

1/28/2014

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

5	In re:	)	BAP No.	CC-12-1608-KuBaPa
		)		
6	BENJAMIN MENJIVAR,	)	Bk. No.	LA 11-61208-NB
		)		
7	Debtor.	)	Adv. No.	LA 12-01125-NB
		)		
8	_____	)		
		)		
9	BENJAMIN MENJIVAR; SARA	)		
	MENJIVAR,	)		
		)		
10	Appellants,	)		
		)		
11	v.	)	<b>MEMORANDUM*</b>	
		)		
12	WELLS FARGO BANK, N.A.,	)		
		)		
13	Appellee.	)		
		)		
14	_____	)		

Argued on November 21, 2013  
at Pasadena, California

Submitted on January 28, 2014

Filed - January 28, 2014

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

Honorable Neil W. Bason, Bankruptcy Judge, Presiding

Appearances: Philip Eberhard Koebel, Esq. argued for appellants Benjamin and Sara Menjivar; Robert Collings Little, Esq. of Anglin, Flewelling, Rasmussen, Campbell & Trytten LLP argued for appellee Wells Fargo Bank, N.A.

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

1 Before: KURTZ, BALLINGER\*\* and PAPPAS, Bankruptcy Judges.

2 **INTRODUCTION**<sup>1</sup>

3 Debtors Benjamin and Sarah Menjivar commenced an adversary  
4 proceeding against Wells Fargo Bank ("WFB") seeking damages and  
5 seeking to invalidate WFB's trust deed against their residence.  
6 The bankruptcy court dismissed all of the Menjivars' claims for  
7 relief without leave to amend, and the Menjivars appealed.

8 None of the Menjivars' allegations stated a claim for relief  
9 plausible on its face. Nor were there any amendments consistent  
10 with the Menjivars' existing allegations that would have cured  
11 the fatal deficiencies in their first amended complaint ("FAC").  
12 The bankruptcy court properly dismissed their FAC without leave  
13 to amend, so we AFFIRM.

14 **FACTS**<sup>2</sup>

15 In October 2005, the Menjivars obtained a loan from WFB's  
16 predecessor World Savings Bank in order to refinance the first  
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18 \*\*Hon. Eddward P. Ballinger, Jr., United States Bankruptcy  
19 Judge for the District of Arizona, sitting by designation.

20 <sup>1</sup>Unless specified otherwise, all chapter and section  
21 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
22 all "Rule" references are to the Federal Rules of Bankruptcy  
23 Procedure, Rules 1001-9037. All "Civil Rule" references are to  
24 the Federal Rules of Civil Procedure.

25 <sup>2</sup>Most of the facts stated herein are drawn from the  
26 Menjivars' FAC. To the extent the Menjivars' factual allegations  
27 are well pleaded, we accept them as true. We also draw some of  
28 the facts from documents referenced in the FAC or which were  
submitted by WFB in support of its motion to dismiss and which  
are properly subject to judicial notice. See United States v.  
Ritchie, 342 F.3d 903, 907-08 (9th Cir. 2003) (discussing  
circumstances under which facts are deemed true for purposes of  
considering a Civil Rule 12(b)(6) dismissal motion).

1 and second trust deeds on their residence. In January 2007,  
2 World Savings Bank persuaded the Menjivars to once again  
3 refinance their residence. The Menjivars admit that \$516,147.97  
4 of the loan proceeds from their January 2007 refinancing were  
5 used to pay off their 2005 home loan, that they also received  
6 \$13,462.50 in cash from the January 2007 refinancing, that they  
7 signed a promissory note agreeing to repay \$538,750.00, and that  
8 the January 2007 note was secured by a deed of trust on their  
9 residence.

10 In July 2007, World Savings Bank persuaded the Menjivars to  
11 refinance their residence a third time. According to the  
12 Menjivars, World Savings Bank persuaded the couple to refinance  
13 by representing that the Menjivars would receive a home loan with  
14 a fixed interest rate. But the loan documents the Menjivars  
15 signed plainly stated otherwise. The loan documentation also  
16 stated that the Menjivars' combined monthly income was \$10,600,  
17 which the Menjivars now admit was inaccurately high. They only  
18 noticed this inaccuracy when they reviewed the loan documentation  
19 later on, presumably after their dispute with WFB arose.

20 The Menjivars claim that, at closing, they were surprised by  
21 the total amount of settlement charges and fees they had to pay,  
22 particularly the roughly \$4,000 they had to pay in cash in order  
23 for the July 2007 refinancing to close. They further claim that  
24 World Savings Bank pressured them to close quickly.

25 According to the FAC, the Menjivars blame the stress of the  
26 July 2007 refinancing for a severe stroke Ms. Menjivar suffered  
27 in August 2007 and for the death of their mentally-ill son in  
28 2008. But the Menjivars have not alleged any legally-cognizable

1 connection between the July 2007 refinancing and these tragedies.

