.

4 Under Civil Rule 12(b)(6), made applicable in adversary
5 proceedings by Rule 7012, a complaint may be dismissed for
6 "failure to state a claim upon which relief can be granted."
7 To survive a Civil Rule 12(b)(6) dismissal motion, a complaint
8 must present cognizable legal theories and sufficient factual
9 allegations to support those theories. See Johnson v. Riverside
10 Healthcare Sys., LP, 534 F.3d 1116, 1121-22 (9th Cir. 2008). As
11 the Supreme Court has explained:

12 a complaint must contain sufficient factual matter,
13 accepted as true, to state a claim to relief that is
14 plausible on its face. . . . A claim has facial
15 plausibility when the plaintiff pleads factual content
16 that allows the court to draw the reasonable inference
17 that the defendant is liable for the misconduct
18 alleged. . . . Threadbare recitals of the elements of
19 a cause of action, supported by mere conclusory
20 statements, do not suffice.

21 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citations and
22 internal quotation marks omitted).

23 In reviewing the sufficiency of a complaint under Civil
24 Rule 12(b)(6), we must accept as true all facts alleged in the
25 complaint and draw all reasonable inferences in favor of the
26 plaintiff. See Newcal Indus., Inc. v. Ikon Office Solutions,
27 513 F.3d 1038, 1043 n.2 (9th Cir. 2008). However, we do not need
28 to accept as true conclusory allegations or legal
29 characterizations cast in the form of factual allegations. See
30 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56 (2007).

31 We may use judicially noticed facts to establish that a
32 complaint does not state a claim for relief. Skilstaf, Inc. v.

1 CVS Caremark Corp., 669 F.3d 1005, 1016 n.9 (9th Cir. 2012). We
2 can take judicial notice of the existence, filing and content of
3 documents in the Riveras' underlying bankruptcy case. See
4 O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d
5 955, 957-58 (9th Cir. 1989).

6 We also may consider the existence and content of documents
7 attached to and referenced in the complaint as exhibits. Lee v.
8 City of L.A., 250 F.3d 668, 688 (9th Cir. 2001); Durning v. First
9 Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). Even when a
10 document is not physically attached to the complaint, we may
11 consider its existence and contents when its authenticity is not
12 contested and when it necessarily is relied upon by the
13 plaintiffs in their complaint. See United States v. Ritchie,
14 342 F.3d 903, 907-08 (9th Cir. 2003); Lee, 250 F.3d at 688.

15 Of course, just because a document states a "fact" does not
16 necessarily mean that this fact is true. Roth v. Jennings,
17 489 F.3d 499, 509 (2d Cir. 2007). Whether the facts stated in a
18 judicially noticed document are reasonably subject to dispute
19 depends on the nature of the facts stated and the nature and
20 purpose of the document as a whole. See Ferguson v. Wells Fargo
21 Bank, N.A., 2013 WL 504709, at **2-3 (E.D. Cal. 2013); see also
22 Lee, 250 F.3d at 690.

23 **DISCUSSION**

24 Citing Gomes and Dick, the bankruptcy court held that the
25 Riveras had no right to dispute that DBNTC was the person
26 entitled to enforce the note and no right to challenge the
27 validity of the assignment of the deed of trust from Chase to
28 DBNTC. We disagree with the bankruptcy court on both points.

1 Gomes was a state court lawsuit in which the plaintiff was
2 alleging that the agent who had initiated nonjudicial foreclosure
3 proceedings on behalf of the noteholder had not been authorized
4 by the noteholder to initiate those proceedings. Gomes,
5 192 Cal.App.4th at 1152. In order to protect California's
6 comprehensive scheme of laws governing nonjudicial foreclosures,
7 Gomes held that there is no cognizable legal theory that enables
8 a borrower to obtain a pre-foreclosure judicial determination as
9 to whether the noteholder's nominee or agent actually had been
10 authorized by the noteholder to initiate the foreclosure
11 proceedings. Gomes, 192 Cal.App.4th at 1155-57.

