Filed 8/27/18 Cutler v. Bank of America, N.A. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

LAWRENCE S. CUTLER et al., Plaintiffs and Appellants, v. BANK OF AMERICA, N.A., et al., Defendants and Respondents.	B283133 (Los Angeles County Super. Ct. No. BC645112)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara A. Meiers, Judge. Affirmed.

Stephen R. Golden & Associates and Stephen R. Golden for Plaintiffs and Appellants.

Severson & Werson, Jan T. Chilton and Kerry W. Franich for Defendant and Respondent Bank of America, N.A.

Yu Mohandesi, Jordan S. Yu, Pavel Ekmekchyan, and Neeru Jindal for Defendants and Respondents Mortgage Electronic Registration Systems, Inc., New Penn Financial, LLC dba Shellpoint Mortgage Servicing, and the Bank of New York

Mellon, fka The Bank of New York, as trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2007-11T1, Mortgage Pass-Through Certificates, Series 2007-11T1.

Plaintiffs Lawrence S. Cutler and Cindy E. Cutler (plaintiffs) lost their home to foreclosure in mid-2016. Several months later, they filed the instant lawsuit, alleging wrongful foreclosure and violations of California's Homeowner Bill of Rights, Civil Code sections 2923.55[1] and 2924.17, and the Unfair Competition Law (UCL), Business and Professions Code section 17200 et seq. Their first amended complaint named as defendants Bank of America, National Association (Bank of America); Mortgage Electronic Systems, Inc. (MERS); the Bank of New York Mellon as Trustee for the Certificateholders Alternative Loan Trust 2007-11T1 Mortgage Pass-Through Certificates, Series 2007-11T1, Mortgage Pass-Through Certificates, Series 2007-11T1 (BONY);[2] and New Penn Financial

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[1] Civil Code section 2023.55 was repealed January 1, 2018.

[2] We note that the operative first amended complaint named as a defendant "THE BANK OF NEW YORK MELLON AS TRUSTEE FOR THE CERTIFICATE HOLDERS ALTERNTIVE LOAN TRUST 2007-11T1 MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2007-11T1 PASS-THROUGH CERTIFICATES, SERIES 2007-11T1 ('BONY')." The party that demurred to the complaint names itself as "the Bank of New York Mellon, fka the Bank of New York, as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2007-11T1, Mortgage Pass-Through Certificates, Series 2007-11T1." As discussed below, plaintiffs appear to allege that these are not the same entity, and the record includes a document showing that the entity named by plaintiffs assigned plaintiffs'

LLC dba Shellpoint Mortgage Servicing (Shellpoint) (collectively, defendants).

Defendants demurred and the trial court sustained the demurrers, dismissing the first amended complaint without leave to amend. Plaintiffs appeal, arguing that "[n]one of the Respondents had title or standing or any security interest sufficient to foreclose," plaintiffs' efforts to modify their promissory note were to no avail, and the trial court abused its discretion in sustaining the demurrer without leave to amend.

We affirm the judgment. Plaintiffs forfeited their appeal as to Bank of America's demurrer by not including a copy of the demurrer in the appellate record, precluding our review of the trial court's ruling. Plaintiffs also forfeited much of their appeal as to the demurrer filed by the other three defendants (codefendants) by submitting an opening brief lacking legal analysis based on the facts and record in this case. As to the three causes of action that plaintiffs did address on appeal, we find that certain claims are time-barred, others impermissibly seek retroactive application of the Homeowner Bill of Rights, and still others lack factual allegations sufficient to establish plaintiffs' standing and sustain a cause of action.

Deed of Trust to the entity that has demurred to the complaint. We shall therefore distinguish between these entities by referring to the first as "BONY," as plaintiffs do, and to the second as "BONY for the CWALT Trust."

FACTUAL BACKGROUND[3]

Plaintiffs purchased a residential property in Arcadia, California (the property) on August 19, 1982. On February 23, 2007, plaintiffs refinanced the property and executed a deed of trust (Deed of Trust) in favor of defendant Bank of America's predecessor in interest, Countrywide Home Loans, Inc., in the amount of $648,000. The Deed of Trust was recorded on March 1, 2007.

The Deed of Trust identified the lender, Countrywide Home Loans, Inc., as a corporation "organized and existing under the laws of NEW YORK." It identified defendant MERS as "a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns." The Deed of Trust provided that "MERS is the beneficiary under this Security Instrument. MERS is organized and existing under the laws of Delaware."

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[3] When reviewing the sustaining of a demurrer, we rely upon the facts alleged in the complaint or established by the attached exhibits and documents judicially noticed. (*Picton v. Anderson Union High School Dist.* (1996) 50 Cal.App.4th 726, 730 (*Picton*); Code Civ. Proc., § 430.30, subd. (a).) Defendants Bank of America, MERS, and BONY for the CWALT Trust requested judicial notice of documents in support of their demurrers to the first cause of action. Plaintiffs objected. The record on appeal does not contain any ruling on the request. Because a judgment of the lower court is presumed correct and " '[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564), we assume the trial court considered these documents in making its ruling.

Under the heading of "TRANSFER OF RIGHTS IN THE PROPERTY," the Deed of Trust again stated: "The beneficiary of this security instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS." The Deed of Trust also provided that "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument."[4] The Deed of Trust additionally stated that the "Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower."

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[4] The California Supreme Court explained the function of MERS as follows: "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 transferred to another MERS member, MERS can execute the transfer by amending its electronic database. When the loan is assigned to a nonmember, MERS executes the assignment and ends its involvement." (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 931, fn. 7 (*Yvanova*).)

