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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MICHAEL T. STOLLER et al., Plaintiffs and Appellants, v. U.S. BANK NATIONAL ASSOCIATION, as Trustee, etc., et al., Defendants and Respondents.	B276902 (Los Angeles County Super. Ct. No. LC102689)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rick S. Brown, Judge. Affirmed in part, reversed in part, and remanded.

Law Office of Charles T. Marshall and Charles T. Marshall for Plaintiffs and Appellants.

Severson & Werson, Jan T. Chilton and Kerry W. Franich, for Defendants and Respondents.

Plaintiffs and appellants Michael and Vanessa Stoller (plaintiffs) filed this lawsuit as part of a series of efforts to stop the financial institutions named as defendants[1] from proceeding with a foreclosure sale of their home. Plaintiffs' operative complaint alleges eleven causes of action, with the primary theory of liability being defendants' alleged lack of authority to foreclose. As pertinent to this appeal, defendants Wells Fargo, MERS, and U.S. Bank demurred to the complaint and the trial court sustained the demurrer without leave to amend. We consider whether this was error and whether plaintiffs have shown they can amend their complaint to cure any of the causes of action found to be defective—including based on a theory advanced for the first time on appeal: that their loan was impermissibly "table funded" because Wall Street, the named lender, was merely acting as an intermediary for the true lender, whose identity was not disclosed.

I. BACKGROUND

A. The Property and Foreclosure

Plaintiffs own a home in Hidden Hills, California (the Property). In 2005, they obtained a $2,480,000 loan from Wall Street and executed a promissory note in that amount. The loan was secured by a deed of trust that was recorded in April 2005.

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[1] Defendants and respondents are Wells Fargo Bank, N.A., d/b/a America's Servicing Company (Wells Fargo), Mortgage Electronic Registration Systems, Inc. (MERS), and U.S. Bank, National Association (U.S. Bank). Plaintiffs also sued Wall Street Mortgage Bankers (Wall Street) and NDEx, LLC (NDEx), but neither of those entities are a party to this appeal.

The deed of trust lists Wall Street Mortgage Bankers, Ltd. as both the "lender" and the "trustee." It does not mention MERS. Shortly thereafter, Wall Street assigned its rights, title, and interest in what the assignment refers to as plaintiffs' "Real Estate mortgage" to MERS.

Additional documents concerning the Property were recorded later, in 2009 and 2011. In January 2009, NDEx recorded a notice of default as the "Agent for Beneficiary." In February 2009, Wells Fargo, as attorney in fact for U.S. Bank, which was in turn the trustee for a mortgage securitization trust (CSFB ARMT 2006-2), executed and recorded a substitution of trustee which named NDEx as the trustee in place of Wall Street. A few days later, MERS executed an assignment of the trust deed for the Property, which transferred its interest in the deed of trust to U.S. Bank as trustee for the securitization trust. This assignment was recorded in early March 2009.

NDEx recorded a notice of trustee's sale in April 2009, and recorded similar notices in May 2010 and May 2011. In August 2011, MERS recorded a "Correction Corporate Assignment of Deed of Trust" to clarify the deed of trust had been assigned to the correct securitization trust, namely "U.S. Bank National Association, As Trustee For Adjustable Rate Mortgage Trust 2006-2, Adjustable Rate Mortgage Backed Pass Through Certificates, Series 2006-2." MERS executed this August 2011 assignment "As Nominee For Wall Street Mortgage Bankers, Ltd., Its Successors and Assigns."

At some point in 2011, plaintiffs began negotiating a loan modification with Wells Fargo. In June, plaintiffs received the terms of a proposed loan modification, but were informed the modification had not yet been approved. The modification would have set monthly payments at approximately $8,500 per month, added arrearages to the loan balance and amortized it over forty years, and set the interest rate at 3.5% for the first five years and 4% for the balance of the loan. In July, plaintiffs were informed the loan modification would be replaced by a special forbearance agreement that provided for a four month trial period. Though plaintiffs' payments would be higher during the trial period, plaintiffs would be provided a permanent loan modification once the trial period was successfully completed.

Plaintiffs ultimately entered into the trial forbearance agreement in August 2011. According to plaintiffs, although they complied with the terms of the agreement, including by timely making the required payments, Wells Fargo did not provide the permanent loan modification.

In May 2012, plaintiffs filed a bankruptcy petition. Plaintiffs did not list any potential legal claims against defendants as assets on their bankruptcy schedules. The bankruptcy was discharged in December 2012.

NDEx recorded another notice of trustee's sale in March 2013. Two months later, Wells Fargo, as servicing agent of U.S. Bank in its role as trustee for the mortgage securitization trust, recorded a substitution of trustee again substituting NDEx as trustee in place of Wall Street.

NDEx recorded yet another notice of trustee's sale in January 2014. About a week later, plaintiffs again submitted a loan modification application to Wells Fargo. Wells Fargo requested additional documents, which plaintiffs submitted, and as of the filing of the operative complaint, plaintiffs had not received a written denial letter. Per the January 2014 notice of trustee's sale, the Property was set to be sold at a foreclosure auction on June 16, 2014. But plaintiff Michael Stoller filed another bankruptcy petition in order to stop defendants from selling the Property. So far as the record reveals, the Property still has not been sold at a foreclosure auction.

B. Plaintiffs' Lawsuit

Plaintiffs filed their original complaint in March 2015. Defendants filed a demurrer and a motion to strike. Plaintiffs thereafter filed a first amended complaint (the operative complaint) before the demurrer was heard.

1. The operative complaint's allegations

The operative complaint asserts eleven causes of action: (1) cancellation of instrument; (2) fraud and deceit; (3) fraud in the inducement; (4) violation of the Homeowner's Bill of Rights (HBOR); (5) violation of California's Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.); (6) statutorily defective foreclosure and injunctive relief to stay trustee's sale;[2] (7) declaratory relief; (8) breach of contract; (9) quiet title; (10) intentional infliction of emotional distress; and (11) violation of the Federal Debt Collection Practices Act (FDCPA).[3] The causes

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[2] Though it is not described as such, this cause of action is, in substance, also a cause of action for violation of the HBOR.

[3] Plaintiffs' opening brief does not address their causes of action for quiet title and violation of the FDCPA. We consider any challenge to the ruling sustaining the demurrer as to these claims waived. (*Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1282 (*Pfeifer*).)

of action for fraud in the inducement and breach of contract[4] were alleged against Wells Fargo and U.S. Bank only; all other causes of action were alleged against all defendants.