12 Thus, the holding in Gomes is not quite as expansive as the
13 bankruptcy court here treated it. This Panel recently examined
14 Gomes and was careful to articulate Gomes's narrow holding:

15 [A]s a California court recently held, Cal.Civ.Code
16 § 2924 "does not provide for a judicial action" when
17 the issue is not whether the wrong entity initiated
foreclosure but whether the entity was merely
authorized to do so by the owner of the note.

18 Cedano v. Aurora Loan Servs., LLC (In re Cedano), 470 B.R. 522,
19 531 (9th Cir. BAP 2012) (emphasis added) (citing Gomes,
20 192 Cal.App.4th at 1155).

21 Meanwhile, in Dick, after a nonjudicial foreclosure had been
22 completed, the debtor-borrower commenced an adversary proceeding
23 for wrongful foreclosure, alleging that an assignment of the deed
24 of trust from the lender to the trustee of a securitization trust
25 was void because the assignment violated the trust's terms, as
26 specified in the pooling and servicing agreement governing the
27 trust. See Dick, 2013 WL 5299180, at *1-2. The bankruptcy court
28 here construed Dick as holding that a debtor-borrower lacks

1 standing to challenge the validity of an assignment of the deed
2 of trust for purposes of asserting that the foreclosure
3 proceedings were unauthorized. We acknowledge that the literal
4 language of Dick arguably might support the bankruptcy court's
5 construction. See Id. Nonetheless, when one reads Dick's
6 literal language in context and looks at the cases that Dick
7 cites, Dick only provides support for a more limited proposition:
8 that the debtor-borrower cannot attack the assignment of a deed
9 of trust to the trustee of a securitization trust based on the
10 terms of a pooling and servicing agreement governing that trust
11 because the debtor-borrower is not a party to the pooling and
12 servicing agreement. Id. Furthermore, Dick acknowledged that
13 there was a split of authority on this issue and ultimately
14 declined to resolve the appeal based on this issue. Id. at *2-3.
15 Instead, the court resolved the appeal based on the borrowers'
16 failure to allege harm or prejudice. Id.

17 On a more fundamental level, Gomes and Dick each involved a
18 direct attack on pending or completed nonjudicial foreclosure
19 proceedings, and each can best be understood as part of a series
20 of decisions protecting the comprehensive scheme of laws enacted
21 by the California legislature to regulate nonjudicial
22 foreclosures and aiming to keep such foreclosures relatively
23 inexpensive, expeditious and out of court. See Debrunner v.
24 Deutsche Bank Nat'l Trust Co., 204 Cal.App.4th 433, 442 (2012).

25 In contrast, the Riveras' second amended complaint arises in
26 a markedly different procedural context. While some aspects of
27 the second amended complaint might be construed as a direct
28 attack on the foreclosure proceedings initiated against the

1 Riveras' property, other aspects addressed DBNTC's proof of claim
2 and its assertions therein that it held a secured claim and was
3 entitled to enforce the note. See, e.g., second amended
4 complaint at ¶¶ 50-53.

5 It is clear from the bankruptcy court's comments at the
6 hearing on the motion to dismiss the second amended complaint
7 that the court understood the Riveras were alleging that DBNTC is
8 not the holder of the note and is not a person entitled to
9 enforce the note. Furthermore, we have no doubt that the
10 bankruptcy court considered DBNTC's proof of claim to be at issue
11 in the adversary proceeding, at least in terms of whether DBNTC
12 was the person entitled to enforce the note and whether DBNTC
13 had standing to file the proof of claim against the Riveras.⁴