In 2009, plaintiffs suffered economic hardship and fell behind in their mortgage payments. According to the first amended complaint, plaintiffs "submitted a loan modification application to [Bank of America], SHELLPOINT, and/or BONY and/or Does 1 through 5, inclusive, and whoever as [*sic*] claiming to be the holder of the First Deed of Trust and/or its agent or servicer. Plaintiffs made repeated efforts to modify their First Promissory Note all to no avail." "[Bank of America], SHELLPOINT and/or BONY and/or Does 1 through 5, inclusive, and whoever as [*sic*] claiming to be the holder of the First Deed of Trust and/or its agent or servicer never approved or informed Plaintiffs about the status of their loan modification application." Plaintiffs ultimately became unable to make their monthly loan payments.

On October 1, 2010, a Corporation Assignment of Deed of Trust (Corporation Assignment) was recorded in the Los Angeles County Recorder's Office. In this instrument, MERS assigned to BONY "all beneficial interest" in the Deed of Trust, "together with the note or notes therein described or referred to, the money due and to become due thereon with interest, and all rights accrued or to accrue under said deed of trust/mortgage."

On January 26, 2015, another Assignment of Deed of Trust was executed by Shellpoint as Attorney in Fact for BONY. The assignment named BONY for the CWALT Trust as the assignee.[5]

A Substitution of Trustee was executed by Shellpoint "servicing as servicer for" BONY for the CWALT Trust on June 1, 2015 and recorded on June 8, 2015. It named as the new

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[5] The record does not indicate whether this assignment was recorded.

trustee under the Deed of Trust Old Republic National Title Insurance Company.

Another Substitution of Trustee was executed by Shellpoint "servicing as servicer" for BONY for the CWALT Trust on December 18, 2015 and recorded on December 30, 2015. It named the Law Offices of Les Zieve as the new trustee under the Deed of Trust.

On January 22, 2016, a Notice of Default and Election to Sell Under Deed of Trust (Notice of Default) was recorded, showing plaintiffs owed $323,646.18 as of January 18, 2016. A "California Declaration of Compliance (Civ. Code, § 2923.55(c))" was attached. The declaration stated that the declarant, Laurie Childs, was employed by the mortgage servicer[6] and had reviewed the servicer's "business records for the borrower's loan, including the borrower's loan status and loan information, to substantiate the borrower's present loan default and the right to foreclose." The declaration further stated: "The information set forth herein is accurate, complete and supported by competent and reliable evidence that I have reviewed in the mortgage servicer's business records." The records reflected that "[t]he mortgage servicer has exercised due diligence to contact the borrower pursuant to California Civil Code § 2923.55(f) to 'assess the borrower's financial situation and explore options for the borrower to avoid foreclosure.' Thirty (30) days, or more, have passed since these due diligence requirements were satisfied."

On May 31, 2016, a Notice of Trustee's Sale was recorded, which reflected the property would be sold at a trustee's sale on

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[6] Shellpoint "servicing as servicer" for BONY for the CWALT Trust.

June 21, 2016. It stated an "[e]stimated amount of unpaid balance and other charges" of $994,664.92.

A Trustee's Deed Upon Sale, dated June 30, 2016, shows the property was conveyed to BONY for the CWALT Trust.

PROCEDURAL BACKGROUND

Plaintiffs filed their original complaint on December 27, 2016. They named as defendants Bank of America, MERS, and BONY. The complaint included causes of action for wrongful foreclosure, cancellation of instruments, declaratory relief, violation of Civil Code section 2923.55, violation of Civil Code section 2924.17, accounting, quiet title, and violation of the UCL, Business and Professions Code section 17200 et seq. Defendants demurred to the entire complaint and each of the causes of action.[7] The hearing was noticed for March 9, 2017.

On February 6, 2017, plaintiffs filed their first amended complaint. They added Shellpoint as a defendant and added a cause of action for elder abuse. Exhibits attached to the complaint included the grant deed to the property, the Deed of Trust, the Notice of Default, the 2015 substitution of trustee naming the Law Offices of Les Zieve as the trustee, and the Corporation Assignment.

Bank of America filed a demurrer on March 10, 2017.[8] The three other defendants—Shellpoint, BONY for the CWALT Trust,

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[7] The appellants' appendix does not include any opposition to or ruling on this demurrer. Defendants claim in the respondents' brief that plaintiffs voluntarily amended their complaint after defendants demurred.

[8] As discussed below, the appellants' appendix does not include a copy of the demurrer.

and MERS (codefendants)—also filed a demurrer to each of the nine causes of action. Defendants Bank of America, MERS, and BONY for the CWALT Trustee filed a request for judicial notice of eight documents, including four documents that were attached to the first amended complaint and also the Substitution of Trustee naming Old Republic National Title Insurance Company as trustee, the Assignment of Deed of Trust to BONY as the CWALT Trustee, the Notice of Trustee's Sale, and the Trustee's Deed Upon Sale. Plaintiffs opposed the demurrer and objected to the request for judicial notice. Defendants filed replies in support of both the request for judicial notice and the demurrers.

The trial court sustained the demurrers without leave to amend on April 12, 2017 and entered judgment dismissing the complaint as to all defendants on April 20, 2017. Notice of entry of judgment was served on April 26, 2017. According to the on-line docket for the case, plaintiffs' notice of appeal was timely filed on June 12, 2017.[9]

Plaintiffs filed an opening brief, Bank of America filed a respondents' brief, and codefendants filed a joinder in Bank of America's brief pursuant to California Rules of Court, rule 8.200(a)(5).