2 At some point, WFB became the successor by merger to World  
3 Savings Bank's rights under the July 2007 note and deed of  
4 trust.<sup>3</sup> The Menjivars requested that WFB refinance them into a  
5 fixed rate loan. But by this time, the national mortgage crisis  
6 already was underway, and WFB told the Menjivars that WFB would  
7 only consider refinancing them if they were in default on the  
8 July 2007 note. Based on the information from WFB, the Menjivars  
9 defaulted on the 2007 note by not making their mortgage payments.  
10 WFB recorded a notice of default in August 2010 and a notice of  
11 trustee's sale in November 2010.

12 In November 2010, with the trustee's sale looming, the  
13 Menjivars sued WFB in the Los Angeles County Superior Court (LASC  
14 Case No. GC046375) ("First State Court Lawsuit") and obtained a  
15 temporary restraining order temporarily enjoining the sale  
16 pending further proceedings. But WFB countered by removing the  
17 First State Court Lawsuit to the United States District Court for  
18 the Central District of California. (USDC Case No. 10-CV-09628).  
19 Ultimately, the temporary injunction terminated, and the  
20 Menjivars voluntarily dismissed the First State Court Lawsuit.<sup>4</sup>

21 \_\_\_\_\_  
22 <sup>3</sup>According to the documents attached to WFB's request for  
23 judicial notice filed in support of its dismissal motion, World  
24 Savings Bank changed its name in 2008 to Wachovia Mortgage, FSB,  
25 and in 2009 changed its name again to Wells Fargo Bank Southwest,  
26 N.A., and merged into WFB. The Menjivars never objected to WFB's  
27 judicial notice request and have never disputed WFB's explanation  
28 of how it became the creditor holding the July 2007 note and  
trust deed. The explanation also is generally consistent with  
the FAC's allegations regarding World Savings Bank and WFB.

<sup>4</sup>We have reviewed the district court's case docket, and we  
(continued...)

1 In January 2011, the Menjivars filed a new state court  
2 lawsuit (LASC Case No. GC046687) ("Second State Court Lawsuit"),  
3 and immediately sought a new temporary restraining order to  
4 prevent WFB's imminent trustee's sale.<sup>5</sup> When it became apparent  
5 that the Menjivars would not be able to obtain a temporary  
6 restraining order before the date of the trustee's sale,  
7 Ms. Menjivar filed a chapter 13 bankruptcy case (USBC Case No.  
8 LA 11-012361-EC). That case was dismissed in March 2011 because  
9 the debtor did not file one of the papers required to support her  
10 bankruptcy filing.

11 In February 2011, shortly before WFB's rescheduled  
12 foreclosure sale, Mr. Menjivar filed a chapter 13 bankruptcy case  
13 (USBC Case No. LA 11-017774-WB). In December 2011, at the  
14 confirmation hearing held in Mr. Menjivar's bankruptcy case, the  
15 bankruptcy court dismissed the bankruptcy case. According to the  
16 Menjivars, they did not oppose the case dismissal because they

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17  
18 <sup>4</sup>(...continued)  
19 can take judicial notice of that docket and the imaged documents  
20 attached thereto. See Estate of Blue v. County of Los Angeles,  
21 120 F.3d 982, 984 (9th Cir. 1997); Mullis v. Bankr. Ct., 828 F.2d  
22 1385, 1388 & n.9 (9th Cir. 1987). Their original state court  
23 complaint on file therein reflects that the First State Court  
24 Lawsuit arose from the same refinancing transactions and loan  
25 modification attempts referenced in their subsequent state court  
lawsuit and in the FAC. That original complaint stated seventeen  
causes of action, including but not limited to violation of the  
Truth In Lending Act, violation of the Real Estate Settlement  
Procedures Act, fraud, predatory lending and unlawful  
foreclosure.

26 <sup>5</sup>The complaint in the Second State Court Lawsuit was  
27 similar but not identical to the Menjivars' complaint in the  
28 First State Court Lawsuit. It was based on essentially the same  
predicate facts, but the stated causes of action were slightly  
different.

1 believed that WFB would not offer them a loan modification unless  
2 the bankruptcy case was dismissed.

3 Also in December 2011, WFB offered to refinance the  
4 Menjivars. This refinance offer consisted of a three-month trial  
5 loan modification program, which provided in relevant part for  
6 three months of mortgage payments at roughly \$2,000 per month,  
7 with a modified interest rate of 2%.

8 In May 2012, WFB sent the Menjivars documentation for a  
9 permanent loan modification. The Menjivars wanted to accept the  
10 permanent loan modification offer, but they also wanted to  
11 continue to litigate over the validity of the July 2007 note and  
12 trust deed, so they attempted to amend the permanent loan  
13 modification documents by striking out the paragraph reaffirming  
14 the July 2007 note and trust deed but otherwise accepting the  
15 permanent loan modification documents as drafted. WFB rejected  
16 the permanent loan modification documents as amended by the  
17 Menjivars.

