MYONG SUK OH, Plaintiff and Appellant,
v.
BANK OF AMERICA, N.A., et al., Defendants and Respondents.

Nos. G055879, G055977.

Court of Appeals of California, Fourth District, Division Three.

Filed September 27, 2019.

Appeal from a judgment of the Superior Court of Orange County, Super. Ct. No. 30-2016-00872840, Craig L. Griffin, Judge. Affirmed.

Law Offices of Richard L. Antognini and Richard L. Antognini for Plaintiff and Appellant.

Edward G. Schloss Law Corporation, Edward G. Schloss, Lior Katz, Lance Kaufman for Defendants and Respondents Bayview Loan Servicing, Bank of New York Mellon and Edward G. Schloss.

McGuireWoods and Leslie M. Werlin for Defendant and Respondent Bank of America, N.A.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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OPINION

MOORE, J.

In her third amended complaint, plaintiff Myong Suk Oh alleges her 2005 home loan documents are void because her lender was misidentified and its nominee was incapable of handling interests created by the documents. Demurrers by the alleged loan servicer, trustee, and lender's successor in interest were sustained by the trial court, without leave to amend. Finding no error in the court's rulings, we affirm the judgment.

I

FACTS AND PROCEDURAL HISTORY

A. Factual Background

In January 2005, plaintiff received two mortgage loans totaling $1,331,900 to purchase real property in Irvine, California. The loans consisted of two deeds of trust securing a promissory note for $1,000,000 (first trust deed) and a credit agreement for $331,900 (second trust deed). The trust deeds granted security interests in the property to the lender, identified in both as "America's Wholesale Lender" (AWL). In the first trust deed, AWL is specifically described as a corporation "organized and existing under the laws of NEW YORK." Also in both trust deeds, Mortgage Electronic Registration Systems, Inc. (MERS), is identified as the beneficiary and characterized as "acting solely as a nominee for" AWL, its successors and assigns.

In 1995, the name "America's Wholesale Lender" was registered by the United States Patent and Trademark Office as a word mark belonging to New York corporation "Countrywide HOME LOANS, INC." (Countrywide).[1] Countrywide had been registered as a New York corporation in that state since 1969. In November 2005, "America's Wholesale Lender" was identified as a fictitious business name of Countrywide in a Fictitious Name Statement filed with the Los Angeles County Recorder's Office. The statement represented that Countrywide had been transacting business under the name of "America's Wholesale Lender" since 2001. In 2008, a corporation with the name of "America's Wholesale Lender, *Inc.*" (italics added) was incorporated in the state of New York.

With respect to plaintiff's trust deeds, in September 2006, MERS signed a substitution of trustee, naming Recontrust Company, N.A., as the trustee of the first trust deed.[2] In January 2012, MERS assigned all beneficial interest in the first trust deed to defendant Bank of New York Mellon (Mellon) as a trustee for a securitized trust. In February 2012, all beneficial interest was again purportedly assigned by MERS to Mellon as trustee for the same securitized trust. At the same time, Recontrust Company, N.A., signed a notice of default on the first trust deed. However, one week later, it signed a notice of rescission for the notice of default. In March 2012, MERS assigned all interests in the second trust deed to Mellon, again as a trustee, but for a different securitized trust. In April 2016, defendant Bayview Loan Servicing, LLC (Bayview), acting on behalf of Mellon, signed a

substitution of trustee, naming a new trustee of the first trust deed. At all times relevant to this appeal, there was no foreclosure of plaintiff's property pending.

B. Procedural Background

In September 2016, plaintiff filed her initial complaint in this case, proceeding in propria persona, alleging six causes of action. Among other claims, plaintiff challenged the authorities of the trust deeds' assigned beneficiaries to initiate foreclosures against the property. The initial complaint included an allegation that Countrywide created AWL as a "trade name (DBA)" and engaged in millions of fraudulent loans using the name. The complaint identified defendant Bank of America, N.A. (BoA) as a claimed successor in interest to AWL and Bayview as BoA's mortgage servicer. Both defendants filed demurrers to plaintiff's original complaint, which were not ruled upon because plaintiff subsequently filed a first amended complaint which added Mellon as a defendant. All three defendants filed demurrers to plaintiff's first amended complaint, which were sustained by the court with leave to amend. Plaintiff filed a second amended complaint and defendants again filed demurrers which, as relevant to this appeal, the court sustained with leave to amend.[3]

Plaintiff then filed a third amended complaint—this time represented by counsel. Although the caption page listed four causes of action, its actual allegations only identify a first cause of action for "Cancellation of Instruments" and a second cause of action for "Cancellation of Promissory Notes." Defendants filed special and general demurrers[4] with supporting requests for judicial notice. Among other matters, defendants requested judicial notice of filings with the Los Angeles County Recorder's Office and Division of Corporations of the New York Department of State, as well as information contained on a Web site of the United States Patent and Trademark Office (trademark office).