14
15 ⁴If we had any doubt that the bankruptcy court intended its
16 rulings in the adversary proceeding to resolve these questions,
17 that doubt would be dispelled by the court's comments at a
18 subsequent hearing in the Riveras' bankruptcy case. At the
19 March 20, 2014 hearing on the Riveras' objection to DBNTC's proof
20 of claim, the court explicitly stated that its ruling disposing
21 of the Riveras' adversary proceeding also disposed of the
22 question regarding DBNTC's standing to file the proof of claim:
23 "The issues as to authority to enforce the note were brought
24 forth in the adversary proceeding which I have ruled on and that
25 I understand is on appeal, so those are being litigated in that
26 area and so [in these claim objection proceedings] we are looking
27 strictly at the amount of the claim on the objection to claim."
28 Audio File of hearing (March 20, 2014) (attached to Bk. Dkt.
No. 12-49703 as Doc. No. 102). We may consider the court's
comments at the March 20, 2014 hearing to the extent they
constitute the court's interpretation of its own rulings. See
generally Rosales v. Wallace (In re Wallace), 490 B.R. 898, 906
(9th Cir. BAP 2013) (holding that we give significant deference
to the bankruptcy court's interpretation of its own order).

At oral argument in this appeal, both the Riveras and DBNTC
argued that DBNTC's proof of claim was not at issue in the

(continued...)

1 This Panel previously has held that a debtor may object on
2 standing grounds to a proof of claim based on a note secured by a
3 deed of trust and that, unless the creditor establishes that it
4 is a person entitled to enforce the note (or an agent of such a
5 person), the claim objection should be sustained. See Veal v.
6 Am. Home Mortg. Servicing, Inc. (In re Veal), 450 B.R. 897,
7 919-21 (9th Cir. BAP 2011). As stated in In re Veal:

8 When debtors such as the Veals challenge an alleged
9 servicer's standing to file a proof of claim regarding
10 a note governed by Article 3 of the UCC, that servicer
11 must show it has an agency relationship with a "person
entitled to enforce" the note that is the basis of the
claim. If it does not, then the servicer has not shown
that it has standing to file the proof of claim.

12 * * *

13 As stated before, AHMSI presented no evidence as to who
14 possessed the original Note. It also presented no
evidence showing indorsement of the note either in its
15 favor or in favor of Wells Fargo, for whom AHMSI
allegedly was servicing the Veal Loan. Without
16 establishing these elements, AHMSI cannot establish
that it is a "person entitled to enforce" the Note.
17 The Veals would thus have a valid claim objection under
§ 502(b)(1).

18 Id. at 920, 21.

19 Here, it is unnecessary for us to decide for purposes of
20 this appeal whether the Riveras' note is a negotiable instrument
21 within the meaning of Cal. Com'l Code § 3104 and thus subject to
22 California's Uniform Commercial Code provisions governing
23 negotiable instruments, as specified in Cal. Com'l Code
24 § 3102(a). Even if the Riveras' note does not qualify as a

25 _____
26 ⁴(...continued)

27 adversary proceeding, but the parties' arguments on this point
28 are contrary to the bankruptcy court's explicitly stated intent
regarding the scope of its rulings in the adversary proceeding.

1 negotiable instrument covered by the Uniform Commercial Code, for
2 purposes of establishing DBNTC's standing to file its proof of
3 claim and to overcome the Riveras' objection to that claim, DBNTC
4 still would need to establish that the payment rights evidenced
5 by the note had been assigned or negotiated to it. As a matter
6 of general California contract law, an entity seeking to enforce
7 contract rights as an alleged assignee of those rights ordinarily
8 must show that the rights actually were assigned to it. See
9 Heritage Pac. Fin., LLC v. Monroy, 215 Cal. App. 4th 972, 988-89
10 (2013); Fontenot, 198 Cal.App.4th at 270.⁵ Without such proof,
11 as In re Veal generally teaches, DBNTC's failure to establish its
12 standing would be fatal to its proof of claim. See In re Veal,
13 450 B.R. at 919.