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[9] The copy of the notice of appeal included in the appellants' appendix shows the date of signing, but not the date of filing, in violation of California Rules of Court, rules 8.122(b)(1)-(2) and 8.124(b)(1)(A).

DISCUSSION

I. BANK OF AMERICA'S DEMURRER

Bank of America points out that the appellants' appendix does not contain a copy of Bank of America's demurrer to the first amended complaint and argues that "[t]he Court cannot determine whether the trial court correctly sustained a demurrer this Court has not seen." We agree and affirm the trial court's sustaining of Bank of America's demurrer.

An appealed judgment is presumed correct and appellant has the burden of overcoming this presumption by affirmatively showing error on an adequate record. (See *Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 564; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141; *Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039 (*Stasz*).) " 'A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.' " (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416 [affirming order where appellant failed to provide a reporter's transcript of a hearing]; see *Stasz,* at p. 1039 [same].) Plaintiffs were alerted to their error, at the latest, when the respondents' brief was served. Yet they did not move to augment the record or file a reply brief explaining how this Court could review a ruling on the missing demurrer.

II. THE CODEFENDANTS' DEMURRER

A. Review Is Limited by Deficiencies in Plaintiffs' Briefing

Defendants urge this Court to dismiss the appeal or summarily affirm without reaching the merits because plaintiffs' opening brief is "abnormally deficient." We agree the brief is deficient.

Certain of plaintiffs' factual and procedural summaries are nonsensical on their face, as when plaintiffs state that the notice of entry of judgment was mailed on April 26, 2017 and the notice of appeal was timely filed and served on August 8, 2016—months before plaintiffs filed suit on December 27, 2016. Plaintiffs discuss at length alleged malfeasance by mortgage lenders in general and certain defendants in particular, purported tensions between MERS's electronic registry and laws governing the transfer and endorsement of instruments, and problems stemming from the securitization and transfer of mortgage loans—without identifying the relevance of these issues to the facts of *this* case.

Even more troubling are long passages of the brief in which plaintiffs do not discuss *this* case at all, but some other case or cases. The brief does not cite to the appellants' appendix filed in this case, but to a clerk's transcript. Sections of the brief address facts and/or rulings that appear nowhere in the record. For example, section II of the argument addresses claims under Civil Code section 2923.6, but the first amended complaint does not include a cause of action under that statutory provision. Section II also refers repeatedly to Bank of America's "January 2013 denial letter," but neither the first amended complaint nor any exhibit refers to such a letter.

Plaintiffs launch argument section III, entitled "The Securitization Is Contrary to California Case and Statutory Law," by citing to a "Ruling on Demurrer to Appellant's SAC." Plaintiffs never filed a second amended complaint. This section also refers to the "purported loan servicer" as "BAYVIEW" and identifies the securitized trust as "CWL-2007-SEA1." These cited facts are at odds with those alleged in the first amended complaint and contained in the attached exhibits. Plaintiffs criticize the trial court's "evidentiary findings" and "written opinion," but no such findings or opinion appear in the record. Our impression that the opening brief addresses a case or cases other than the instant one is confirmed by our review of the opening brief in case No. B276722 in this Court, which contains many of the same sections.

We will consider as forfeited issues asserted in this appeal that are unsupported by " ' adequate factual or legal analysis.' " (*Singh v. Lipworth* (2014) 227 Cal.App.4th 813, 817; see *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th 1066, 1078 ["suggestions of error without supporting argument or authority other than general abstract principles do not properly present grounds for appellate review"].) In particular, we will disregard those sections of the opening brief that appear to be predicated on another case or cases, including argument sections I, II, and III. Plaintiffs have also forfeited the appeal in regard to those causes of action that the opening brief does not identify or address, including the first, third, fourth, sixth, seventh and ninth causes of action.

We now turn to the remaining three causes of action.

B. Standard of Review

A demurrer challenges only the legal sufficiency of the complaint—that is, "whether it states facts sufficient to constitute a cause of action upon which relief may be based." (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1037 (*Kong*); *Picton*, *supra*, 50 Cal.App.4th 726, 732.) It does not test either the truth of the complaint's factual allegations or the plaintiff 's ability to prove those allegations. (*Picton*, at p. 732.)

On appeal, we review de novo the trial court's sustaining of a demurrer without leave to amend, exercising independent judgment as to whether a cause of action has been stated. (*Kong*, *supra*, 108 Cal.App.4th at p. 1038.) We treat as true all of the complaint's material factual allegations, facts that can reasonably be inferred from those expressly pleaded, and matters of which judicial notice has been taken—but not the truth of any contentions, deductions or conclusions of fact or law appearing in the complaint. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 111; *Kong*, at p. 1037; *Picton*, *supra*, 50 Cal.App.4th at pp. 732-733.) We may also consider facts reasonably inferred from those alleged in the complaint, as well as facts appearing in exhibits attached to the complaint; if facts appearing in the exhibits contradict the facts alleged, the facts in the exhibits take precedence. (*Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447 (*Holland*), superseded by statute on another ground, as stated in *White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 521; *Picton*, at p. 733.)

In determining whether a cause of action has been pleaded, we construe the complaint liberally, reading the complaint as a whole and its parts in their context. (*Blank v. Kirwan* (1985)

39 Cal.3d 311, 318; *Kong*, *supra*, 108 Cal.App.4th at p. 1037; *Picton*, *supra*, 50 Cal.App.4th at p. 733.)

In reviewing the denial of leave to amend, we apply the abuse of discretion standard. (*Kong*, *supra*, 108 Cal.App.4th at p. 1038.) "[I]t is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967 (*Aubry*).)