Plaintiff did not object to defendants' requests for judicial notice and instead belatedly filed her own request. Plaintiff's request included, among other things, a declaration by her proffered expert witness and a filing with the Division of Corporations of the New York Department of State showing that a company named "America's Wholesale Lender, *Inc.*" (italics added) was registered in that state in 2008.

The court granted defendants' requests for judicial notice in full, partially granted plaintiff's request as to BoA's demurrer only,[5] and sustained defendants' demurrers without leave to amend. Judgments in favor of defendants' respective demurrers

were entered[6] and plaintiff timely filed appeals to both, which have been consolidated by this court.

II

DISCUSSION

On appeal, plaintiff argues the trial court committed errors in sustaining defendants' demurrers and not granting leave to amend her complaint.

A. Standard of Review and Relevant law

"[T]he function of a demurrer is to test the legal sufficiency of the pleading by raising questions of law." (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383.) On appeal of a demurrer ruling, we review questions of law de novo but liberally construe the complaint to draw factual "inferences favorable to the plaintiff, not the defendant." (*Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1238.) "For purposes of reviewing a demurrer, we accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law." (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924 (*Yvanova*).) Moreover, factual allegations are *not* accepted as true if they are found to be contradicted by or inconsistent with facts judicially noticed by the court. (See *Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1474 [rejecting plaintiffs' characterization of real property transaction where contradicted by judicially noticed deeds of trust]; *Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 38-39 [disregarding plaintiffs' allegations contradicted by judicially noticed official acts].)

We review a trial court's decision to take judicial notice for abuse of discretion. (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 536, disapproved of on other grounds in *Yvanova, supra*, 62 Cal.4th at p. 939, fn. 13.) Among other categories of matters, the court may take judicial notice of official acts of any federal legislative, executive or judicial department (Evid. Code, § 452, subd. (c)), as well as "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subd. (h).)

With respect to documents, **the general rule is that "`[t]aking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning.'"** (*Fremont Indem. Co. v. Fremont Gen.*

Corp. (2007) 148 Cal.App.4th 97, 113, quoting *Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374.) However, if not reasonably controverted, judicial notice can extend to the contents of a noticed document. For example, **in the context of real property transactions, the court may take judicial notice of a fact or proposition contained in a recorded document, even if it negates an express allegation of the pleading**. (See *Jenkins v. JP Morgan Chase Bank, N.A., supra*, 216 Cal.App.4th at p. 536, disapproved on other grounds in *Yvanova, supra*, 62 Cal.4th at p. 939, fn. 13; see also *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 753-754 [where a purchase and assumption agreement between the Federal Deposit Insurance Corporation and a solvent bank was posted on the former's official Web site, the court appropriately took judicial notice of both the existence of the agreement and its legal effect that the bank assumed the assets of an insolvent bank, but not its liabilities]; compare *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 886-887 [declining to take judicial notice of purchase and assumption agreement where authenticity of agreement was disputed].)

In this case, as mentioned above, plaintiff's operative (third amended) complaint alleged two equitable causes of action to cancel written instruments. "`**To prevail on a claim to cancel an instrument, a plaintiff must prove (1) the instrument is void or voidable due to, for example, fraud; and (2) there is a reasonable apprehension of serious injury including pecuniary loss or the prejudicial alteration of one's position.**'" (*Thompson v. Ioane* (2017) 11 Cal.App.5th 1180, 1193-1194, quoting *U.S. Bank National Assn. v. Naifeh* (2016) 1 Cal.App.5th 767, 778.)

B. AWL's Identity Based Upon Judicially Noticed Matters

Plaintiff primarily argues that because AWL did not exist at the time she signed her trust deeds, promissory note, and credit agreement (collectively the loan documents), they were void and unenforceable. At the trial court level, plaintiff did not object to defendants' requests for judicial notice supporting their demurrers and, on appeal, does not dispute the accuracy or relevance of the matters that were judicially noticed. We find the trial court properly took judicial notice of the parties' requests.