In broad strokes, the complaint alleged two categories of claims. First, plaintiffs alleged claims based on the purported invalidity of the recorded assignments and trustee substitutions. The causes of action for cancellation of instruments, statutorily defective foreclosure, quiet title, and declaratory relief all seek relief based on the same premise—defendants had no right to foreclose because they lacked any right or interest in the note or deed of trust. Similarly, their cause of action for violation of California's Unfair Competition Law (UCL) alleged defendants had engaged in unfair, unlawful, and fraudulent business practices by committing forgery and by knowingly recording false documents. Second, plaintiffs alleged claims based on representations made and actions taken by defendants during the foreclosure process. The two fraud causes of action and the breach of contract cause of action sought relief for false representations allegedly made by defendants in relation to plaintiffs' efforts to obtain a permanent loan modification and defendants' failure to provide one. The cause of action for violation of the HBOR alleged defendants continued with plans to conduct the scheduled foreclosure sale even after plaintiffs submitted an allegedly complete loan modification application (a practice plaintiffs refer to as impermissible "dual tracking"). The

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[4] The title of the breach of contract cause of action does not state it is alleged against Wells Fargo, but the text of the cause of action indicates it is alleged against both Wells Fargo and U.S. Bank.

intentional infliction of emotional distress cause of action alleged defendants created “false documents” to “harass and invade the Plaintiff’s privacy to steal the Plaintiffs['] home.”

The operative complaint attached a number of documents, including the deed of trust, the 2009 and 2011 assignments, the 2009 notice of default, the 2009 and 2013 trustee substitutions, and the various recorded notices of trustee’s sale. Defendants also sought judicial notice of these documents.

2. Demurrers to the operative complaint

U.S. Bank, MERS, and Wells Fargo demurred to the operative complaint, arguing it failed to state facts sufficient to constitute a valid cause of action.[5] Among other things, defendants contended the causes of action for cancellation of instrument, statutorily defective foreclosure, and quiet title all failed because plaintiffs did not have standing to maintain a preemptive suit challenging defendants’ authority to conduct a nonjudicial foreclosure.

3. The trial court’s ruling

The trial court sustained the demurrer to all eleven causes of action. The court found the causes of action challenging the propriety of the assignments and trustee substitutions failed for a number of reasons, including because the obligations of a borrower under a promissory note are not changed by an assignment and there is no rule requiring a substitution of trustee to be recorded prior to the recording of a notice of default.

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[5] Plaintiffs dismissed the action as against Wall Street after Wall Street stipulated to produce documents to plaintiffs.

The fraud and UCL causes of action failed to state valid claims, the court reasoned, because plaintiffs were obligated to repay their loan and thus failed to allege damage or injury. The court found plaintiffs' HBOR cause of action failed because plaintiffs previously applied for a loan modification and had not alleged there had been a change in circumstances that would justify a second loan modification request. The trial court concluded plaintiffs' breach of contract claim failed because (a) the statute of frauds barred oral loan modifications and plaintiffs had not alleged the contract was in writing, and (b) plaintiffs alleged no consideration that would make the forbearance agreement an actual contract. Finally, the intentional infliction of emotional distress claim failed because plaintiffs insufficiently alleged outrageous conduct and the declaratory relief claim could not survive given the court's conclusion that no other causes of action were viable.

The court invited the parties to submit supplemental briefing on the issue of leave to amend, which they did. After hearing additional argument, the trial court sustained the demurrer without leave to amend "based on *Saterbak*[*v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 814-815 (*Saterbak*)]," which held a plaintiff may not bring a pre-foreclosure lawsuit to challenge a defendant's ability to foreclose.

II. DISCUSSION

To prevail in this appeal from the trial court's demurrer ruling, plaintiffs must state the elements of each cause of action they seek to pursue and explain why the facts alleged are sufficient to state the cause of action. Plaintiffs' briefing leaves much to be desired on this score. Where plaintiffs have not supported their contentions with reasoned argument and citation to authority, we deem those arguments waived. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 (*Cahill*).)

With one caveat, we conclude the trial court properly sustained the demurrer to plaintiffs' causes of action without leave to amend. Plaintiffs' action, particularly reflected in the cancellation of instrument and declaratory relief claims, is a preemptive challenge to defendants' authority to foreclose. Such challenges are generally not permitted by California law, and they are unquestionably not permitted where, as here, a plaintiff has not properly alleged the pertinent foreclosure-related documents are void. Plaintiffs' table-funding theory, presented for the first time on appeal, does not cure the problem because claims relying on such a theory are barred by the applicable statutes of limitations. Finally, judicial decisions prohibiting preemptive challenges to an entity's right to foreclose cannot be said to be unconstitutional deprivations of federal due process—this is not a serious argument and we easily reject it.

Plaintiffs' causes of action for violation of the HBOR fail to state valid claims because much of the conduct plaintiffs challenge predates the HBOR's enactment and because plaintiffs' allegations in any event do not establish defendants violated the pertinent HBOR provisions. The trial court also correctly sustained defendants' demurrer to their intentional infliction of emotional distress, UCL, and fraud causes of action without leave to amend because plaintiffs have failed to demonstrate they can amend to allege viable causes of action.

We further hold the trial court properly sustained the demurrer to plaintiffs' breach of contract cause of action because plaintiffs' complaint fails to adequately allege whether the contract was in writing (an oral contract would be unenforceable under the statute of frauds) and because plaintiffs have alleged no facts that would permit a factfinder to conclude the contract cause of action is not the property of their bankruptcy estate. These are deficiencies that could potentially be remedied by amendment, however, so we will remand with directions to permit plaintiffs a final opportunity to amend, solely as to their breach of contract claim.

A. Standard of Review

We review an order sustaining a demurrer without leave to amend de novo. (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010; *Morales v. 22nd Dist. Agricultural Assn.* (2016) 1 Cal.App.5th 504, 537.) "[W]e accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6[ ].)" (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn. omitted (*Yvanova*).)

"'[T]he plaintiff has the burden of showing that the facts pleaded are sufficient to establish every element of the cause of action and overcoming all of the legal grounds on which the trial court sustained the demurrer, and if the defendant negates any essential element, we will affirm the order sustaining the demurrer as to the cause of action.'" (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1490-1491; accord, *Carman v. Alvord* (1982) 31 Cal.3d 318, 324 ["A judgment of dismissal after a demurrer has been sustained without leave to amend will be affirmed if proper on any grounds stated in the demurrer, whether or not the [trial] court acted on that ground”]; *E.L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 504, fn. 2 [validity of the trial court’s action, not the reason for its action, is what is reviewable].)

“To determine whether the trial court should, in sustaining the demurrer, have granted plaintiff leave to amend, we consider whether on the pleaded and noticeable facts there is a reasonable possibility of an amendment that would cure the complaint’s legal defect or defects. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081[ ].)” (*Yvanova*, *supra*, 62 Cal.4th at p. 924.)

B. The Causes of Action Challenging Defendants’ Right to Foreclose

Plaintiffs support several of their causes of action, including those for cancellation of instrument and declaratory relief, with allegations that assignments or trustee substitutions in the chain of title are void for various reasons. Because the foreclosure sale has not yet occurred, both causes of action constitute pre-foreclosure challenges to defendants’ authority to institute foreclosure proceedings. As we shall describe, borrowers generally lack standing to bring such preemptive actions in the nonjudicial foreclosure context, and none of the three arguments plaintiffs present to avoid this general rule is persuasive.

1. Overview of nonjudicial foreclosure law

“A deed of trust to real property acting as security for a loan typically has three parties: the trustor (borrower), the beneficiary (lender), and the trustee. ‘The trustee holds a power of sale. If the debtor defaults on the loan, the beneficiary may demand that the trustee conduct a nonjudicial foreclosure sale.' (*Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 813[ ].) The nonjudicial foreclosure system is designed to provide the lender-beneficiary with an inexpensive and efficient remedy against a defaulting borrower, while protecting the borrower from wrongful loss of the property and ensuring that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser. (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830[ ].)" (*Yvanova*, *supra*, 62 Cal.4th at p. 926.)