14 With respect to the Riveras' challenge to DBNTC's assertion
15 of secured status, there is a similar dichotomy between the
16 Riveras' rights for purposes of a nonjudicial foreclosure and
17 their rights for purposes of DBNTC's assertion of secured status
18 in its proof of claim. California law indicates that, for
19 purposes of a non-judicial foreclosure, a party may foreclose
20 based solely on its status as an assignee of the lender's rights
21 under the deed of trust without regard to who holds the
22 borrower's note. See Siliga v. Mortg. Electr. Registration Sys.,
23 Inc., 219 Cal.App.4th 75, 84 n.5 (2013); Jenkins v. JP Morgan
24 Chase Bank, N.A., 216 Cal.App.4th 497, 512-13 (2013); Debrunner,

25
26 ⁵For an overview of the different ways under California law
27 a lender might convey its payment rights to another outside the
28 Uniform Commercial Code provisions governing negotiable
instruments, see 4 Harry D. Miller & Marvin B. Starr, CAL. REAL
EST. § 10:43 (3d ed. 2014).

1 204 Cal.App.4th at 440-42. But outside of the nonjudicial
2 foreclosure context, an attempted assignment of a mortgage or
3 trust deed without an assignment of the underlying debt is a
4 nullity. Kelley v. Upshaw, 39 Cal. 2d 179, 192 (1952); Wolfe v.
5 Leisure Time Sports, Inc. (In re Leisure Time Sports, Inc.),
6 194 B.R. 859, 861 (9th Cir.BAP 1996) (citing Union Supply Co. v.
7 Morris, 220 Cal. 331, 338-39, 30 P.2d 394, 397 (1934)); see also
8 Carpenter v. Longan, 83 U.S. 271, 275 (1872) ("An assignment of
9 the note carries the mortgage with it, while an assignment of the
10 latter alone is a nullity.").

11 Even though Siliqa, Jenkins and Debrunner may preclude the
12 Riveras from attacking DBNTC's foreclosure proceedings by arguing
13 that Chase's assignment of the deed of trust was a nullity in
14 light of the absence of a valid transfer of the underlying debt,
15 we know of no law precluding the Riveras from challenging DBNTC's
16 assertion of secured status for purposes of the Riveras'
17 bankruptcy case. Nor did the bankruptcy court cite to any such
18 law.

19 We acknowledge that our analysis promotes the existence of
20 two different sets of legal standards - one applicable in
21 nonjudicial foreclosure proceedings and a markedly different one
22 for use in ascertaining creditors' rights in bankruptcy cases.
23 But we did not create these divergent standards. The California
24 legislature and the California courts did. We are not the first
25 to point out the divergence of these standards. See CAL. REAL
26 EST., at § 10:41 (noting that the requirements under California
27 law for an effective assignment of a real-estate-secured
28 obligation may differ depending on whether or not the dispute

1 over the assignment arises in a challenge to nonjudicial
2 foreclosure proceedings).

3 We must accept the truth of the Riveras' well-pled
4 allegations indicating that the Hutchinson endorsement on the
5 note was a sham and, more generally, that neither DBNTC nor Chase
6 ever obtained any valid interest in the Riveras' note or the loan
7 repayment rights evidenced by that note. We also must
8 acknowledge that at least part of the Riveras' adversary
9 proceeding was devoted to challenging DBNTC's standing to file
10 its proof of claim and to challenging DBNTC's assertion of
11 secured status for purposes of the Riveras' bankruptcy case. As
12 a result of these allegations and acknowledgments, we cannot
13 reconcile our legal analysis, set forth above, with the
14 bankruptcy court's rulings on the Riveras' second amended
15 complaint. The bankruptcy court did not distinguish between the
16 Riveras' claims for relief that at least in part implicated the
17 parties' respective rights in the Riveras' bankruptcy case from
18 those claims for relief that only implicated the parties'
19 respective rights in DBNTC's nonjudicial foreclosure proceedings.

20 Given these circumstances, we must separately examine each
21 of the Riveras' claims for relief to account for this distinction
22 and to determine if there is any alternate basis for concluding
23 that, as a matter of law, a particular claim for relief lacks
24 merit.