Given this record, we find that at all times relevant to this case, **Countrywide had been a New York corporation which had successfully registered AWL as its trade name with the trademark office 11 years before plaintiff's loan documents were signed, in 1994. The legal effect of the registration was that**

Countywide was the legal owner and constructive user of the AWL word mark at all times relevant to this appeal. (See 15 U.S.C. § 1057(b) & (c); 37 C.F.R. § 2.46.) As a result, we find the trial court correctly ruled that plaintiff's allegation that AWL did not exist at the time of her loan documents was contradicted by judicially noticeable facts.[7]

None of the matters judicially noticed through plaintiff's request alter the effects of defendants' judicially noticed matters. First, the court did not abuse its discretion in declining to judicially notice the substantive contents of plaintiff's expert witness's declaration (*Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1057), so they provided no basis for challenging defendants' demurrers. Next**, we reject plaintiff's argument that because a company using a nearly identical name was registered in the state of New York in 2008, it proves AWL did not exist prior to that registration. More than two entities can claim the same business name.**

In other words, plaintiff did not refute defendants' judicially noticeable matters demonstrating **the existence of AWL as a trade name of Countrywide** at the time of plaintiff's loan transactions. As a consequence, plaintiff's operative complaint did not sufficiently state facts supporting causes of action to cancel written instruments on the basis of AWL's status of existence.

C. Plaintiff's Three Arguments for Finding Void Loan Documents Regarding AWL's Identity

1. Civil Code section 1550

On appeal, plaintiff asserts three unpersuasive arguments for finding the loan documents void.[8] First, plaintiff asserts her loan documents were void for failure to satisfy all elements necessary to establish an enforceable contract under section 1550. Plaintiff cites to *Lopez v. Charles Schwab & Co., Inc.* (2004) 118 Cal.App.4th 1224, and asserts AWL could not enter into a transaction with plaintiff because it did not exist. This argument fails first because *Lopez* did not involve the proposition asserted by plaintiff.[9] More importantly, given that plaintiff cannot rely upon her argument that AWL did not exist at the time of her loans, plaintiff has failed to demonstrate that Civil Code section 1550 was not satisfied when she entered her loan agreements.

2. Fraud theories

Second, plaintiff asserts her loan documents were void based upon a theory of fraud. This argument initially fails because, for the reasons discussed above, plaintiff cannot demonstrate fraud based upon the nonexistence of AWL, given that judicially noticed matters show **AWL was the trade name of Countrywide starting no later than 1994.** Next, it follows that plaintiff's allegations could only sufficiently support a theory of fraud by showing that AWL's identification as a New York corporation (in the first trust deed) was a misidentification of its true identity, Countrywide. Indeed, in her appellate reply brief, plaintiff claims that companies operating under fictitious names in California "must identify themselves as such." The fatal problem, however, is that plaintiff provides no authority for her assertion. Accordingly, we treat her contention on the point as waived. (*Dabney v. Dabney* (2002) 104 Cal.App.4th 379, 384 **["We need not consider an argument for which no authority is furnished"**].)

Moreover, we otherwise find plaintiff's allegations insufficient to support a theory of fraud for lack of a material misrepresentation. Plaintiff cites to *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 403, to argue the loan transactions were void due to fraud in the inception. **"California law distinguishes between fraud in the `inducement' of a contract and fraud in the `execution' or `inception' of a contract."** (*Hotels Nevada v. L.A. Pacific Center, Inc.* (2006) 144 Cal.App.4th 754, 763, quoting *Rosenthal*, at p. 415.) **In "[t]he more usual case of fraud in the inducement . . . `"the promisor knows what he is signing but his consent is *induced* by fraud, mutual assent is present and a contract is formed, which, by reason of the fraud, is *voidable*.** In order to escape from its obligations the aggrieved party must *rescind*, by prompt notice and offer to restore the consideration received, if any."'" (*Hotels Nevada*, at p. 763, quoting *Ford v. Shearson Lehman American Express, Inc.* (1986) 180 Cal.App.3d 1011, 1028.)

In contrast, a case of **fraud in the execution or inception of a contract "occurs when `"the promisor is deceived as to the nature of his act, and actually does not know what he is signing, or does not intend to enter into a contract at all."'"** (*Hotels Nevada v. L.A. Pacific Center, Inc., supra*, 144 Cal.App.4th at p. 763, quoting *Ford v. Shearson Lehman American Express, Inc., supra*, 180 Cal.App.3d at p. 1028.) **The lack of "`"mutual assent"'" renders the contract void and it may be disregarded without the necessity of rescission**. (*Ibid.*) In other words, **the difference between a voidable as opposed to void agreement, under *Rosenthal*, turns on whether there was mutual assent at the time of contracting**. (*Rosenthal v. Great Western Fin. Securities Corp., supra*, 14 Cal.4th at p. 415.)