"To preserve this remedy for beneficiaries while protecting the rights of borrowers, 'Civil Code sections 2924 through 2924k provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust.' [Citation.]" (*Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 10.) "[I]t is the trustee who formally initiates the nonjudicial foreclosure, by recording first a notice of default and then a notice of sale[; however,] the trustee may take these steps only at the direction of the person or entity that currently holds the note and the beneficial interest under the deed of trust—the original beneficiary or its assignee—or that entity's agent." (*Yvanova*, *supra*, 62 Cal.4th at p. 927.)

"'Because of the exhaustive nature of this scheme, California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute.' [Citations.]" (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154 (*Gomes*).)

2. Borrowers generally lack standing to bring a pre-foreclosure challenge to an entity's authority to foreclose

In its most recent opinion in this area, *Yvanova*, *supra*, 62 Cal.4th 919, our Supreme Court clarified that in a post-foreclosure context a borrower has standing "to claim a nonjudicial foreclosure was wrongful because an assignment by which the foreclosing party purportedly took a beneficial interest . . . was not merely voidable but void." (*Id.* at pp. 942-943.) Our high court has not, however, addressed the question of whether a plaintiff has standing to challenge a foreclosure before the sale takes place. Indeed, *Yvanova* expressly declined to decide whether, or under what circumstances, a pre-foreclosure suit may be brought. (*Id.* at p. 924 ["We do not hold or suggest that a borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed"].)

Persuasive Court of Appeal decisions, however, have rejected "preemptive suits [to determine whether a party had authority to initiate a nonjudicial foreclosure] because they 'would result in the impermissible interjection of the courts into a nonjudicial scheme enacted by the California Legislature.' (*Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 513[ ], disapproved on other grounds in *Yvanova*, *supra*, 62 Cal.4th at p. 939, fn. 13[ ]; see *Gomes*[, *supra*,] 192 Cal.App.4th [at p.] 1156[ ] ['California's nonjudicial foreclosure law does not provide for the filing of a lawsuit to determine whether MERS has been authorized by the holder of the Note to initiate a foreclosure'].) As the court reasoned in *Gomes*: '[The borrower] is not seeking a remedy for misconduct. He is seeking to impose the additional requirement that MERS demonstrate in court that it is authorized to initiate a foreclosure. . . . [S]uch a requirement would be inconsistent with the policy behind nonjudicial foreclosure of providing a quick, inexpensive and efficient remedy.' (*Gomes*, *supra*, at p. 1154, fn. 5.)" (*Saterbak*, *supra*, 245 Cal.App.4th at pp. 814-815, fn. omitted.) We conclude the trial court properly sustained defendants' demurrer to the causes of action challenging their authority to foreclose for this reason.

3. Plaintiffs have not alleged a void assignment

Plaintiffs argue their operative complaint alleged facts demonstrating assignments and/or substitutions of trustee in the chain of title were void. Though *Yvanova*'s holding was, by its own terms, confined to post-foreclosure lawsuits (*Yvanova*, *supra*, 62 Cal.4th at p. 935), *Saterbak* analyzes *Yvanova*'s impact on a pre-foreclosure claim. As we have just quoted, *Saterbak* disallowed a pre-foreclosure action but also analyzed, in the alternative, whether the plaintiff had in fact validly alleged a void assignment. (*Saterbak*, *supra*, 245 Cal.App.4th at p. 815.) Federal district courts in California applying *Saterbak* have largely adopted this same "belt and suspenders" approach. (See, e.g., *Wyman v. First Am. Title Ins. Co.* (N.D.Cal. Feb. 8, 2017, No. C 16-07079 WHA) 2017 U.S.Dist.LEXIS 18231, at *9 [collecting cases].) We do the same and accordingly consider whether plaintiffs in any event have alleged facts indicating "an assignment by which the foreclosing party purportedly took a beneficial interest . . . was not merely voidable but void." (*Yvanova*, *supra*, at pp. 942-943.)

Plaintiffs contend they have alleged a void assignment because (1) MERS's participation in the chain of assignments renders one or more of the relevant assignments void, (2) the assignment from MERS to U.S. Bank was an impermissible "self-to-self" assignment, and (3) the February 2009 substitution of trustee is void because it does not meet Civil Code section 1095 requirements.[6]

a. MERS's role

Plaintiffs argue MERS could neither receive nor affect a valid assignment of the deed of trust because MERS cannot hold any beneficial interest in plaintiffs' debt. They also argue MERS cannot be an *agent* with respect to the deed of trust because MERS was identified as a *beneficiary* in the 2005 assignment from Wall Street to MERS.

"MERS was formed by a consortium of residential mortgage lenders and investors to streamline the transfer of mortgage loans and thereby facilitate their securitization. A member lender may name MERS as mortgagee on a loan the member originates or owns; MERS acts solely as the lender's 'nominee,' having legal title but no beneficial interest in the loan. When a loan is assigned to another MERS member, MERS can execute

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[6] Plaintiffs suggest in passing that the assignment from Wall Street to MERS was void because it was described as an assignment of a "mortgage" and not an assignment of a "deed of trust." The argument is insufficiently presented in the opening brief (*Cahill*, *supra*, 194 Cal.App.4th at p. 956) and we treat the point as waived for that reason. Regardless, plaintiffs allege no facts demonstrating MERS did not receive an assignment of the deed of trust. (See *Wilson v. Pacific Coast Title Ins. Co.* (1951) 106 Cal.App.2d 599, 602 [assignment need not be recorded to be effective].)

the transfer by amending its electronic database. When the loan is assigned to a nonmember, MERS executes the assignment and ends its involvement." (*Yvanova*, *supra*, 62 Cal.4th at p. 931, fn.7.)

We disagree with plaintiffs' contention that the pertinent MERS assignments are invalid because the holder of plaintiffs' deed of trust is not the holder of a beneficial interest in the related loan. While, "[o]rdinarily, the owner of a promissory note secured by a deed of trust is designated as the beneficiary of the deed of trust . . . . [u]nder the MERS System . . . , MERS is designated as the beneficiary in deeds of trust, acting as 'nominee' for the lender, and granted the authority to exercise legal rights of the lender." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 267 (*Fontenot*), disapproved on other grounds in *Yvanova*, *supra*, 62 Cal.4th 919.) MERS's lack of beneficial interest in a note does not necessarily render MERS incapable of assigning the note because it may do so as the nominee or agent of the lender that possesses an assignable interest, provided the agency agreement between MERS and the lender granted MERS such authority. (*Id.* at pp. 270-271.) Here, MERS was designated the beneficiary under the 2005 assignment, and thereafter identified itself as Wall Street's nominee on the 2009 and 2011 assignments to U.S. Bank, pursuant to which it assigned the beneficial interest in the deed of trust "[t]ogether with the note." The allegation that MERS possessed no beneficial interest in the note is not sufficient to demonstrate MERS lacked authority to make a valid assignment.