25 **1. First Claim for Relief - to Determine the Extent and**
26 **Validity of Lien**

27 Except when the debtor seeks to avoid a lien or other
28 interest in exempt property under § 522(f), all other bankruptcy

1 court actions challenging a creditor's secured status must be
2 brought as an adversary proceeding to determine the validity,
3 priority or extent of the creditor's lien. See Rule 7001(2);
4 Bear v. Coben (In re Golden Plan of Cal., Inc.), 829 F.2d 705,
5 711-12 (9th Cir. 1986).

6 Here, the underlying legal basis for the Riveras' first
7 claim for relief is state law. They principally allege that
8 Chase's assignment of the deed of trust was void because it
9 violated the terms of the pooling and servicing agreement
10 governing the securitization trust to which Chase purported to
11 assign the Riveras' deed of trust. The Riveras cited Glaski,
12 218 Cal.App.4th at 1094-97, to support their argument. Glaski
13 held that the assignment of a deed of trust to a securitization
14 trust is void under New York trust law if the assignment violated
15 the trust's governing pooling and servicing agreement. Id. The
16 bankruptcy court here rejected Glaski and instead adopted as
17 persuasive the reasoning of Sandri v. Capital One, N.A.
18 (In re Sandri), 501 B.R. 369 (Bankr. N.D. Cal. 2013), which held
19 that such a violation of the pooling and servicing agreement only
20 would render the deed of trust assignment voidable rather than
21 void and that the borrower lacked standing to raise issues
22 regarding violation of the pooling and servicing agreement
23 because it was not a party to that agreement. Id. at 375-76.
24 In re Sandri followed the weight of authority among the
25 California appellate courts on this issue. See, e.g., Jenkins,
26 216 Cal.App.4th at 515. Moreover, like the bankruptcy court, we
27 find Sandri's analysis persuasive.

28 When, as here, we must apply state law to resolve an issue,

1 and the state's highest court has not yet addressed the issue,
2 our job as a federal court applying state law is to predict how
3 the state's highest court would resolve the issue. Hemmings v.
4 Tidyman's Inc., 285 F.3d 1174, 1203 (9th Cir. 2002). Unless we
5 are convinced that the California Supreme Court would decide the
6 issue differently, we are obliged to follow the decisions of
7 California's intermediate appellate courts. Vestar Dev. II, LLC
8 v. Gen. Dynamics Corp., 249 F.3d 958, 960 (9th Cir. 2001); Spear
9 v. Wells Fargo Bank, N.A. (In re Bartoni-Corsi Produce, Inc.),
10 130 F.3d 857, 861 (9th Cir. 1997).

11 Here, we note that the California Supreme Court recently
12 granted review from an intermediate appellate court decision
13 following Jenkins and rejecting Glaski. Yvanova v. New Century
14 Mortg. Corp., 226 Cal.App.4th 495 (2014), review granted &
15 opinion de-published, 331 P.3d 1275 (Cal. Aug 27, 2014). Thus,
16 we eventually will learn how the California Supreme Court views
17 this issue. Even so, we are tasked with deciding the case before
18 us, and Ninth Circuit precedent suggests that we should decide
19 the case now, based on our prediction, rather than wait for the
20 California Supreme Court to rule. See Hemmings, 285 F.3d at
21 1203; Lewis v. Telephone Employees Credit Union, 87 F.3d 1537,
22 1545 (9th Cir. 1996). Because we have no convincing reason to
23 doubt that the California Supreme Court will follow the weight of
24 authority among California's intermediate appellate courts, we
25 will follow them as well and hold that the Riveras lack standing
26 to challenge the assignment of their deed of trust based on an
27 alleged violation of a pooling and servicing agreement to which
28 they were not a party.