C. The Second Cause of Action[10] for Cancellation of Instruments

In the second cause of action, plaintiffs alleged that assignments of the Deed of Trust, substitutions of trustee, and the Notice of Default were recorded illegally and were void. They further alleged that the documents "were a result of robo-signing which California Civil Code § 2924.17(b) was designed to prevent."

The codefendants demurred on two grounds. First, they argued that an action to cancel an instrument under Civil Code section 3412 is governed by the four-year statute of limitations set forth in Code of Civil Procedure section 343. Because the Corporation Assignment was publicly recorded on October 1, 2010, a cause of action for cancellation of that instrument had to be filed by October 1, 2014—long before plaintiffs filed suit on December 27, 2016. Second, codefendants argued that the first amended complaint failed to allege facts showing that the trust

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10 Plaintiffs' opening brief identifies this, incorrectly, as the "Sixth Cause of Action."

deed assignments, the substitutions of trustee, or the Notice of Default were invalid and procured by fraud, accident, or mistake.

In opposing the demurrer, plaintiffs referred generally to their allegations that the Corporation Assignment was void and their contention that "all subsequent actions based upon that void document are void." On appeal, plaintiffs appear to argue that MERS had no interest in plaintiffs' promissory note and a "purported assignment of the security is void and ineffective unless accompanied by an assignment of the note."[11]

Considering these arguments, we conclude that (1) the second cause of action is time-barred as to the Corporation Assignment of the Deed of Trust, (2) plaintiffs failed to allege facts establishing that they have standing to challenge any assignment of the Deed of Trust on the grounds that it occurred after the closing date of a securities trust to which the Deed of Trust was assigned; and (3) plaintiffs failed to allege facts that, if true, would establish that the trust deed assignments, substitutions of trustee and/or the Notice of Default are void.

1. The cancellation cause of action is time-barred as to the Corporation Assignment.

Civil Code section 3412 provides a cause of action for cancellation of a written instrument: "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

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[11] Plaintiffs also engage in wide-ranging comments about the operation of MERS's digital registry, the electronic transfer of original signed instruments, and "non-existent" entities without identifying any relevance of this discussion to the alleged facts of this case.

it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." (Civ. Code, § 3412.) Ordinarily, a suit to cancel a void instrument is governed by the four-year statute of limitations in Code of Civil Procedure section 343. (*Zakaessian v. Zakaessian* (1945) 70 Cal.App.2d 721, 725.) When the gravamen of the cause of action involves fraud or mistake, however, the three-year period in section 338 applies and the cause of action does not accrue until discovery of the facts constituting the mistake. (*Zakaessian*, at p. 725; see Code Civ. Proc., § 338, subd. (d).)

Although plaintiffs alleged "fraudulent forgeries" of the documents at issue and averred that assignments of the Deed of Trust, substitutions of trustee, and Notice of Default were "fraudulent," they did not allege that any late discovery of the relevant facts delayed accrual of their cause of action. Thus, the cause of action was time-barred as to the Corporation Assignment, recorded on October 1, 2010, when plaintiffs filed suit on December 27, 2016. The trial court properly sustained the demurrer to the second cause of action as to that instrument.

2. Plaintiffs fail to allege facts sufficient to support cancellation of any assignment of the Deed of Trust.

Even apart from the statute of limitations bar, plaintiffs' cause of action for cancellation fails as to any assignment of the Deed of Trust—either the Corporation Assignment or the later assignment to the CWALT Trust—because plaintiffs do not allege facts that, if true, would show the assignment is void.

To the extent the assignment is merely voidable—rather than void—plaintiffs lack standing to challenge it. A void contract has no legal effect and binds no one. (*Yvanova*, *supra*,

62 Cal.4th at p. 929.) By contrast, a voidable contract " 'is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.' " (*Id.* at p. 930, quoting Rest.2d Contracts, § 7, p. 20.) Such a transaction *may* be declared void but is not void in itself. (*Yvanova*, at p. 930.)

When a contract is merely voidable, only a party to the contract may invalidate it. As the California Supreme Court explained in *Yvanova*, "California law does not give a party personal standing to assert rights or interests belonging solely to others. [Citations.] When an assignment is merely voidable, the power to ratify or avoid the transaction lies solely with the parties to the assignment; the transaction is not void unless and until one of the parties takes steps to make it so." (*Yvanova*, *supra*, 62 Cal.4th at p. 936, fn. omitted.) Because plaintiffs were not themselves parties to any assignment of the Deed of Trust, they could only challenge it if it were void—not voidable. (See *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 815 (*Saterbak*) ["*Yvanova* recognizes borrower standing only where the defect in the assignment renders the assignment *void*, rather than *voidable*"].)

In the first amended complaint, plaintiffs did not allege facts sufficient to establish that any assignment was void. First, plaintiffs alleged assignment of the Deed of Trust was ineffective because it occurred after the closing date designated in the Pool and Servicing Agreement (PSA) of the trust to which it was assigned.[12] Plaintiffs appear to assert that the trust at issue is

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[12] The first amended complaint does not specify whether it refers to the Corporation Assignment or the later assignment to

governed by New York law: "Because the Assignment of [the Deed of Trust] was not executed, not recorded and unlawful under New York Trust Law, any subsequent recordings, would also be deemed wrongful and *void ab initio*." This Court has held, however, that "a postclosing assignment of a loan to an investment trust that violates the terms of the trust renders the assignment voidable, not void, under New York law." (*Yhudai v. IMPAC Funding Corp.* (2016) 1 Cal.App.5th 1252, 1259.) Therefore, if the trust to which the Deed of Trust was assigned is governed by New York law, the assignment is at most voidable, and plaintiffs lack standing to challenge it because they are not parties to the assignment. Plaintiffs have not alleged in the first amended complaint, nor argued in the trial court or on appeal, that the law of any state other than New York applies that would make a postclosing assignment void.