To plaintiffs' second point, "[t]here is nothing inconsistent in MERS's being designated both as the beneficiary and as a nominee, i.e., agent, for the lender. The legal implication of the designation is that MERS may exercise the rights and obligations of a beneficiary of the deed of trust, a role ordinarily afforded the lender, but it will exercise those rights and obligations only as an agent for the lender, not for its own interests." (*Fontenot*, *supra*, 198 Cal.App.4th at p. 273.) Given the foregoing, we see "no reason to doubt the legitimacy of the common arrangement whereby MERS holds bare legal title as mortgagee of record and the noteholder alone enjoys the beneficial interest in the loan." (*Culhane v. Aurora Loan Services of Nebraska* (1st Cir. 2013) 708 F.3d 282, 291.)

b. self-to-self transfer

Plaintiffs next argue the assignments from MERS, as nominee for Wall Street, to U.S. Bank, as trustee for the securitized trusts, are void self-to-self assignments because all the parties involved work for the assignee.

Plaintiffs' complaint does not allege either of the individuals who signed the assignments on behalf of MERS were not, in fact, employed by MERS. However, their opening brief asserts other companies, NDEx and Wells Fargo, employed the two individuals. Statements in an appellate brief are no substitute for a properly drafted pleading.

Even assuming (charitably) the brief's contention is an implied request for leave to amend, the theory is still unavailing. Employees of other involved entities typically sign as officers or employees of MERS. As explained by the Ninth Circuit Court of Appeals: "MERS relies on its members to have someone on their own staff become a MERS officer with the authority to sign documents on behalf of MERS. [Citations.] As a result, most of the actions taken in MERS's own name are carried out by staff at the companies that sell and buy the beneficial interest in the loans." (*Cervantes v. Countrywide Home Loans, Inc.* (9th Cir. 2011) 656 F.3d 1034, 1040.) Furthermore, "[a] dual agency role of an individual employed by a mortgage company and signing on behalf of MERS is a necessary consequence of this system rather than an indication of any impropriety." (*Halajian v. Deutsche Bank Nat. Trust Co.* (E.D. Cal. Jan. 9, 2015, No. 1:12-cv-00814-AWI-GSA) 2015 WL 139703, at *3.) Here, each of the two individuals signed the respective assignments in their capacity as an "Assistant Secretary" of MERS, not as an employee of any other entity. Plaintiffs cite no authority prohibiting "dual agency" and we are aware of none. Plaintiffs have not alleged facts demonstrating an impermissible self-to-self transfer or assignment.

c. violation of Civil Code section 1095

Plaintiffs' final argument for deeming the challenged assignments and substitutions void focuses specifically on the February 9, 2009, substitution of trustee. Plaintiffs claim the substitution did not comply with Civil Code section 1095.[7] That statute states that when "an attorney in fact executes an

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[7] Plaintiffs appear to expand their argument regarding Civil Code section 1095 in their reply brief to encompass not just the substitution of trustee but also the assignments of the deed of trust. To the extent plaintiffs do so, we are not required to consider the argument because it was not raised in their opening brief. (*Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1292, fn. 6 ["Arguments presented for the first time in an appellant's reply brief are considered waived"].)

instrument transferring an estate in real property, he must subscribe the name of his principal to it, and his own name as attorney in fact."

The plain language of Civil Code section 1095 defeats plaintiffs' theory because it does not require a substitution of trustee to be executed by an attorney in fact. A substitution of trustee does not transfer any "estate in" property; it merely changes the entity serving as trustee under the deed of trust. (*Yvanova*, *supra*, 62 Cal.4th at p. 927 [trustee acts only "as an agent for the borrower-trustor and lender-beneficiary"]; *Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 510-511 [trustee under a deed of trust holds "'bare legal title—sufficient only to permit him to convey the property at the out of court sale'" and "'carries none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor in the payment of his debt.'"]; 4 Miller & Starr, Cal. Real Estate (4th ed. 2016) § 12:1, p. 12-3 ["A security device, such as a mortgage or a deed of trust, is an interest in land that does not convey any estate in real property. The interest conveyed by such a device is merely a lien or charge on the land encumbered"]; see also Civ. Code, § 2920.) Compliance with Civil Code section 1095 was not required for the substitution of trustee to be valid.

4. Plaintiffs have not demonstrated leave to amend should be granted

As now alleged, the operative complaint presents an impermissible pre-foreclosure challenge for the reasons we have given. For the first time on appeal, plaintiffs advance a new theory of voidness, presumably intended to avoid the prohibition on pre-foreclosure actions. They assert the loan they received in 2005 was “table funded” in violation of California statutes and regulations. “‘Table-funding’ is defined as a ‘settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds’ [(See, e.g.], 24 C.F.R. § 3500.2.[)] In a table-funded loan, the originator closes the loan in its own name, but is acting as an intermediary for the true lender, which assumes the financial risk of the transaction. The timing of the assignment is therefore sometimes pivotal in determining whether a residential mortgage loan is table-funded because the determinative question is who bears the risk of the transaction.” (*Easter v. Am. West Fin.* (9th Cir. 2004) 381 F.3d 948, 955.)

A plaintiff may propose new amendments for the first time on appeal to show leave to amend should be granted. (*Connerly v. State of California* (2014) 229 Cal.App.4th 457, 460.) When doing so, “[t]he plaintiff must clearly and specifically set forth the ‘applicable substantive law’ [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary.” (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44, (*Rakestraw*).) The plaintiff bears the burden of demonstrating in what manner the pleading can be amended and how the amendment will change its legal effect. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.)

Plaintiffs propose to add the following factual allegations to their complaint: (1) “the true source of funds [for the loan] were not from [Wall Street] but from DLJ Mortgage, Inc., a privately held New York corporation that is not licensed to lend money in California"; and (2) "on the day the loan funded, [Wall Street] purportedly transferred the loan to the true lender, DLJ Capital Mortgage, Inc. ('DLJ'), an unlicensed lender, while assigning beneficial interest in the deed of trust to MERS." The thrust of their table-funding theory is that Wall Street was a mere conduit and the transaction as structured deprived them of the right to know who the "true" lender was.

Plaintiffs' proposed amendment to allege a table-funding theory of liability is not viable because it would be barred by the statute of limitations. Pursuant to Civil Code section 3412, "[a] written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may 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 cancelled." Ordinarily, a four-year statute of limitations under Code of Civil Procedure section 343 applies to a suit to cancel a written instrument. (*Robertson v. Superior Court* (2001) 90 Cal.App.4th 1319, 1326 (*Robertson*).) This remains true even if the plaintiff claims an instrument is void as violative of public policy. (*Moss v. Moss* (1942) 20 Cal.2d 640, 644.) When the alleged claim involves fraud or mistake, the applicable statute is three years from the time of discovery of the facts constituting fraud or mistake. (*Robertson*, *supra*, at p. 1326; *Zakaessian v. Zakaessian*, 70 Cal.App.2d 721, 725 (1945); Code Civ. Proc., § 338, subd. (d).)