1 Even though the Riveras' first claim for relief principally
2 relies on their allegations regarding the assignment's violation
3 of the pooling and servicing agreement, their first claim for
4 relief also explicitly incorporates their allegations challenging
5 DBNTC's proof of claim and disputing the validity of the
6 Hutchinson endorsement. Those allegations, when combined with
7 what is set forth in the first claim for relief, are sufficient
8 on their face to state a claim that DBNTC does not hold a valid
9 lien against the Riveras' property because the underlying debt
10 never was validly transferred to DBNTC. See In re Leisure Time
11 Sports, Inc., 194 B.R. at 861 (citing Kelly v. Upshaw, 39 Cal.2d
12 179 (1952) and stating that "a purported assignment of a mortgage
13 without an assignment of the debt which it secured was a legal
14 nullity.").

15 While the Riveras cannot pursue their first claim for relief
16 for purposes of directly challenging DBNTC's pending nonjudicial
17 foreclosure proceedings, Debrunner, 204 Cal.App.4th at 440-42,
18 the first claim for relief states a cognizable legal theory to
19 the extent it is aimed at determining DBNTC's rights, if any, as
20 a creditor who has filed a proof of secured claim in the Riveras'
21 bankruptcy case.

22 Consequently, the bankruptcy court erred when it dismissed
23 the Riveras' first claim for relief.

24 **2. Second Claim for Relief - For Cancellation of Written**
25 **Instruments**

26 The Riveras' second claim for relief seeks cancellation of
27 Chase's assignment of the deed of trust, as well as the notice of
28 default and the notice of sale that Chase caused to be recorded

1 on DBNTC's behalf.

2 As provided in Cal. Civ. Code § 3412:

3 A written instrument, in respect to which there is a
4 reasonable apprehension that if left outstanding it may
5 cause serious injury to a person against whom it is
void or voidable, may, upon his application, be so
adjudged, and ordered to be delivered up or canceled.

6 Id.; see also In re Cedano, 470 B.R. at 533. To plead a viable
7 claim for relief, the Riveras needed to allege that they would be
8 injured or prejudiced unless these instruments were cancelled.

9 See Dick, 2013 WL 5299180, at *4.

10 The Riveras' second claim for relief is based on the same
11 two legal arguments regarding the violation of the pooling and
12 servicing agreement and the absence of a valid transfer of the
13 underlying debt to DBNTC. As set forth above, the Riveras lack
14 standing to assert violations of the pooling and servicing
15 agreement in support of their claims for relief. See Jenkins,
16 216 Cal.App.4th at 515; see also In re Sandri, 501 B.R. at 375-
17 76.

18 As for their remaining argument - that the assignment was a
19 nullity because DBNTC did not receive a valid transfer of the
20 underlying debt - the only alleged harm the second amended
21 complaint specifically references (arising from the trust deed
22 assignment, the notice of default and the notice of sale) relates
23 to DBNTC's pending nonjudicial foreclosure proceedings. As we
24 already have explained, the alleged absence of noteholder status
25 is not an issue that a borrower can raise to challenge
26 nonjudicial foreclosure proceedings. Debrunner, 204 Cal.App.4th
27 at 440-42.

28 Even if the California courts generally permitted borrowers

1 to raise noteholder status issues to challenge nonjudicial
2 foreclosure proceedings, any harm arising from DBNTC's
3 foreclosure proceeding is not logically attributable to the
4 so-called false written instruments; rather, it is attributable
5 to the Riveras' default on their loan obligations. As the
6 bankruptcy court pointed out, the Riveras admitted in other court
7 filings that they had fallen behind on their loan payments. The
8 Riveras have not challenged this point on appeal. In light of
9 this admitted default, we cannot reasonably infer from the
10 Riveras' allegations that they have been harmed by the allegedly
11 false written instruments. See Iqbal, 556 U.S. at 678.