18 Mr. Menjivar filed in December 2011 a new chapter 13  
19 bankruptcy case, the case in which the underlying adversary  
20 proceeding was commenced. According to the Menjivars, this  
21 latest case was necessitated by the wrongful repossession of  
22 their automobile by a creditor not associated with the underlying  
23 adversary proceeding. Up until January 2012, their Second State  
24 Court Lawsuit remained dormant while the Menjivars' serial  
25 bankruptcy cases proceeded. But the Menjivars then removed the  
26 Second State Court Lawsuit to the bankruptcy court, on  
27 January 30, 2012, thereby commencing the adversary proceeding.

28 On July 31, 2012, the Menjivars filed the FAC. The FAC

1 relied on essentially the same facts as their two state court  
2 complaints, but many of the claims for relief set forth in the  
3 FAC were new. The FAC claims for relief generally fall into one  
4 of several categories: (1) they allege that the 2007 notes and  
5 trust deeds were constructive fraudulent transfers under  
6 California law; (2) they allege that the 2007 notes and trust  
7 deeds were actual fraudulent transfers under California law;  
8 (3) they allege that World Savings Bank fraudulently induced them  
9 to enter into the July 2007 refinancing by misrepresenting that  
10 the refinancing would be for a fixed rate loan when in reality it  
11 was for an adjustable rate loan; (4) they allege that World  
12 Savings Bank did not give them any consideration whatsoever in  
13 exchange for the 2007 notes and trust deeds; (5) they allege that  
14 World Savings Bank violated the Truth in Lending Act ("TILA");  
15 and (6) they allege that World Savings Bank violated the Fair  
16 Housing Act ("FHA") and the Equal Credit Opportunity Act  
17 ("ECOA"). Based on all of these claims, the Menjivars sought to  
18 invalidate the 2007 notes and trust deeds, and sought actual  
19 damages, statutory damages, punitive damages, injunctive relief,  
20 to quiet title, and costs and attorney's fees.

21 WFB filed a Civil Rule 12(b)(6) motion to dismiss, and the  
22 Menjivars opposed the motion. The bankruptcy court heard the  
23 dismissal motion on October 25, 2012, and entered an order  
24 granting the motion with prejudice on November 7, 2012.<sup>6</sup> The

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25  
26 <sup>6</sup>The bankruptcy court's initial dismissal order stated that  
27 the dismissal was without prejudice but, upon limited remand from  
28 this Panel, the bankruptcy court corrected the dismissal order to  
clarify that the dismissal was with prejudice and without leave

(continued...)

1 hearing transcript and the tentative ruling incorporated into the  
2 court's dismissal order reflect that the court essentially  
3 adopted the grounds for dismissal presented by WFB. In  
4 particular, the bankruptcy court held that some of the claims for  
5 relief were barred by the applicable statutes of limitation and  
6 others could not be reconciled with the contents of the loan  
7 documentation underlying the claims. The bankruptcy court  
8 further opined that the Menjivar's claims based on state law  
9 appeared to be preempted by the Home Owners' Loan Act of 1933  
10 ("HOLA"). The Menjivars timely filed their notice of appeal on  
11 November 21, 2012.<sup>7</sup>

#### 12 JURISDICTION

13 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
14  
15  
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17 <sup>6</sup>(...continued)  
18 to amend.

19 <sup>7</sup>Shortly before oral argument in this appeal, Mr. Menjivar's  
20 current bankruptcy case was converted from chapter 13 to  
21 chapter 7. The Menjivars' claims for relief at least in part  
22 were property of Mr. Menjivar's bankruptcy estate and, hence, the  
23 chapter 7 trustee had a direct interest in the outcome of this  
24 appeal. See McGuire v. United States, 550 F.3d 903, 914 (9th  
25 Cir. 2008); Estate of Spirtos v. One San Bernardino County  
26 Superior Court Case, 443 F.3d 1172, 1175-76 (9th Cir. 2006).  
27 Accordingly, we issued an order deferring submission of this  
28 appeal and directing the chapter 7 trustee to advise us whether  
he desired to appear in this appeal. The trustee then filed a  
response indicating that he had no intention of participating in  
this appeal. He subsequently filed a supplemental response  
indicating that he has abandoned the estate's interest in the  
Menjivars' real property and in the associated claims for relief.  
As a result, this appeal has been taken under submission and is  
now ready for decision.



1 §§ 1334 and 157(b)(2)(K).<sup>8</sup> We have jurisdiction under 28 U.S.C.  
2 § 158.

3 **ISSUE**

4 Did the bankruptcy court commit reversible error when it  
5 dismissed the Menjivars' FAC with prejudice and without leave to  
6 amend?

7 **STANDARDS OF REVIEW**

8 We review de novo a dismissal under Civil Rule 12(b)(6).  
9 See Movsesian v. Victoria Versicherung AG, 670 F.3d 1067, 1071  
10 (9th Cir. 2012) (en banc). When we review a matter de novo, we  
11 consider it anew, "as if no decision previously had been  
12 rendered, giving no deference to the bankruptcy court's prior  
13 determinations." Nordeen v. Bank of America, N.A.  
14 (In re Nordeen), 495 B.R. 468, 475 (9th Cir. BAP 2013).