Here, the loan transaction took place in April 2005. The original complaint in this action was filed nearly ten years later, in March 2015. Any amended cause of action to allege a table-funded void trust deed or promissory note would be time barred under any relevant statute of limitation.[8]

Plaintiffs do not discuss any of the limitations periods. Instead, they argue there is no statute of limitations for a claim regarding a void instrument. That is not the law. (*Walters v. Boosinger* (2016) 2 Cal.App.5th 421, 433 [case law "'make[s] clear,' that *'statutes of limitations apply whether the document under challenge is asserted to be "void" or "voidable"'*"].) Plaintiffs also argue the accrual of the statute of limitations cannot be decided on demurrer because it is an issue of fact. Incorrect again, based on plaintiffs' showing—or lack thereof: "Where the operative facts are undisputed, the question of the application of the statute of limitations is a matter of law." (*Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1142.)

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[8] The date a loan transaction occurs is the starting point of a statute of limitations analysis. (*Schneidereit v. San Luis Capital, Inc.* (C.D.Cal. Jan. 16, 2013, No. CV 12 - 8253 PSG (Ex)) 2013 U.S.Dist.LEXIS 199997, at *10.) Plaintiffs have not identified any *facts* that would indicate their cause of action accrued later, or that the statute of limitations was tolled. Though they alternately assert their harm is either ongoing or their claim did not become ripe until January 2014, they do so only in conclusory fashion. *City of Vista v. Robert Thomas Securities, Inc.* (2000) 84 Cal.App.4th 882 (*City of Vista*) is inapposite. While *City of Vista* addresses the accrual of causes of action, it does so where "damages are an element of a cause of action." (*Id.* at p. 886.) A cancellation of instrument cause of action only requires a showing the instrument "may cause serious injury" if it is not cancelled, not that actual damage has been suffered.

5. Due process

Plaintiffs argue that preventing borrowers from suing to stop foreclosure *before* it occurs violates their right to procedural due process under the Fourteenth Amendment. The Fourteenth Amendment provides "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" (U.S. Const. amend. XIV, § 1.) Our Supreme Court has held "California's nonjudicial foreclosure procedure does not constitute state action and is therefore immune from the procedural due process requirements of the federal Constitution." (*Garfinkle v. Superior Court of Contra Costa County* (1978) 21 Cal.3d 268, 281 (*Garfinkle*).) The Ninth Circuit Court of Appeals has similarly held other states' nonjudicial foreclosure schemes do not implicate the Fourteenth Amendment because no state action is involved. (*Apao v. Bank of New York* (9th Cir. 2003) 324 F.3d 1091, 1095 [analyzing Hawaii law].)

Only private entities were involved in instituting nonjudicial foreclosure proceedings concerning the Property, and insofar as plaintiffs' constitutional challenge focuses on the actions of those entities, it fails under *Garfinkle*. Insofar as plaintiffs contend judicial decisions faithfully applying California's statutory scheme are themselves unconstitutional, the argument is frivolous.

C. The Causes of Action for Violation of the HBOR

In their operative complaint, plaintiffs alleged two causes of action for violation of the HBOR: (1) a claim for "statutorily defective foreclosure" pursuant to former section 2924.17; and (2) a claim for violation of former Civil Code section 2923.6. Plaintiffs' "statutorily defective foreclosure" cause of action alleges defendants commenced nonjudicial foreclosure proceedings even though they owned no beneficial interest in the deed of trust for the Property. Plaintiffs' other HBOR cause of action is premised on the allegation defendants dual-tracked their loan by continuing to postpone the previously noticed foreclosure sale after plaintiffs had submitted a complete loan modification application. Both causes of action seek to enjoin the foreclosure sale pursuant to former Civil Code section 2924.12, subdivision (a)(1).

Plaintiffs maintain the operative complaint as drafted sufficiently states claims for violation of former Civil Code sections 2924.17, subdivision (b) and 2923.6. They also assert it could be amended to allege defendants violated the HBOR by failing to attach declarations to the post-January 2013 notices of trustee's sale, providing an insufficiently detailed declaration with the 2009 notice of default, and failing to notify plaintiffs of their right to request copies of the note, deed of trust, assignments, or accounting records.

1. HBOR

"The [HBOR] (Civ. Code, §§ 2920.5, 2923.4-2923.7, 2924, 2924.9-2924.12, 2924.15, 2924.17-2924.20) . . . was enacted 'to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure.' (§ 2923.4, subd. (a).)" (*Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1272.) The HBOR is not retroactive. (*Lucioni v. Bank of America, N.A.* (2016) 3 Cal.App.5th 150, 158 (*Lucioni*);

Rockridge Trust v. Wells Fargo, N.A. (N.D.Cal. 2013) 985 F.Supp.2d 1110, 1153.) Accordingly, it applies only to documents recorded and actions taken after its effective date, January 1, 2013.

2. *Plaintiffs have not stated a claim for violation of former Civil Code section 2924.17*

Former Civil Code section 2924.17, subdivision (a) provides a "notice of sale . . . or substitution of trustee recorded by or on behalf of a mortgage servicer in connection with a foreclosure subject to the requirements of [Civil Code] Section 2924 . . . shall be accurate and complete and supported by competent and reliable evidence." Subdivision (b) states, "[b]efore recording or filing any of the documents described in subdivision (a), a mortgage servicer shall ensure that it has reviewed competent and reliable evidence to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and loan information." (Civ. Code, § 2924.17, subd. (b).) Former Civil Code section 2924.12, subdivision (a) provides in relevant part, "[i]f a trustee's deed upon sale has not been recorded, a borrower may bring an action for injunctive relief to enjoin a material violation of Section . . . 2924.17."

As pertinent to this appeal, plaintiffs' operative complaint alleges defendants violated former Civil Code section 2924.17 by initiating foreclosure proceedings without the authority to do so. Specifically, plaintiffs alleged the April 2007 assignment of the deed of trust to MERS and the February 2009 assignment from MERS to U.S. Bank were both void and, as a result, the January 2009 notice of default was void because U.S. Bank had no authority to initiate the foreclosure.

Plaintiffs' claim for a violation of former Civil Code section 2924.17 fails because the HBOR applies only to documents recorded after January 1, 2013. (*Lucioni*, *supra*, 3 Cal.App.5th at p. 158.) The relevant assignments and notice of default were all executed and recorded in 2009 and 2011.

Plaintiffs attempt to preserve their claim, however, by arguing that the post-HBOR recorded notices of trustee sale and trustee substitutions are infirm under former Civil Code section 2924.17 because they are predicated on the assertedly void assignments, which cannot be competent or reliable evidence. This argument fails for two reasons. First, as we have already concluded, plaintiffs have not alleged a void assignment. Second, former "section 2924.17 does not impose a preforeclosure duty on foreclosing entities to demonstrate that they have a right to foreclose." (*Lucioni*, *supra*, 3 Cal.App.5th at p. 162.) In other words, as we explained in *Lucioni*, former "section[ ] 2924.17 . . . do[es] not create a right to litigate, preforeclosure, whether the foreclosing party's conclusion that it had the right to foreclose was *correct*. If the Legislature wished to authorize as much, it could have authorized injunctive relief for a violation of [Civil Code] section 2924[, subdivision] (a)(6), but it did not." (*Id*. at p. 163.)