Plaintiff failed to sufficiently plead fraud in either form because, be it fraud in the inducement or inception, the misrepresentation at issue must be material. (See *Rosenthal v. Great Western Fin. Securities Corp., supra*, 14 Cal.4th at pp. 403-404 [noting that declarations under review alleged, among other facts, that defendant's "representatives materially misrepresented the nature of the investments being sold"].) In this case, both of plaintiff's alleged misrepresentations—that AWL falsely represented it existed and that it was a New York corporation—are insufficient to support plaintiff's asserted fraud. As to AWL's existence, again, judicially noticed matters contradicted plaintiff's claim that AWL did not exist when plaintiff signed her loan documents (and received loans totaling over $1.3 million).

As to the argument that an existing AWL fraudulently identified itself as a New York corporation when it was not one, judicially noticed matters demonstrate that the claimed misrepresentation is arguably incorrect and in any case immaterial under the circumstances of this case. That is, **AWL was Countrywide's trade name and the latter was indisputably a New York corporation. So even assuming that identifying AWL as a New York corporation was inaccurate—a debatable point because AWL and Countrywide were legally one and the same entity** (*Pinkerton's, Inc. v. Superior Court* (1996) 49 Cal.App.4th 1342, 1348-1349)—**given that AWL was Countrywide at the time of her loan transaction,** plaintiff has not shown how the purported inaccuracy amounted to a material misrepresentation constituting fraud.

Granted, plaintiff is correct that appending the phrase "doing business as" to AWL's identification in the first trust deed would have achieved crystal clear clarity as to its identity as Countrywide's fictitious business name. However, plaintiff's operative complaint is bereft of facts and inferences which would tend to demonstrate **what difference it would have made if she had known she was receiving a loan from Countrywide and not a separate entity named AWL**. Equally telling, none of plaintiff's discussions, at the trial court or in this court, attempt to provide further context or otherwise demonstrate materiality of the arguable inaccuracy in identifying AWL as a New York corporation in the first trust deed—this within the undisputed context of plaintiff asking for and receiving over $1.3 million from AWL to purchase her property, more than a decade before claiming fraud.

Under these circumstances, it does not follow that AWL identifying itself as a New York corporation without clarifying it was the trade name of Countrywide amounted to any form of fraud. Absent materiality, plaintiff did not plead facts

sufficient to support her two causes of action to cancel written instruments based upon a theory of fraud.

3. Corporations Code section 2105, subdivision (a)[10]

Third, plaintiff argues her loan documents were and are void because AWL failed to obtain a "certificate of qualification" from the California Secretary of State, pursuant to section 2105, subdivision (a), before transacting intrastate in California. Plaintiff raises this argument for the first time on appeal and cites to two cases which did not involve section 2105. Factually, plaintiff asserts AWL "could not have been authorized to do business [at the time of plaintiff's loan documents in 2005] because it was not incorporated until 2008."

We exercise our discretion to entertain plaintiff's argument (*Farrar v. Direct Commerce, Inc.* (2017) 9 Cal.App.5th 1257, 1275-1276, fn. 3), and find plaintiff's argument unpersuasive on multiple grounds. First and foremost, plaintiff's factual basis for demonstrating that AWL was not in compliance with section 2105, fails because, for the reasons discussed above, plaintiff cannot demonstrate AWL did not exist until 2008, given that judicially noticed matters show **AWL was the trade name of Countrywide starting no later than 1994.**

Further, in its respondent's brief, Bayview cites two specific subdivisions of section 191 to argue that section 2105's registration requirement did not apply to AWL's transactions underlying plaintiff's loan documents. Specifically, Bayview counterargues that, pursuant to section 191, subdivision (c)(7), Countrywide (doing business as AWL) was exempt from section 2105's registration requirement because it was a foreign corporation "[c]reating evidences of debt or mortgages, liens or security interests on real or personal property." (§ 191, subd. (c)(7).) Bayview also counterargues Countrywide was additionally exempt from registration because it was a "foreign lending institution" engaged in its ownership and enforcement of loans. (§ 191, subd. (d)(3).)