Second, plaintiffs alleged that assignment of the Deed of Trust is void because "their original note was with [Countrywide Home Loans, Inc.] and there is no document recorded showing how MERS had authority to transfer by assignment the Deed of Trust to [Bank of America] or BONY." They further alleged that the note was "split" from the Deed of Trust and suggest that, because MERS could not assign the note, the Deed of Trust itself was never properly transferred.

The contention that MERS lacked authority to assign the Deed of Trust is belied by the Deed of Trust itself. The document states: "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom,

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CWALT Trust in making this allegation.

MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any and all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument." This court has held that such language, giving MERS "authority to exercise all of the rights and interests of the lender necessarily includes the authority to assign the deed of trust." (*Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 83-84, disapproved on other grounds by *Yvanova*, *supra*, 62 Cal.4th at p. 939, fn. 13.)

The argument that MERS necessarily lacked authority to assign the note because it did not have an interest in the note is likewise infirm. MERS was identified in the Deed of Trust as a "nominee" of the Lender. A "nominee" is "person or entity designated to act for another in a limited role—in effect, an agent." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 270, disapproved on other grounds by *Yvanova*, *supra*, 62 Cal.4th 919, 939, fn. 13.) As the *Fontenot* court pointed out on similar facts, "[t]he extent of MERS's authority as a nominee was defined by its agency agreement with the lender, and whether MERS had the authority to assign the lender's interest in the note must be determined by reference to that agreement." (*Fontenot*, at pp. 263, 270-271.) Thus, the court concluded, "the allegation that MERS was merely a nominee is insufficient to demonstrate that MERS lacked authority to make a valid assignment of the note on behalf of the original lender." (*Id.* at p. 271.)

Here, plaintiffs alleged no facts that, if true, would show MERS lacked authority to assign the note. They did not allege

that MERS's agreement with the lender did not grant MERS authority to assign the note or otherwise precluded it from doing so. In addition, the assignment of the Deed of Trust itself undermines plaintiffs' contention that the note was "split" from the Deed of Trust. That document states that the beneficial interests under the Deed of Trust are assigned "together with the note or notes therein described or referred to."

In sum, plaintiffs have not alleged facts that would establish that the assignment of the Deed of Trust was void, such that they have standing to challenge it. At most, they have alleged that the assignment occurred after the closing date of the trust to which it was assigned—which could render it voidable under New York law.[13]

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[13] Plaintiffs also allege: "Since the inception of the Trust closed on or about March 31, 2007, there had not been execution of an assignment of the Deed of Trust and no posting to Los Angeles County Recorder's Office for public record of the assignment of Plaintiff 's [*sic*] [Deed of Trust] and Note." Plaintiffs do not appear to mean this sentence literally. Plaintiffs attached to the first amended complaint the executed Corporation Assignment, showing its recording in the Los Angeles County Recorder's Office on October 1, 2010. A request for judicial notice filed in support of the demurrer to the original complaint included the executed 2015 assignment of the Deed of Trust to the CWALT Trust.

3. Plaintiffs fail to allege facts sufficient to support their cancellation cause of action as to instruments other than assignments of the Deed of Trust.

Plaintiffs' allegations likewise do not suffice to establish that the substitutions of trustee or Notice of Default are void. In opposing the demurrer in the trial court, plaintiffs contended otherwise, arguing that "all subsequent actions" based upon the Corporation Assignment, including the substitution of trustee recorded on December 30, 2015 and the Notice of Default, are void because that assignment is void. This contention fails because, as just discussed, the first amended complaint does not allege facts establishing that the Corporation Assignment is void.

Plaintiffs also alleged in the first amended complaint that "the foreclosing Trustee, Les Zieve was substituted in as Trustee by an entity that was never assigned the Deed of Trust." Plaintiffs pointed out, correctly, that "the corporation assignment of Deed of Trust which was recorded on 10/01/2010 assigns the Deed of Trust to another entity and does not reference 'Certificate Holders of CWALT, Inc.' " On this basis, plaintiffs argued in their opposition to the demurrer that the wrong beneficiary signed the Notice of Default, rendering it void and improperly recorded. However, these allegations do not take account of the January 2015 assignment of plaintiffs' Deed of Trust from BONY to BONY for the CWALT Trust, which was included in codefendants' request for judicial notice. That assignment occurred before the 2015 substitution of trustee and the Notice of Default; hence the substitution and Notice of Default show BONY for the CWALT Trust as the beneficiary.

Plaintiffs additionally alleged that the assignments of the Deed of Trust, substitutions of trustee, and Notice of Default resulted from "robo-signing." For purposes of the demurrer, we accept the allegation of robo-signing as true. As to the assignments of the Deed of Trust, however, plaintiffs lack standing to challenge them on this ground. Courts have concluded that " '[t]o the extent that an assignment was in fact robo-signed, it would be voidable, not void.' " (*Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 819 (*Mendoza*), quoting *Pratap v. Wells Fargo Bank, N.A.* (N.D. Cal. 2014) 63 F.Supp.3d 1101, 1109.) As for the substitutions of trustee and Notice of Default, courts have found that robo-signing of such documents does not render them invalid or ineffective where the borrower does not contest "the accuracy of any of the salient facts, such as the amount owed or that their loan was in default." (*Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 46; see *Sandri v. Capitol One, N.A.* (N.D.Cal. 2013) 501 B.R. 369, 373-374.)