15 Generally speaking, we review the bankruptcy court's  
16 decision to dismiss without leave to amend for an abuse of  
17 discretion. See, e.g., Zadrozny v. Bank of N.Y. Mellon,  
18 720 F.3d 1163, 1167 (9th Cir. 2013); Reddy v. Litton Indus.,  
19 Inc., 912 F.2d 291, 296 (9th Cir. 1990). It also has been said  
20 that appellate courts should "review strictly a . . . court's

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21  
22 <sup>8</sup>The Menjivars effectively consented to the bankruptcy court  
23 entering a final disposition by pursuing their litigation against  
24 WFB in the bankruptcy court, with full knowledge of the decision  
25 in Stern v. Marshall, 131 S.Ct. 2594 (2011), as that decision is  
26 cited in the second paragraph of the Menjivars' FAC. WFB  
27 similarly consented to the bankruptcy court entering a final  
28 disposition. See Res. Funding, Inc. v. Pac. Cont'l Bank  
(In re Wash. Coast I, L.L.C.), 485 B.R. 393, 407-11, (9th Cir.  
BAP 2012). Alternately, the parties have forfeited any argument  
challenging the bankruptcy court's entry of a final disposition  
by not raising the issue either in the bankruptcy court or on  
appeal. See id.

1 exercise of discretion denying leave to amend." Albrecht v.  
2 Lund, 845 F.2d 193, 195 (9th Cir. 1988).

3 On the other hand, the strictness of this review apparently  
4 diminishes when the plaintiff has amended its complaint, as the  
5 Ninth Circuit has held a number of times that "[t]he district  
6 court's discretion to deny leave to amend is particularly broad  
7 where plaintiff has previously amended the complaint.'" See  
8 Zadrozny, 720 F.3d at 1173 (quoting United States ex rel. Cafasso  
9 v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1058 (9th Cir.  
10 2011)) (emphasis added). Accord, Mir v. Fosburg, 646 F.2d 342,  
11 347 (9th Cir. 1980).

12 In any event, the Ninth Circuit also has held that  
13 "[d]ismissal without leave to amend is improper, unless it is  
14 clear, upon de novo review, that the complaint could not be saved  
15 by any amendment.'" Intri-Plex Techs., Inc. v. Crest Group,  
16 Inc., 499 F.3d 1048, 1056 (9th Cir. 2007). This is the key  
17 standard of review for purposes of our analysis and disposition  
18 of the instant appeal.

19 We may affirm on any ground supported by the record. Diener  
20 v. McBeth (In re Diener), 483 B.R. 196, 202 (9th Cir. BAP 2012).

## 21 DISCUSSION

### 22 A. Overview of Applicable Legal Standards

23 A defendant may obtain dismissal of a complaint under Civil  
24 Rule 12(b)(6) if the complaint lacks a cognizable legal theory or  
25 lacks sufficient facts to support a cognizable legal theory. See  
26 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
27 1988), partially abrogated on other grounds by, Bell Atl. Corp.  
28 v. Twombly, 550 U.S. 544, 562-63 (2007). The complaint can

1 survive the dismissal motion "only if, taking all well-pleaded  
2 factual allegations as true, it contains enough facts to 'state a  
3 claim to relief that is plausible on its face.'" Hebbe v.  
4 Pliler, 627 F.3d 338, 341-42 (9th Cir. 2010) (quoting Ashcroft v.  
5 Iqbal, 556 U.S. 662, 678 (2009), and Twombly, 550 U.S. at 570).

6 This plausibility standard requires more than the mere  
7 possibility that the defendant is liable to the plaintiff.  
8 Iqbal, 556 U.S. at 678. "Where a complaint pleads facts that are  
9 merely consistent with a defendant's liability, it stops short of  
10 the line between possibility and plausibility of entitlement to  
11 relief." Id. (quoting Twombly, 550 U.S. at 557) (internal  
12 quotation marks omitted). Formulaic recitations of the elements  
13 of a claim for relief are insufficient by themselves to meet the  
14 plausibility standard. Iqbal, 556 U.S. at 678.

15 In reviewing the dismissal, while we must accept as true all  
16 well-pleaded facts, we do not need to accept as true conclusory  
17 statements, statements of law, and unwarranted inferences cast as  
18 factual allegations. Twombly, 550 U.S. at 555-57; Clegg v. Cult  
19 Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994). We also  
20 may reject factual allegations contradicted by judicially noticed  
21 material. See Shwarz v. United States, 234 F.3d 428, 435 (9th  
22 Cir. 2000). Indeed, we can use judicially noticed facts and  
23 documents to establish that the complaint fails to state a viable  
24 claim for relief. Often, we similarly can use documents attached  
25 to or referenced in the complaint. See Ritchie, 342 F.3d at  
26 907-08; Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th  
27 Cir. 2001); Durning v. First Boston Corp., 815 F.2d 1265, 1267  
28 (9th Cir. 1987).