3. Plaintiffs have not stated a claim for violation of Civil Code section 2923.6

Plaintiffs argue their "dual tracking" allegations are sufficient to state a valid cause of action for violation of HBOR. The operative complaint alleges plaintiffs submitted a completed application for a loan modification to Wells Fargo on January 31, 2014. Plaintiffs concede the pertinent notice of trustee's sale was recorded on January 23, 2014, i.e., before they submitted their modification application, but argue defendants nonetheless engaged in impermissible dual tracking because they continued to "postpone" the trustee's sale, which was scheduled for June 16, 2014.

Former Civil Code section 2923.6, subdivision (c) provides in pertinent part: "If a borrower submits a complete application for a first lien loan modification offered by, or through, the borrower's mortgage servicer, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending" until the borrower is provided with a written determination regarding his application and the time for an appeal (30 days) has expired. Subdivision (g) of former section 2923.6 additionally provides: "[T]he mortgage servicer shall not be obligated to evaluate applications from borrowers who have already been evaluated . . . prior to January 1, 2013, or who have been evaluated or afforded a fair opportunity to be evaluated consistent with the requirements of this section, unless there has been a material change in the borrower's financial circumstances since the date of the borrower's previous application and that change is documented by the borrower and submitted to the mortgage servicer." Former section 2923.6, subdivision (h) clarifies an application is be deemed "'complete'" for purposes of the section "when a borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer."

Plaintiffs' Civil Code section 2923.6 claim fails for three reasons. First, plaintiffs had not yet submitted their loan modification application when defendants recorded the January 2014 notice of trustee's sale. Because plaintiffs do not (and apparently cannot) allege the trustee's sale went forward, they have also failed to allege defendants violated section 2923.6 by "conduct[ing] a trustee's sale" while a complete modification application was pending. Second, any objection to the notice of trustee's sale is now moot because defendants did not proceed with the sale and the purportedly improper notice has expired. Third, the operative complaint alleges plaintiffs applied for a loan modification in 2011. The operative complaint further alleges (albeit obliquely) that plaintiffs were given some type of foreclosure reprieve in response, indicating defendants evaluated their application. Because plaintiffs' 2011 loan modification application was evaluated, former Civil Code section 2923.6, subdivision (g) did not require defendants to evaluate plaintiffs' 2014 application "unless there ha[d] been a material change in [their] financial circumstances since the date of [their] previous application." (Former § 2923.6, subd. (g).) Plaintiffs alleged no such material change in their complaint, nor do they present any facts on appeal indicating they could do so.

4. Plaintiffs have not demonstrated they can amend to allege a viable HBOR cause of action

Plaintiffs offer no new facts to support a further amended claim for violation of the HBOR. Instead, they present two new legal theories on which they contend the facts already alleged in their complaint would support HBOR relief. Neither is viable.

First, plaintiffs contend the notices of trustee's sale recorded after January 1, 2013, violated former Civil Code section 2923.55 because the notices must be supported by an attached declaration, which was absent. The argument fails for the most fundamental of reasons: the statute contains no such requirement. The applicable version of section 2923.55, subdivision (c)[9] provides "[a] notice of default recorded pursuant to Section 2924 shall include a declaration that the mortgage servicer has contacted the borrower, has tried with due diligence to contact the borrower as required by this section, or that no contact was required because the individual did not meet the definition of 'borrower' pursuant to subdivision (c) of Section 2920.5." In other words, former section 2923.55, subdivision (c) only requires a declaration regarding contact with the borrower to be attached to a notice of default recorded after January 1, 2013. It does not require any such declaration to be attached to a notice of trustee's sale, and plaintiffs do not cite any authority for such a requirement.[10]

Second, plaintiffs claim defendants violated former Civil Code section 2923.55 because they did not notify plaintiffs of their right to request copies of their promissory note, deed of trust, any assignments, or payment history pursuant to former section 2923.55, subdivision (b)(1)(B)(iii). This contention fails for a similar reason. Former section 2923.55 only required such notices to be sent before the recording of a notice of default. (Former § 2925.55, subd. (a)(1), as amended by Stats. 2013, ch.

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[9] Though plaintiffs' opening brief cites section 2923.5, the argument substantively refers to section 2923.55.

[10] To the extent plaintiffs argue the 2009 notice of default's "conclusory language" violates the HBOR, their challenge fails because the notice of default was recorded in 2009 and the HBOR is not retroactive.

76, § 15.) The only notice of default recorded here was recorded in 2009, years before the HBOR was enacted. Accordingly, the HBOR does not apply to the notice of default.

D. The Breach of Contract Cause of Action

The operative complaint alleges Wells Fargo provided plaintiffs with something alternately described as a "special forbearance" and a "trial payment agreement"; informed plaintiffs the agreement provided for a four-month trial period; and advised plaintiffs they would be provided a permanent loan modification after the successful completion of the trial period. The complaint further alleges plaintiffs fully complied with the trial payment agreement but Wells Fargo never provided a permanent loan modification.

Plaintiffs argue Wells Fargo's failure to provide the permanent modification was a breach "of the TPP [trial period plan], which is an enforceable contract." In support of their theory, plaintiffs rely on a series of cases discussing TPPs offered under a federal program called the Home Affordable Modification Program (HAMP). (See, e.g., *Corvello v. Wells Fargo Bank, NA* (9th Cir. 2013) 728 F.3d 878; *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780.) These cases are inapposite because plaintiffs have not alleged their trial payment agreement was, in fact, a TPP under HAMP.

Nevertheless, we assess whether the complaint can be said to more generally allege the breach of a contract. "'A cause of action for breach of contract requires proof of the following elements: (1) existence of the contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damages to plaintiff as a result of the breach.' [Citation.]" (*Miles* *v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 402.) Plaintiffs allege they entered into a special forbearance/trial payment agreement with Wells Fargo and the operative complaint specifies the payments they were to make under the agreement. The operative complaint further alleges plaintiffs timely made the required monthly payments and otherwise "substantially performed" all of their conditions and defendants breached the agreement by failing to provide them with a permanent loan modification, which caused them damages.

Defendants argue plaintiffs' breach of contract claim fails because plaintiffs' complaint is unclear as to whether the alleged contract (or, perhaps, contracts) was (or were) written or oral. Though the operative complaint states in one instance that plaintiffs "executed" the trial payment agreement, all of the allegations regarding the promised loan modification are phrased as oral representations.[11] The portion of the operative complaint devoted to alleging the breach of contract cause of action does not resolve the ambiguity; it merely alleges Wells Fargo and U.S. Bank "breached an agreement which provided that upon Plaintiffs' making four monthly payments that they would be provided a permanent loan modification."

The distinction between a written or an oral contract to modify the loan is important because the latter would be unenforceable for failure to comply with the statute of frauds.

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[11] For example, the complaint alleges a representative "advised" plaintiffs they would be provided a permanent loan modification if the trial was successful, and they "were told" the terms of the promised loan modification.