Finally, the first amended complaint alleged "a possible backdating" of "relevant documents." These allegations, which do not specify particular documents, are too vague to support a cause of action.

For all of the reasons above, we conclude that the first amended complaint failed to allege facts sufficient to state a cause of action for cancellation of instruments and the trial court properly sustained the demurrer as to the second cause of action.

D. The Fifth Cause of Action for Violation of Civil Code Section 2924.17

In their fifth cause of action, plaintiffs alleged that defendants failed to comply with the requirements of Civil Code section 2924.17 when they recorded the "fraudulent and/or false Assignment of Deed of Trust, Substitution of Trustee, Notice of Default, Notice of Trustee's Sale and Trustee's Deed Upon Sale."

Subdivision (a) of Civil Code section 2924.17 provides: "A declaration recorded pursuant to Section 2923.5, or until January 1, 2018, pursuant to Section 2923.55, a notice of default, notice of sale, assignment of a deed of trust, or substitution of trustee recorded by or on behalf of a mortgage servicer in connection with a foreclosure subject to the requirements of Section 2924, or a declaration or affidavit filed in any court relative to a foreclosure proceeding shall be accurate and complete and supported by competent and reliable evidence." (Civ. Code, § 2924.17, subd. (a).)

Subdivision (b) provides: "Before 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).) Section 2924.12 permits borrowers to bring an action for damages or injunctive relief for "a material violation" of Section 2924.17. (Civ. Code, § 2924.12, subd. (a), (b).)

1. The parties' contentions

Codefendants demurred to the fifth cause of action on three grounds. First, the Notice of Default included a Declaration of

Compliance stating: "I am employed by the undersigned mortgage servicers, and I have reviewed its business records for the borrower's loan, including the borrower's loan status and loan information, to substantiate the borrower's present loan default and the right to foreclose. The information set forth herein is accurate, complete and supported by competent and reliable evidence that I have reviewed in the mortgage servicer's business records." Second, codefendants argued that plaintiffs' allegations were too conclusory to support the cause of action. Third, codefendants argued that the claim failed as to MERS because MERS neither recorded any of the documents at issue nor foreclosed.

In their opposition, plaintiffs did not address any of codefendants' contentions directly, but argued that they had alleged that the Notice of Default was void "because the Law Offices of Les Zieve was never properly substituted in as Trustee because of the defects in the Corporate Assignment of Deed o[f] Trust wherein the wrong beneficiary signed the [notice of default]." Plaintiffs further argued that they had alleged that defendants violated Civil Code section 2924.17 by (1) recording inaccurate and unsupported declarations in connection with the Notice of Default and notice of trustee sale, (2) recording a Notice of Default unsupported by competent and reliable evidence, and (3) foreclosing without ensuring there was competent and reliable evidence to substantiate the borrower's default, the right to foreclose, and the borrower's loan status. Plaintiffs did not, however, identify specific allegations of fact in the first amended complaint supporting these contentions.

On appeal, plaintiffs appear to contest the codefendants' reliance on the Declaration of Compliance attached to the Notice

of Default. They argue that taking judicial notice of a document does not equate with accepting the contents of the document as true. They also contend, again, that MERS acted only as the lender's nominee and could not transfer the note—rendering the assignment of the Deed of Trust invalid. They additionally contend that the note was not physically transferred and legally endorsed.

For their part, defendants argue on appeal that the Corporation Assignment occurred before Civil Code section 2924.17 became effective in 2013; because the law is not retroactive, the Corporation Assignment cannot support a section 2924.17 cause of action. Defendants also maintain that Civil Code section 2924.17, subdivision (a) "has nothing to do with assignments of deeds of trust." Finally, defendants argue that the Corporation Assignment was not inaccurate or unreliable even if MERS lacked an interest in the promissory note because, in signing the Deed of Trust, plaintiffs agreed that MERS could act as the lender's nominee and assign the Deed of Trust—as we discussed above.

Considering these arguments, we conclude that the trial court properly sustained the demurrer as to the fifth cause of action.

2. Analysis

As an initial matter, we note that the Notice of Default, to which the Declaration of Compliance was attached, was itself attached to the first amended complaint and therefore can be considered on demurrer regardless of the request for judicial notice. (*Holland*, *supra*, 86 Cal.App.4th at p. 1447.) Nevertheless, we agree with plaintiffs that the declaration, standing alone, does not defeat their claim that defendants

violated section 2924.17. It evidences only that an employee of the loan servicer declared that she conducted a review of the sort required by section 2924.17—not that the review was actually conducted or was sufficient or accurate. We also reject defendants' assertion that Civil Code section 2924.17, subdivision (a) "has nothing to do with assignments of deeds of trust" because the statute expressly includes an "assignment of a deed of trust" among the instruments that must be "accurate and complete and supported by competent and reliable evidence" when recorded in connection with a foreclosure. (Civ. Code, § 2924.17, subd. (a).)

a. Civil Code section 2924.17 does not apply to the Corporation Assignment.