1 In short, the allegations of the complaint, along with other  
2 materials properly before the court, may demonstrate that the  
3 plaintiff is not entitled to relief as a matter of law. See  
4 Weisbuch v. County of L.A., 119 F.3d 778, 783 n.1 (9th Cir. 1997)  
5 ("If the pleadings establish facts compelling a decision one way,  
6 that is as good as if depositions and other expensively obtained  
7 evidence on summary judgment establishes the identical facts.").

8 The Menjivars dispute whether the bankruptcy court properly  
9 dismissed their FAC with prejudice and without leave to amend.  
10 They assert that the bankruptcy court should have explicitly set  
11 forth its reasoning explaining why it was not granting leave to  
12 amend and that the absence of such explicit reasoning mandates  
13 reversal. We disagree. The Ninth Circuit expressly rejected  
14 this argument in Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d  
15 1149, 1160 (9th Cir. 1989), partially abrogated on other grounds  
16 by, Leatherman v. Tarrant County Narcotics Intelligence and  
17 Coordination Unit, 507 U.S. 163 (1993). In Ascon Props., even  
18 though the trial court there did not state any explicit reasoning  
19 in support of its decision to dismiss without leave to amend, the  
20 Ninth Circuit held that it still could affirm because adequate  
21 and proper grounds for the trial court's decision were apparent  
22 from the entire record. Id. at 1160-61.

23 When it is apparent from our de novo review that amendment  
24 would have been futile, we may affirm the bankruptcy court's  
25 dismissal without leave to amend. See Intri-Plex Techs., Inc.,  
26 499 F.3d at 1056. Amendment is futile when it is clear that  
27 amendment would not have remedied the complaint's fatal  
28 deficiencies. Id.

1 While the Menjivars stated in their opposition to the  
2 dismissal motion that they desired to amend their FAC in the  
3 event the bankruptcy court determined that their FAC was  
4 deficient, the Menjivars never filed a formal motion to amend  
5 their FAC, never submitted to the court a proposed second amended  
6 complaint,<sup>9</sup> and never even indicated in any of their papers how  
7 they would amend the FAC to overcome any deficiencies. The  
8 Menjivars assert on appeal that there is no rule requiring them  
9 to offer a proposed amended complaint in advance of dismissal and  
10 that their failure to indicate how they would amend the complaint  
11 is not grounds, by itself, for dismissal without leave to amend.  
12 This much is true. But the Menjivars overlook the real  
13 significance of the absence of proposed amendments. Whereas the  
14 Menjivars were entitled to propose amendments inconsistent with  
15 their existing allegations, see PAE Gov't Servs., Inc. v. MPRI,  
16 Inc., 514 F.3d 856, 859-60 (9th Cir. 2007), in deciding whether  
17 amendment was futile, the bankruptcy court and this Panel only  
18 are required to take into account hypothetical amended pleadings  
19 containing facts consistent with those already alleged. See  
20 Swartz v. KPMG LLP, 476 F.3d 756, 761 (9th Cir. 2007) (citing  
21 Albrecht, 845 F.2d at 195, and holding that dismissal without  
22 leave to amend is proper when "allegation of other facts  
23 consistent with the challenged pleading could not possibly cure  
24 the deficiency") (emphasis added); Schreiber Distrib. Co. v.

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26 <sup>9</sup>If the Menjivars had filed a motion to amend, the  
27 bankruptcy court's local rules would have required the Menjivars  
28 to submit the proposed amended pleading in conjunction with that  
motion. See Bankr. C.D. Cal. R. 7016-1(a)(1).

1 Serv-Well Furniture Co., Inc., 806 F.2d 1393, 1401 (9th Cir.  
2 1986) (same); see also Knox v. Davis, 260 F.3d 1009, 1013 (9th  
3 Cir. 2001) (in ruling on Civil Rule 12(b)(6) motion, court may  
4 rely on concessions made by plaintiff); Weisbuch, 119 F.3d at 781  
5 (same).

## 6 **B. California Fraudulent Transfer Claims**

7 With this legal framework in mind, we turn our attention to  
8 the Menjivars' claims for relief. Most of the Menjivars' claims  
9 explicitly rely on California's version of the Uniform  
10 Fraudulent Transfer Act ("UFTA"), Cal. Civ. Code. §§ 3439, et  
11 seq., or implicitly rely on the UFTA by referencing the  
12 Menjivars' fraudulent transfer allegations.

13 The principal ground for dismissal of the Menjivars' UFTA  
14 claims was HOLA preemption. See Silvas v. E\*Trade Mortg. Corp.,  
15 514 F.3d 1001, (9th Cir. 2008). Silvas held that, pursuant to  
16 12 C.F.R. § 560.2, claims for relief based on Cal. Bus. and Prof.  
17 Code §§ 17200 and 17500 were preempted as applied by the  
18 plaintiffs therein "because [their] state law claims provide  
19 state remedies for violations of federal law in a field preempted  
20 entirely by federal law." In conducting its HOLA preemption  
21 analysis, Silvas focused on the specific factual allegations  
22 contained in the complaint and whether these allegations  
23 referenced activities and conduct subject to the exclusive  
24 regulation of the Office of Thrift Supervision ("OTS"), as  
25 specified in 12 C.F.R. § 560.2(b). Because all of the specific  
26 misconduct alleged fell within the ambit of 12 C.F.R. § 560.2(b),  
27 Silvas concluded that the California statutes at issue were  
28 preempted as applied there by the plaintiffs.