(See *Granadino v. Wells Fargo Bank, N.A.* (2015) 236 Cal.App.4th 411, 416 ["A mortgage or deed of trust is subject to the statute of frauds"]; *Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544, 553 ["[a]n agreement to modify a contract that is subject to the statute of frauds is also subject to the statute of frauds"].)

Plaintiffs' opening brief suggests, though it does not outright state, that the trial payment agreement and promise to provide a permanent forbearance agreement were one and the same. Additionally, a charitable reading of the complaint supports an inference that the alleged promise to provide a permanent loan modification upon satisfaction of the terms of the trial payment agreement was part of a written trial payment agreement. We believe these ambiguities (written or oral, one agreement or two) could be cured by amendment if the agreement(s) was (or were) indeed written.[12]

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[12] Plaintiffs also contend a new theory—that defendants failed to satisfy a condition precedent in the deed of trust—would support a viable breach of contract cause of action. This theory is premised on a clause that requires the lender to, among other things, "inform Borrower of . . . the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale" prior to acceleration following the borrower's breach. Even assuming plaintiffs could amend their complaint to allege they never received such a notice (a fact not alleged in their complaint), the theory would fail because there is no prospect of alleging resulting damage. The pendency of this action indicates defendants' purported failure to provide plaintiffs with notice of their right to "bring a court action to assert the non-existence of a default or any other defense . . . to

Defendants, however, point to a more troubling deficiency in the breach of contract claim as alleged, arguing plaintiffs lack standing to pursue the claim because it is property of plaintiffs' chapter 7 bankruptcy estate. In doing so, defendants ask us to judicially notice certain documents filed during plaintiffs' chapter 7 proceedings, though those documents were not part of the record below. Because lack of standing can be raised at any time, even for the first time on appeal (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 438-439), we address defendants' contentions and take judicial notice of plaintiffs' chapter 7 bankruptcy petition, bankruptcy schedules, and the discharge order, all of which were filed in the United States Bankruptcy Court for the Central District of California.[13] (Evid. Code, §§ 452, 459; Cal. Rules of Court, rule 8.252.)

"As a general matter, upon the filing of a petition for bankruptcy, 'all legal or equitable interests of the debtor in property' become the property of the bankruptcy estate and will be distributed to the debtor's creditors. [(11 U.S.C.] § 541(a)(1).[)]" (*Rousey v. Jacoway* (2005) 544 U.S. 320, 325; see also *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1001 (*Cloud*).) This means "after a person files for bankruptcy protection, any causes of action previously possessed by that person becomes the property of the bankrupt estate. [Citations.]"

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acceleration and sale" did not deprive plaintiffs of the opportunity to bring suit.

[13] In light of our decision to affirm the order sustaining the demurrer to all causes of action other than the breach of contract claim, we analyze the bankruptcy issue only in regard to that claim.

(*Cloud*, *supra*, at p. 1001; see also *Sierra Switchboard Co. v. Westinghouse Electric Corp.* (9th Cir. 1986) 789 F.2d 705, 707 ["The scope of section 541 is broad, and includes causes of action"].)

"[A] Chapter 7 debtor may not prosecute on his or her own a cause of action belonging to the bankruptcy estate unless the claim has been abandoned by the trustee." (*Bostanian v. Liberty Savings Bank* (1997) 52 Cal.App.4th 1075, 1081.) "[P]roperty not formally scheduled in the bankruptcy proceeding is *not abandoned* at the close of the bankruptcy proceeding . . . . [Citation.]" (*M & M Foods, Inc. v. Pacific American Fish Co., Inc.* (2011) 196 Cal.App.4th 554, 563; 11 U.S.C. § 554(d).) If a debtor "failed properly to schedule an asset, including a cause of action, that asset continues to belong to the bankruptcy estate and [does] not revert to [the debtor]" upon discharge. (*Cusano v. Klein* (9th Cir. 2001) 264 F.3d 936, 945-946 (*Cusano*).)

Plaintiffs' chapter 7 bankruptcy estate was created when they filed their bankruptcy petition on May 9, 2012. Accordingly, any causes of action that accrued prior to that date belonged to the bankruptcy estate and only reverted to plaintiffs if they were properly listed as assets in the bankruptcy proceedings. A cause of action belongs to the debtor at the time of the bankruptcy filing (and thus is transferred into the bankruptcy estate) if the cause of action had "accrued" at the time. (*State Farm Life Ins. Co. v. Swift* (5th Cir. 1997) 129 F.3d 792, 795; see *Cusano*, *supra*, 264 F.3d at p. 947.) To determine accrual for this purpose, bankruptcy courts look to applicable state law. (*Cusano*, *supra*, at p. 947.) Under California law, "[a] cause of action accrues 'when [it] is complete with all of its elements'—those elements being wrongdoing, harm, and causation." (*Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 797.) The fact a statute of limitations has not yet commenced does not necessarily affect whether the cause of action accrued for purposes of determining the scope of the bankruptcy estate. (See *Cusano*, *supra*, at pp. 947-948.)

Plaintiffs' cause of action for breach of contract accrued prior to the bankruptcy filing. Based on the allegations in the operative complaint, plaintiffs "executed and made their initial payment" under the trial payment agreement on August 2, 2011. They made the four monthly payments required by the agreement, which means they made their last payment on December 1, 2011. As alleged in the complaint, plaintiffs were to be provided with a permanent loan modification "after completing [the] forbearance agreement successfully." The only requirement plaintiffs allegedly had to satisfy was making the four monthly payments. Wells Fargo was required to provide plaintiffs with the permanent loan modification after they made the last payment, and as alleged, it did not. Thus, at that pre-petition point in time, plaintiffs could have brought their breach of contract cause of action. (See, e.g., *In re Goldstein* (Bankr. 9th Cir. 2015) 526 B.R. 13, 21 [claims based on failure to provide permanent loan modification after TPP, including breach of contract claim, accrued after debtor made final TPP payment].)

In their reply brief, plaintiffs argue their breach of contract action "occurred principally after the discharge in bankruptcy, starting in 2014." Plaintiffs do not identify any allegations indicating their breach of contract cause of action is grounded in events that occurred in 2014. Nor have we identified any allegations that would support such a theory. Because plaintiffs failed to disclose the breach of contract cause of action as personal property in the bankruptcy petition, it remained the property of the bankruptcy estate even after the discharge order.

Though we conclude on the facts alleged that the breach of contract cause of action is property of the bankruptcy estate, our conclusion is not necessarily fatal to plaintiffs' ability to allege the claim. "The California Supreme Court has held that if the facts of the cause of action against the defendant would not be 'wholly different' after amendment, a complaint filed by a party without standing may be amended to substitute in the real party in interest." (*Cloud*, *supra*, 67 Cal.App.4th at p. 1005.) Accordingly, where, as here, a cause of action asserted by a plaintiff remains in a bankruptcy estate, the complaint may be amended to substitute the bankruptcy trustee as plaintiff. (*Id.* at pp. 1004-1005 ["Although the original complaint does not state a cause of action *in the plaintiff*, the amended complaint by the right party restates the identical cause of action, and amendment is freely allowed"].) Alternatively, the trustee could abandon the claims and thereby provide plaintiffs with standing to bring the claims themselves. (*Id.* at p. 1003 [describing three methods by which property of a bankruptcy estate can be abandoned].)