Defendants are correct that section 2924.17 does not apply to the Corporation Assignment of the Deed of Trust because the assignment predated the enactment of the statute. In *Saterbak*, *supra*, the court addressed this issue in a case brought by a plaintiff who argued, as plaintiffs do here, that MERS's assignment of her deed of trust was invalid. (*Saterbak*, *supra*, 245 Cal.App.4th at pp. 811, 818.) The court noted that the Homeowner Bill of Rights, which includes section 2924.17, went into effect on January 1, 2013. (*Saterback*, at p. 818; see Civ. Code, § 2923.4.) The court concluded that the statute did not give plaintiff a cause of action because the assignment of a deed of trust at issue occurred in December 2011 and was recorded in December 2012. (*Saterback*, at p. 818.) The court quoted *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841, which observed that " 'California courts comply with the legal principle that unless there is an "express retroactivity provision, a statute will *not* be applied retroactively unless it is

very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application." ' " (*Saterbak*, at p. 818.)

The plaintiff in *Saterbak* did not identify any statutory provision or other evidence that would support retroactive application; nor do plaintiffs here. The Corporation Assignment was recorded in 2010. Thus, plaintiffs' cause of action under section 2924.17 fails as to the alleged defects in the Corporation Assignment.

b. Plaintiffs fail to allege facts sufficient to support a Civil Code section 2924.17 claim as to other documents.

In regard to the other documents that plaintiffs reference in their Civil Code section 2924.17 claim, we likewise find plaintiffs' factual allegations insufficient to support the claim. First, plaintiffs challenged the Substitution of Trustee naming the Law Offices of Les Zieve on the grounds that the party signing the substitution—BONY for the CWALT Trust—was not properly assigned the Deed of Trust. As we discussed above, this allegation fails to account for the 2015 assignment from BONY to BONY for the CWALT Trust. Plaintiffs also alleged that "the Substitution of Trustee was recorded with a false Declaration of Mailing," but offered no facts in support of this allegation.

Second, plaintiffs appear to have alleged that defendants violated section 2924.17 by recording inaccurate and unsupported declarations in connection with the Notice of Default and Notice of Trustee Sale.[14] Plaintiffs apparently based this allegation on

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[14] The Notice of Trustee Sale submitted by defendants with their request for judicial notice does not include a declaration and plaintiffs alleged no specifics about a declaration

violations of former Civil Code section 2923.55 alleged in the fourth cause of action, as well as alleged failures to substantiate the right to foreclose, the default, and plaintiffs' loan status.

Civil Code section 2923.55 provided that, before recording a notice of default, a mortgage servicer must contact the borrower in person or by telephone "to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure." (Civ. Code, § 2923.55, subd. (a), (b)(2), repealed Jan. 1, 2018.) A notice of default must 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." (Civ. Code, § 2923.55, subd. (c).) The declaration attached to the Notice of Default here stated that the mortgage servicer had used "due diligence," as defined in section 2923.55, subdivision (f), to contact the borrower and that 30 or more days had passed since the due diligence efforts.

In the first amended complaint, plaintiffs alleged that defendants violated Civil Code section 2923.55 because they failed "to contact Plaintiff in order to assess their financial situation and explore options to avoid foreclosure; to advise Plaintiff of their right to request a meeting with Defendant within 14 days; and to provide Plaintiff the toll-free telephone number made available by the Department of Housing and Urban Development ('HUD') for housing counseling." Instead of fulfilling these requirements, plaintiffs alleged, defendants "feigned working with Plaintiff, then went ahead and illegally

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attached to the Notice of Sale Trustee.

initiated foreclosure proceedings." Plaintiffs further alleged that "when Defendants discovered that Plaintiff was eligible for relief, they implemented their scheme of delay and foreclosure."

On demurrer, we accept as true the allegations that defendants did not initiate contact with plaintiffs or comply with the specifics of Civil Code section 2923.55.[15] These allegations do not support a claim that defendants *materially* violated Civil Code section 2924.17. Courts have interpreted the term "material" in section 2924.12 "to refer to whether the alleged violation affected a plaintiff 's loan obligations or the modification process." (*Cornejo v. Ocwen Loan Servicing, LLC* (E.D.Cal. 2015) 151 F.Supp.3d 1102, 1113 [citing cases].) Although plaintiffs alleged that defendants failed to *initiate* contact with them, they also alleged that they did submit an application for loan modification to Bank of America, Shellpoint, and/or BONY. They did not allege that they lacked information about their options or about the loan modification process specifically or that the lack of initial contact somehow affected their loan modification application or their obligations.[16]

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[15] We note that at one point in the first amended complaint, plaintiffs allege: "No contact was made or attempted and any Affidavit re: § 2923.55 attached to the Notice of Default and Election to Sell is false." This allegation appears to be contradicted by allegations that plaintiffs "submitted a loan application" and defendants "feigned working with Plaintiff."

[16] Plaintiffs did allege that defendants did not negotiate in good faith for the loan modification and also that defendants "never approved or informed Plaintiffs about the status of their loan modification application." Civil Code section 2923.55 did not address the obligations of lenders or mortgage servicers when loan modification applications are submitted, so defendants'

Plaintiffs did allege that they were harmed because defendants failed to ensure reliable and competent evidence supported the asserted right to default, as required by Civil Code section 2924.17, subdivision (b). This contention is predicated on allegations of defects with the Corporate Assignment and allegations that the Law Offices of Les Zieve were not properly substituted in as trustee—allegations we have found to be deficient as discussed above. For the same reasons that the allegations do not support a claim for cancellation of instruments, they do not support a claimed violation of Civil Code section 2429.17.

Plaintiffs also argued in their opposition to the demurrers that defendants proceeded with the foreclosure without ensuring it had competent and reliable evidence to substantiate plaintiffs' default and loan status as is also required under section 2924.17, subdivision (b). These allegations do not appear in the first amended complaint and, even if that complaint could be construed to include them, it includes no supporting factual allegations.