1 Here, the specific factual allegations underlying the  
2 Menjivars' UFTA claims are that World Savings Bank<sup>10</sup>  
3 misrepresented the terms of the 2007 loans, overcharged for  
4 settlement fees, and ultimately extended credit to the Menjivars  
5 under terms that the Menjivars considered unfavorable and  
6 incapable of helping them meet their personal financial goals.  
7 These allegations deal with conduct and activities exclusively  
8 regulated by the OTS. See 12 CFR § 560.2(b)(4), (5) and (9).<sup>11</sup>  
9

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10 <sup>10</sup>WFB's judicial notice request contains documents  
11 identifying World Savings Bank as a federal savings bank that was  
12 subject to OTS oversight at the time of the 2007 refinancing  
13 transactions.

14 <sup>11</sup>The above-referenced subparagraphs of 12 CFR § 560.2(b)  
15 provide for field preemption of:

16 (b) . . . state laws purporting to impose requirements  
17 regarding:

18 \* \* \*

19 (4) The terms of credit, including amortization of  
20 loans and the deferral and capitalization of interest  
21 and adjustments to the interest rate, balance, payments  
22 due, or term to maturity of the loan, including the  
23 circumstances under which a loan may be called due and  
24 payable upon the passage of time or a specified event  
25 external to the loan;

26 (5) Loan-related fees, including without limitation,  
27 initial charges, late charges, prepayment penalties,  
28 servicing fees, and overlmit fees;

\* \* \*

(9) Disclosure and advertising, including laws  
requiring specific statements, information, or other  
content to be included in credit application forms,  
credit solicitations, billing statements, credit

(continued...)

1 Accordingly, based on Silvas and 12 CFR § 560.2(b), the  
2 bankruptcy court here correctly concluded that the Menjivars'  
3 UFTA claims should be dismissed based on HOLA preemption. Nor  
4 were there any amendments consistent with the Menjivars' existing  
5 allegations that would have saved their UFTA claims from  
6 preemption. Thus, dismissal without leave to amend was  
7 appropriate.

8 As a separate and independent ground for affirmance, we note  
9 that the Menjivars' actual fraudulent transfer allegations are  
10 fatally inconsistent with the UFTA, which requires the plaintiff  
11 to plead and prove that the transferor actually intended to  
12 hinder, delay or defraud his creditors. That the focus is on the  
13 transferor's intent is plain on the face of the statute. See  
14 Cal. Civ. Code § 3934.04(a)(1). This has been the rule in  
15 California for a long time, well before California enacted the  
16 UFTA:<sup>12</sup> "It is well settled that it is the motive of the  
17 grantor, and not the knowledge of the grantee, that determines  
18 the validity of the transfer." Bush & Mallett Co. v. Helbing,  
19 134 Cal. 676, 679 (1901). Here, the Menjivars have not alleged  
20 that they as the transferors of the 2007 notes and trust deeds  
21 entered into the 2007 refinancing transactions with the intent to  
22 hinder, delay or defraud their creditors. Instead, they in  
23 essence alleged that World Savings Bank duped them into entering

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24 <sup>11</sup>(...continued)

25 contracts, or other credit-related documents and laws  
26 requiring creditors to supply copies of credit reports  
27 to borrowers or applicants[.]

28 <sup>12</sup>California enacted the UFTA in 1986. See Mejia v. Reed,  
31 Cal.4th 657, 664 (Cal. 2003).



1 into refinancing transactions that were not in their financial  
2 best interests. No amendments consistent with these existing  
3 allegations were going to meet the requirement to allege  
4 intentional misconduct by the Menjivars, which would be necessary  
5 to state a viable claim to invalidate the 2007 notes and trust  
6 deeds as actual fraudulent transfers.

7 Similarly, the Menjivars' constructive fraudulent transfer  
8 allegations are fatally inconsistent with the UFTA, which  
9 requires an absence of reasonably equivalent value. See Cal.  
10 Civ. Code §§ 3439.04(a)(1)(2), 3439.05. Reasonably equivalent  
11 value under the UFTA is measured objectively, from the  
12 perspective of the transferor's creditors. See Decker v. Tramiel  
13 (In re JTS Corp.), 617 F.3d 1102, 1109 (9th Cir. 2010); Maddox v.  
14 Robertson (In re Prejean), 994 F.2d 706, 708 (9th Cir. 1993).  
15 This focus on the creditors' perspective is consistent with the  
16 underlying purpose of the UFTA, which seeks to protect the  
17 creditors from "transfers that impede them in the collection of  
18 their claims." Mejia 31 Cal.4th at 664. Here, the Menjivars'  
19 specific factual allegations admit that, in July 2007, the  
20 Menjivars executed a note for roughly \$550,000 in order to payoff  
21 the \$539,000 note they executed in January 2007. In turn, the  
22 Menjivars executed the January 2007 note in exchange for \$13,000  
23 in cash and the payoff of their October 2005 note in the amount  
24 of \$516,000. All three notes were secured by the Menjivars'  
25 residence.