12 Our reasoning is consistent with a number of California
13 appellate court decisions holding that, when a borrower is in
14 default and seeks to challenge the foreclosure process by
15 attacking a prior assignment of the deed of trust, the borrower
16 must allege particularized prejudice arising from the assignment
17 - either that the allegedly invalid assignment interfered with
18 his or her ability to make loan payments or that the original
19 lender would not have initiated foreclosure proceedings. See,
20 e.g., Siliga, 219 Cal.App.4th at 85; Herrera v. Fed. Nat'l Mortg.
21 Ass'n, 205 Cal.App.4th 1495, 1507-08 (2012); Fontenot,
22 198 Cal.App.4th at 272.

23 Because the Riveras second amended complaint did not allege
24 any legally cognizable harm arising from the subject written
25 instruments, the bankruptcy court did not err when it dismissed
26 the Riveras' cancellation of written instruments claim.

27 **3. Third Claim for Relief - For Slander of Title**

28 "Slander of title is a 'tortious injury to property

1 resulting from unprivileged, false, malicious publication of
2 disparaging statements regarding the title to property owned by
3 plaintiff, to plaintiff's damage.'" In re Cedano, 470 B.R. at
4 533 (quoting Southcott v. Pioneer Title Co., 203 Cal.App.2d 673,
5 676 (1962)). Recording a facially valid written instrument with
6 no underlying merit can give rise to a slander of title claim for
7 relief. In re Cedano, 470 B.R. at 533 . The elements for a
8 slander of title claim are: "(1) publication, (2) absence of
9 justification, (3) falsity, and (4) direct pecuniary loss." Id.

10 The Riveras' slander of title claim is based on the same
11 legal theories as their cancellation of written instruments
12 claim. It also suffers from the same fatal deficiencies. Thus,
13 the bankruptcy court did not err when it dismissed the Riveras'
14 slander of title claim.

15 **4. Fourth Claim for Relief - for Violation of California's**
16 **Unfair Competition Law, Cal. Bus. & Prof. Code § 17200**

17 The Riveras' fourth claim for relief alleges that DBNTC
18 engaged in unfair, unlawful and fraudulent business practices
19 within the meaning of Cal. Bus. & Prof. Code § 17200, et seq.,
20 which is known as California's Unfair Competition Law ("UCL").
21 To establish their right to pursue their UCL claim, the Riveras
22 needed to allege, among other things, that they lost money or
23 property "as a result of" the alleged unfair business practice.
24 Kwikset Corp. v. Super. Ct., 51 Cal.4th 310, 321-22 (2011).

25 In their UCL claim for relief, the Riveras allege against
26 DBNTC a number of different wrongful practices arising from the
27 same activities complained of throughout their second amended
28 complaint. Even if we were to assume that these allegedly

1 wrongful practices are actionable under the UCL, the Riveras have
2 not alleged facts from which we reasonably can infer that they
3 personally have been injured by those practices. See Iqbal,
4 556 U.S. at 678.

5 We already have explained in detail above the fatal
6 deficiencies in the Riveras' second amended complaint concerning
7 the issues of causation and injury. More specifically, we
8 explained that any loss they might have suffered as a result of
9 DBNTC's foreclosure proceedings is logically and legally the
10 result of the Riveras' default on their loan obligations rather
11 than the result of Chase's and DBNTC's alleged conduct.
12 Accordingly, the bankruptcy court did not err when it dismissed
13 the Riveras' slander of title claim.

14 **5. Fifth Claim for Relief – for violation of the Federal Truth**
15 **In Lending Act, 15 U.S.C. § 1641(g)**

16 The Riveras' TILA Claim alleged, quite simply, that they did
17 not receive from DBNTC, at the time of Chase's assignment of the
18 deed of trust to DBNTC, the notice of change of ownership
19 required by 15 U.S.C. § 1641(g)(1). That section provides:

20 In addition to other disclosures required by this
21 subchapter, not later than 30 days after the date on
22 which a mortgage loan is sold or otherwise transferred
23 or assigned to a third party, the creditor that is the
24 new owner or assignee of the debt shall notify the
25 borrower in writing of such transfer, including--

26 (A) the identity, address, telephone number of the new
27 creditor;

28 (B) the date of transfer;

(C) how to reach an agent or party having authority to
act on behalf of the new creditor;

(D) the location of the place where transfer of
ownership of the debt is recorded; and

1 (E) any other relevant information regarding the new
2 creditor.