For all of these reasons, we conclude the trial court properly sustained the demurrer as to the fifth cause of action.

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alleged failure to respond does not appear to allege a violation of section 2923.55, and plaintiffs have provided no authority to the contrary. (Civ. Code, § 2923.55.) Plaintiffs did not allege in either the first amended complaint, their opposition to the demurrer in the trial court, or their opening brief that the alleged failure to respond to their application violated other statutory provisions or otherwise supported their cause of action under Civil Code section 2924.17.

E. The Eighth Cause of Action for Violation of Business and Professions Code section 17200, et seq.

Plaintiffs alleged that defendants violated the Unfair Competition Law (UCL), Business and Professions Code section 17200, et seq. by engaging in unlawful, unfair and fraudulent business practices. Plaintiffs specifically alleged that defendants engaged in fraudulent practices by violating Civil Code section 2923.55 "in failing to reach out to Plaintiffs to discuss their alternatives to foreclosure, and [by] violating Civil Code section 2924.17 by recording inaccurate documents." Plaintiffs further alleged that they suffered injuries that could have been avoided had defendants (1) performed an accounting of plaintiffs' account, (2) reviewed plaintiffs' loan modification application in good faith, (3) offered loan modification assistance, and (4) provided plaintiffs with a single point of contact.

Codefendants demurred on multiple grounds. They argued that plaintiffs lacked standing because they had not alleged facts demonstrating that they "suffered injury in fact and lost money or property" as a result of defendants' alleged practices, as required by Business and Professions Code section 17204. Codefendants further contended that plaintiffs had failed to allege the elements of a UCL claim. They argued that a claim of "unfair" business practices under the UCL must be "tethered" to specific constitutional, statutory or regulatory provisions (see *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 939), and pointed out that a claim of "unlawful" practices depends on a predicate statutory violation (see *Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1554). Because plaintiffs failed to allege facts sufficient to support their predicate

causes of action, codefendants argued, their allegations of unfair and unlawful practices necessarily fail. Codefendants further argued that plaintiffs' UCL claim of "fraudulent" practices failed because plaintiffs did not plead " 'specific facts affording an inference' " that defendants' actions were " 'an immediate cause' " of injury.

In opposing the demurrer, plaintiffs argued that their allegations of wrongful foreclosure, elder abuse, and violations of provisions of the Homeowner's Bill of Rights were predicates for the UCL claim. They further argued, without reference to any specifics, that they had alleged actual injury.

On appeal, plaintiffs recite case law defining "unfair" and "fraudulent" practices. Plaintiffs do not attempt to demonstrate how the case law applies to their allegations. Their one-sentence argument is: "This ruling and opinion of the trial court is indicative of the bias and prejudice of the Court against the interests of the Appellant, is replete with prejudice constitutes reversible error."

In the absence of any argument with an articulated nexus to the first amended complaint, we decline to consider plaintiffs' assertion of error. (See *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 286-287 ["[W]e may disregard conclusory arguments that are not supported by pertinent legal authority or fail to disclose the reasoning by which the appellant reached the conclusions he wants us to adopt."]; *City of Palo Alto v. Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, 1302 ["When points are perfunctorily raised without adequate analysis and authority, we may treat them as abandoned or forfeited."].) We affirm the sustaining of the demurrer to the eighth cause of action.

F. Leave to Amend

When a demurrer is sustained without leave to amend, the plaintiff bears the burden of proving there is a reasonable possibility that the complaint could have been amended to cure the defect. (*Aubry*, *supra*, 2 Cal.4th at p. 967; *Kong*, *supra*, 108 Cal.App.4th at pp. 1037-1038.) Plaintiffs failed to carry this burden.

In opposing the demurrer below, plaintiffs requested leave to amend if the trial court found their pleading inadequate. Plaintiffs' written opposition did not specify any possible amendments and plaintiffs have provided neither a reporter's transcript nor a settled statement of the hearing on the demurrer.

On appeal, plaintiffs argue that it was an abuse of discretion to sustain the demurrer without leave to amend given "publicly known and acknowledged facts": "It is . . . not an unreasonable position to ascertain from already acknowledged and settled suits by state and federal agencies against Bank of America for various fraudulent and other illegitimate practices in its mortgage lending, loan servicing, and other related businesses that the Appellant, as an actual or putative victim, has causes of action against Bank of America for its own despicable acts, as well as those acts of Countrywide as successor in interest to Countrywide and its subsidiaries." Plaintiffs attempt to bolster this contention with references to a $17 billion settlement by the Bank of America with the United States Department of Justice and discussions of the issues raised by the electronic transfer of documents. On the basis of this general information, plaintiffs urge that the trial court could not reasonably have concluded that

"there exists no theory upon which the Appellant could state a claim against the respondents."

What plaintiffs fail to identify is what facts they might allege to state such a theory in *this* case. Given this failure, the trial court did not abuse its discretion in denying leave to amend.

DISPOSITION

The judgment of the trial court is affirmed. Defendant Bank of America, N.A. shall recover its costs on appeal.[17]

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.

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[17] We do not award costs to defendants Mortgage Electronic Systems, Inc.; New Penn Financial, LLC dba Shellpoint Mortgage Servicing; and the Bank of New York Mellon, fka The Bank of New York, as trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2007-11T1, Mortgage Pass-Through Certificates, Series 2007-11T1 because these defendants filed only a joinder to the respondent's brief of defendant Bank of America and waived oral argument.