26 The FAC's allegations make clear that, from the Menjivars'  
27 subjective viewpoint, the 2007 refinancing transactions did not  
28 meet their personal, subjective financial needs and goals. But

1 for purposes of the UFTA, when we consider the transactions as we  
2 must from the creditors' objective viewpoint, it simply is not  
3 plausible that the satisfaction of antecedent debt accomplished  
4 by the 2007 refinancing transactions did not constitute  
5 reasonably equivalent value. As a matter of law, a note and  
6 trust deed given on account of antecedent debt does not qualify  
7 as a constructive fraudulent transfer. See In re Prejean,  
8 994 F.2d at 709. Nor would any amendment of the FAC consistent  
9 with its existing allegations cure this deficiency.

10 In sum, the bankruptcy court did not err by dismissing the  
11 Menjivars' UFTA claims without leave to amend.

### 12 **C. Claims Based on Fraud and Lack of Consideration**

13 In a single claim for relief, the Menjivars state both fraud  
14 and lack of consideration as grounds to invalidate the 2007 notes  
15 and trust deeds.

16 The Menjivars lack of consideration contention is based on a  
17 false premise: that the agreed-upon satisfaction of their  
18 antecedent debts was invalid or insufficient consideration to  
19 bind them to the terms of 2007 notes and trust deeds. To the  
20 contrary, the satisfaction of their antecedent debt conferred a  
21 substantial and valid legal benefit on the Menjivars, a benefit  
22 that they were not otherwise entitled to but for the 2007  
23 refinancing transactions. Thus, the 2007 notes and trust deeds  
24 were supported by sufficient and valid consideration. See Cal.  
25 Civ. Code § 1605; Raedeke v. Gibraltar Sav. & Loan Assn.,  
26 10 Cal.3d 665, 673-74 (1974).

27 As for their fraud contentions, they are barred by  
28 California's three-year statute of limitations on fraud claims.

1 See Cal. Civ. Proc. Code § 338(d). The limitations period began  
2 to run when the Menjivars entered into the 2007 refinancing  
3 transactions, and they did not commence the current litigation  
4 until more than three years had elapsed thereafter.

5 The Menjivars made only one argument in their opening appeal  
6 brief regarding the fraud statute of limitations. They claim  
7 that their fraud contentions are governed by California's  
8 four-year limitations period covering claims based on contract,  
9 see Cal. Civ. Code § 337(1), and not based on California's  
10 three-year limitations period covering claims based on fraud.  
11 See Cal. Civ. Code § 338(d). This claim is specious. The  
12 Menjivars' allegations that they were fraudulently induced to  
13 execute the 2007 notes and trust deeds sound in fraud and not in  
14 contract. Under similar circumstances, the Ninth Circuit did not  
15 hesitate to apply a three-year limitations period applicable to  
16 fraud claims. See Zadrozny, 720 F.3d at 1173; see also Rosenfeld  
17 v. JPMorgan Chase Bank, N.A., 732 F.Supp.2d 952, 971 (N.D. Cal.  
18 2010) (same).

19 For the first time in their reply brief, the Menjivars argue  
20 that the fraud statute of limitations did not begin to run until  
21 they were presented with sufficient facts from which a reasonable  
22 person would have been suspicious that some sort of wrong had  
23 been committed. See Norgart v. Upjohn Co., 21 Cal.4th 383,  
24 397-98 (1999). The Menjivars forfeited this argument by not  
25 raising it either in the bankruptcy court or in their opening  
26 appeal brief. See Zadrozny, 720 F.3d at 1173.

27 Even if we were to consider this argument, the July 2007  
28 loan terms the Menjivars now complain of are clear on the face of

1 the July 2007 loan documents the Menjivars signed. Accordingly,  
2 California's discovery rule would not have delayed the  
3 commencement of the limitations period, as the Menjivars had  
4 sufficient information from the outset regarding the true terms  
5 of the July 2007 refinancing transaction. See id. (alleged  
6 problems with loan transaction evident on the face of loan  
7 documents, so fraud limitations period not tolled); Rosenfeld,  
8 732 F.Supp.2d at 970-71 (same).

9 The defects associated with the Menjivars' fraud and lack of  
10 consideration allegations are not the type the Menjivars could  
11 have cured with amendments consistent with their existing  
12 allegations. Thus, the bankruptcy court properly dismissed these  
13 claims without leave to amend.