3 The bankruptcy court did not explain why it considered this
4 claim as lacking in merit. It refers to the fact that the
5 Riveras had actual knowledge of the change in ownership within
6 months of the recordation of the trust deed assignment. But the
7 bankruptcy court did not explain how or why this actual knowledge
8 would excuse noncompliance with the requirements of the statute.

9 Generally, the consumer protections contained in the statute
10 are liberally interpreted, and creditors must strictly comply
11 with TILA's requirements. See McDonald v. Checks-N-Advance, Inc.
12 (In re Ferrell), 539 F.3d 1186, 1189 (9th Cir. 2008). On its
13 face, 15 U.S.C. § 1640(a)(2)(A)(iv) imposes upon the assignee of
14 a deed of trust who violates 15 U.S.C. § 1641(g)(1) statutory
15 damages of "not less than \$400 or greater than \$4,000."

16 While the Riveras' TILA claim did not state a plausible
17 claim for actual damages, it did state a plausible claim for
18 statutory damages. Consequently, the bankruptcy court erred when
19 it dismissed the Riveras' TILA claim.

20 **6. Dismissal without leave to amend**

21 Because we are affirming the bankruptcy court's dismissal of
22 at least some of the Riveras' claims for relief, it is
23 appropriate for us to acknowledge the issue of the bankruptcy
24 court's denial of leave to amend. In appeals from Civil
25 Rule 12(b)(6) dismissals, we typically review the court's
26 decision to deny leave to amend. See, e.g., Tracht Gut, LLC v.
27 Cnty. of L.A. Treasurer & Tax Collector (In re Tracht Gut, LLC),
28 503 B.R. 804, 814-15 (9th Cir. BAP 2014); Nordeen v. Bank of

1 Am., N.A. (In re Nordeen), 495 B.R. 468, 489-90 (9th Cir. BAP
2 2013). Here, however, the Riveras did not argue in either the
3 bankruptcy court or in their opening appeal brief that the court
4 should have granted them leave to amend. Having not raised the
5 issue in either place, we may consider it forfeited. See Golden
6 v. Chicago Title Ins. Co. (In re Choo), 273 B.R. 608, 613 (9th
7 Cir. BAP 2002).

8 Even if we were to consider the issue, we note that the
9 bankruptcy court gave the Riveras two chances to amend their
10 complaint to state viable claims for relief, examined the claims
11 they presented on three occasions and found them legally
12 deficient each time. Moreover, the Riveras have not provided us
13 with all of the record materials that would have permitted us a
14 full view of the analyses and explanations the bankruptcy court
15 offered them when it reviewed the Riveras' original complaint and
16 their first amended complaint. Under these circumstances, we
17 will not second-guess the bankruptcy court's decision to deny
18 leave to amend. See generally In re Nordeen, 495 B.R. at 489-90
19 (examining multiple opportunities given to the plaintiffs to
20 amend their complaint and the bankruptcy court's efforts to
21 explain to them the deficiencies in their claims, and ultimately
22 determining that the court did not abuse its discretion in
23 denying the plaintiffs leave to amend their second amended
24 complaint).

25 **CONCLUSION**

26 In ruling on DBNTC's motion to dismiss the Riveras' second
27 amended complaint, the bankruptcy court erred when it dismissed
28 the Riveras' first and fifth claims for relief, but the court did

1 not err when it dismissed the Riveras' second, third and fourth
2 claims for relief. Accordingly, we AFFIRM the dismissal of the
3 second, third and fourth claims for relief, we REVERSE the
4 dismissal of the first and fifth claims for relief, and we REMAND
5 for further proceedings.

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