We believe there is a reasonable possibility plaintiffs can plead sufficient facts in a further amended complaint to state a viable breach of contract cause of action—particularly if plaintiffs are able to meet their obligation to more specifically describe the alleged contract, including whether it was written, and can allege facts that would establish the cause of action is brought by a proper plaintiff notwithstanding the bankruptcy proceedings.[14] We emphasize we do not hold plaintiffs necessarily have a valid cause of action for breach of contract. Rather, consistent with the well-established standard we apply at this stage of the proceedings, we hold only that there is a reasonable possibility they could plead such a claim. We will therefore remand the matter to the trial court to give plaintiffs that opportunity solely as to the breach of contract cause of action, which if again contested via demurrer, the trial court will evaluate on the record then before it.

E. The Cause of Action for Intentional Infliction of Emotional Distress

"Intentional infliction of emotional distress requires a plaintiff to prove: ""(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct . . . .' Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." [Citation.] The defendant must have

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[14] Defendants also contend for the first time on appeal that plaintiffs are judicially estopped from bringing their claims because their positions in this litigation are contrary to positions they took in their chapter 7 bankruptcy. Because "determination of the existence of judicial estoppel is a factual finding" (*International Engine Parts, Inc. v. Feddersen & Co.* (1998) 64 Cal.App.4th 345, 354), we decline to address this issue for the first time on appeal.

engaged in "conduct intended to inflict injury or engaged in with the realization that injury will result."'" (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 902; accord, *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.)

Plaintiffs allege the foreclosure caused them severe emotional distress but do not support their contention with pleaded facts. The purportedly extreme and outrageous conduct in which defendants engaged was proceeding with the foreclosure process using what plaintiffs term "false and forged documents." Plaintiffs have not alleged, however, facts demonstrating the assignments and notices were void, much less fraudulent or forged. Stripped of their chosen descriptors, plaintiffs allege little more than defendants' involvement in the nonjudicial foreclosure process, and "[i]t is simply not tortious for a commercial lender to lend money, take collateral, or to foreclose on collateral when a debt is not paid."[15] (*Sierra-Bay Fed. Land Bank Assn. v. Superior Court* (1991) 227 Cal.App.3d 318, 334.)

Plaintiffs do not present any specific new facts that would support an amended cause of action for intentional infliction of emotional distress. Rather, they merely state that "if this Court

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[15] Plaintiffs rely on *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182 to support their contention defendants have engaged in extreme and outrageous conduct. While *Ragland* held a plaintiff in a mortgage foreclosure case stated a claim for intentional infliction of emotional distress, the factual circumstances there render it inapposite here. (*Id*. at p. 204 [extreme and outrageous conduct where the defendant allegedly induced the plaintiff to skip a mortgage payment, later refused to accept loan payments, and ultimately sold her home at foreclosure].)

finds there is need for additional factual allegations, the brief as a whole demonstrates [plaintiffs] can further articulate the cause of distress." This is insufficient. (*Rakestraw*, *supra*, 81 Cal.App.4th at pp. 43-44; see also *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 890 ["[A] plaintiff must submit a proposed amended complaint or, on appeal, enumerate the facts and demonstrate how those facts establish a cause of action"] (*Cantu*).)

F. The Cause of Action for Violation of the Unfair Competition Law

Plaintiffs argue they have a cognizable Unfair Competition Law claim because their operative complaint "allege[s] violations of the Business and Professions Code, Financial Codes, Civil Codes, and Penal Codes." The operative complaint alleges in somewhat conclusory fashion that defendants engaged in "unfair, unlawful and fraudulent business practices" by violating Penal Code sections 470 (forgery), 115 and 115.5 (knowingly filing false documents), 118 (perjury), 132 (knowingly offering forged or fraudulently altered evidence in a judicial proceeding), and 532f, subdivision (a)(4) (knowingly recording a document with a deliberate misstatement in connection with a mortgage loan). The thrust of plaintiffs' allegations appears to be that various documents involved in the loan transaction were "fraudulent, falsified, and forged."

We have largely addressed and rejected such assertions at other points in this opinion, concluding plaintiffs have not alleged a void assignment. To the extent this claim rests on the same alleged errors with the documents in the Property's chain of title discussed above, it fails because the underlying claims fail. (*Price* *v. Starbucks Corp*. (2011) 192 Cal.App.4th 1136, 1147.) Any other grounds on which plaintiffs purported to base their UCL cause of action are waived because they are not sufficiently presented on appeal. (*Pfeifer*, *supra*, 211 Cal.App.4th at p. 1282.)

G. The Causes of Action for Fraud and Deceit and Fraud in the Inducement

Plaintiffs' opening brief on appeal makes no effort to demonstrate the operative complaint sufficiently alleged causes of action for fraud and fraud in the inducement. Though plaintiffs briefly discuss the level of specificity required to plead a fraud claim where the defendants are in full possession of the alleged facts, they do not make even a passing reference to the merits of the claim as pled in their operative complaint. By failing to attempt to explain how the allegations in the operative complaint satisfied the elements of either fraud cause of action, or otherwise arguing the trial court should not have sustained defendants' demurrer to these causes of action, plaintiffs have waived this argument. (*Pfeifer*, *supra*, 211 Cal.App.4th at p. 1282.)

Though plaintiffs do argue they could amend their complaint to state viable fraud causes of action, they fail to identify the elements of the causes of action and explain how the proposed amendments would sufficiently establish those elements. Instead, plaintiffs argue that "with the discovery of additional facts, and a review of the records as recorded, [defendants] engaged in the unfair and deceptive business practice of table funding, then have sought to conceal the funding scheme by creating a series of instruments that contain hearsay statements which are in fact, untrue." That is not enough to establish an abuse of discretion in denying leave to amend. (*Cantu*, *supra*, 4 Cal.App.4th at p. 890.)

Even if properly presented on appeal, the assertion that plaintiffs could state a valid fraud claim would still be missing the necessary facts that would support it. A cause of action for fraud must allege: (1) misrepresentation of a material fact; (2) knowledge of falsity (or scienter); (3) intent to defraud; (4) justifiable reliance on the misrepresentation; and (5) damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) Here, there is no possibility of demonstrating the alleged fraud—Wall Street obtaining the funds for the loan from DLJ and not revealing DLJ's participation to plaintiffs—caused them any damage. Plaintiffs' property was not foreclosed upon because the loan was table-funded or because the table-funding was not disclosed, but because they did not make the payments on their mortgage. Plaintiffs have put forward no facts to suggest Wall Street or any other financial institution would have refrained from foreclosing despite their nonpayment.

DISPOSITION

The order of dismissal is affirmed as to defendant MERS. The order of dismissal is reversed as to defendants Wells Fargo and U.S. Bank, and the matter is remanded to permit the trial court to grant plaintiffs further leave to amend as to the breach of contract cause of action only. In all other respects, the ruling sustaining the demurrer without leave to amend is affirmed.

Defendant MERS is to recover its costs on appeal; all other parties are to bear their own costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, Acting P.J.

We concur:

MOOR, J.

KIM, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.