#### 14 **D. Claims Based on TILA, FHA and ECOA.**

15 The Menjivars had up to three years to demand rescission of  
16 the 2007 refinancing transactions based on alleged TILA  
17 violations. 15 U.S.C. § 1635(f). Meanwhile, most TILA damages  
18 claims need to be filed within one year, but a handful of TILA  
19 violations will support a damages claim for up to three years.  
20 See 15 U.S.C. § 1640(e). As for the alleged violations of the  
21 FHA and the ECOA, the Menjivars only had two years from the  
22 occurrence of the alleged violations to bring suit. See  
23 42 U.S.C. § 3613(a)(1)(A); 15 U.S.C. § 1691e(f).<sup>13</sup> Because the

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25 <sup>13</sup>In 2010, Congress enlarged the ECOA limitations period  
26 from two years to five years. See Cottrell v. Vilsack,  
27 915 F.Supp.2d 81, 90 & n.7 (D. D.C. 2013). But the ECOA  
28 limitations period in effect at the time of the 2007 refinancing  
transactions was two years, and the time for the Menjivars to

(continued...)

1 Menjivars did not commence their litigation against WFB, and did  
2 not demand rescission of the 2007 refinancing transactions, until  
3 after all of these limitations periods had expired, their TILA,  
4 FHA and ECOA claims are time-barred.

5 The Menjivars argue for the first time in their appeal reply  
6 brief that one or more of these limitations periods did not run  
7 because they did not discover sufficient facts regarding World  
8 Savings Bank's TILA, FHA and ECOA violations until sometime in  
9 2010, well after the 2007 refinancing transactions were  
10 consummated.

11 We reject this argument as to the Menjivars' TILA claims for  
12 the same reasons we rejected the Menjivars' similar argument  
13 regarding their discovery of the facts underlying their fraud  
14 claim. First, the Menjivars forfeited these arguments by not  
15 asserting them in the bankruptcy court or in their opening appeal  
16 brief. And second, the facts alleged in the FAC and the contents  
17 of the July 2007 loan documents demonstrate that the Menjivars  
18 had sufficient information from the outset regarding the true  
19 terms of the July 2007 refinancing transaction so as to fatally  
20 undermine their discovery argument. Cf. Meyer v. Ameriquest  
21 Mortg. Co., 342 F.3d 899, 902 (9th Cir. 2003) (borrowers had all  
22 the information they needed to discover their TILA claim at the  
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24 <sup>13</sup>(...continued)  
25 file their ECOA claim expired in 2009, before the ECOA  
26 limitations period was amended. The new larger limitations  
27 period cannot be applied to the Menjivars' ECOA claim because  
28 that claim already was time barred before the 2010 amendment of  
the ECOA was enacted. See Chenault v. U.S. Postal Serv., 37 F.3d  
535, 539 (9th Cir. 1994), cited with approval in, Hughes Aircraft  
Co. v. United States ex rel. Schumer, 520 U.S. 939, 950 (1997).

1 time the loan was consummated, so TILA limitations period was not  
2 tolled); Rosenfeld, 732 F.Supp.2d at 964 (same); Rosal v. First  
3 Fed. Bank of Cal., 671 F.Supp.2d 1111, 1122-24 (N.D. Cal. 2009)  
4 (same).

5 As for the Menjivars' FHA and ECOA claims, once again, the  
6 Menjivars did not timely offer any argument countering WFB's  
7 contention that these claims were time-barred, and thus they have  
8 forfeited any such argument. Moreover, the discovery rule simply  
9 does not apply to these claims. See Garcia v. Brockway,  
10 526 F.3d 456, 465 (9th Cir. 2008) (en banc); Thiel v. Veneman,  
11 859 F.Supp.2d 1182, 1199 (D. Mont. 2012); see also Grimes v.  
12 Fremont Gen. Corp., 785 F.Supp.2d 269, 291-94 (S.D.N.Y. 2011).

13 Because no amendments consistent with the Menjivars'  
14 existing allegations would have cured the limitations defects in  
15 their TILA, FHA and ECOA claims, the bankruptcy court properly  
16 dismissed these claims without leave to amend.

#### 17 **E. Other Claims**

18 The FAC sets forth several so-called claims for relief that  
19 in reality are remedies or are entirely derivative of their  
20 other, substantive claims. Because we have determined that none  
21 of their substantive claims are viable, none of their derivative  
22 claims or remedies-based claims are viable either.<sup>14</sup>

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24 <sup>14</sup>The Menjivars' fourteenth claim for relief, seeking to  
25 disallow as untimely WFB's proof of claim filed in Mr. Menjivar's  
26 latest chapter 13 bankruptcy case is derivative because it  
27 assumes that WFB's claim is unsecured based on the allegations  
28 contained in the Menjivars' other claims for relief. In any  
event, Rule 3002(c)(3) gives a secured creditor whose security  
interest is avoided by a judgment of the bankruptcy court an  
(continued...)

1 **CONCLUSION**

2 For the reasons set forth above, we AFFIRM the bankruptcy  
3 court's order dismissing the FAC without leave to amend.  
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25 <sup>14</sup>(...continued)  
26 extended deadline to file a proof of claim, until thirty days  
27 after all appeals from the subject judgment have been exhausted.  
28 Since no judgment has been entered against WFB avoiding its July  
2007 trust deed, the deadline for WFB to file a proof of claim  
has not run.