Plaintiff replies only to Bayview's counterargument regarding section 191, subdivision (c)(7), by simultaneously arguing that AWL did not exist but also that its conduct of "soliciting [plaintiff's] loan and then funding it" went beyond the scope of the subdivision's exemption. Plaintiff cites no legal authority or operative facts in support of her reply so we are not persuaded plaintiff's vague allusion to AWL's conduct prevents the facially valid exemption of section 191, subdivision (c)(7), as it relates to plaintiff's loan document transactions. Additionally, since plaintiff's reply is silent as to Bayview's counterargument for registration

exemption pursuant to section 191, subdivision (d)(3), we find that ground for exemption conceded. (See *Johnson v. English* (1931) 113 Cal.App. 676, 677 ["[a]ppellant, by failing to file a reply brief, concedes that respondent's position is unassailable"].)

Moreover, we are not persuaded by plaintiff's legal argument for finding her loan documents void based upon the two cases she cites. Indeed, in the case directly involving section 2105, *The Capital Gold Group, Inc. v. Nortier* (2009) 176 Cal.App.4th 1119. 1132,[11] the Second District Court of Appeal expressly discussed "a number of penalties for transacting intrastate business without qualifying [under section 2105]" by analyzing section 2203 (which is not mentioned anywhere in plaintiff's briefing). Our independent review of that section identifies express penalties of "twenty dollars ($20) for each day that unauthorized intrastate business is transacted" (§ 2203, subd. (a)), as well as "two hundred fifty dollars ($250) in addition to the fees due for filing the statement and designation required by Section 2105" which would allow a noncompliant business to maintain a legal action in a California court. (§ 2203, subd. (c).) Neither this unbriefed section on penalties nor plaintiff's cited case makes any mention of finding void a transaction conducted by a business not in compliance with section 2105. (*The Capital Gold Group, Inc.*, at p. 1132.) **Plaintiff has failed to demonstrate that, even if Countrywide (doing business as AWL) was subject to section 2105 and failed to comply, such noncompliance would compel a conclusion that plaintiff's loan documents were void as a result.**

D. Plaintiff's Allegations Regarding MERS

Plaintiff's third amended complaint allegations and appellate briefs appear to argue that, in addition to her loan documents being void, she sufficiently alleged facts to cancel written instruments based upon MERS's lack of capability to receive and transfer interests arising from the loan documents. To the extent this is so, such an argument fails for two reasons.

First, plaintiff generally lacks standing to bring such a challenge unless she can sufficiently allege the at issue documents are void (*Yvanova, supra,* 62 Cal.4th at p. 924), which she failed to do for the reasons discussed above. Second, as the trial court correctly found, because it is undisputed there was no foreclosure pending at any time relevant to this case, the holding in *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1155-1156—which generally prohibits a plaintiff from attempting a preemptive, preforeclosure challenge to authority to foreclose—is on point with the facts of this case. With respect to plaintiff's

assertion that her claim is exempt from the general rule of *Gomes*, her assertion fails because her claim is based upon the invalid premise that AWL did not exist when plaintiff entered into her loan transactions.

In sum, the properly judicially noticed matters in this case contradicted plaintiff's third amended complaint allegations and their effects persuade us that the loan documents in question were not void (or voidable). Accordingly, plaintiff has not demonstrated she pleaded facts sufficient to state valid causes of action to cancel written instruments. The trial court properly sustained defendants' demurrers to plaintiff's third amended complaint.

E. Leave to Amend

Last, we consider whether the trial court abused its discretion in not granting plaintiff leave to file a fourth amended complaint. On this issue, generally, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) In this case, plaintiff argues, for the first time on appeal, that she should be granted leave to amend because she can amend her complaint to allege a violation of the federal Fair Debt Collection Practices Act (FDCPA).

"Leave to amend should be denied where the facts are not in dispute and the nature of the claim is clear, but no liability exists under substantive law." (*Lawrence v. Bank of America* (1985) 163 Cal.App.3d 431, 436-437.) "`The plaintiff bears the burden of proving there is a reasonable possibility of amendment. [Citation.] . . . [¶] To satisfy that burden on appeal, a plaintiff "must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." [Citation.] The assertion of an abstract right to amend does not satisfy this burden. [Citation.] The plaintiff must clearly and specifically set forth the "applicable substantive law" [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary. [Citation.]'" (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1491.)

We exercise our discretion to entertain plaintiff's proffered claim under the FDCPA (*Farrar v. Direct Commerce, Inc., supra*, 9 Cal.App.5th at pp. 1275-1276, fn. 3), and find it has no merit. Plaintiff cites to title 15 United States Code section

1692f(6), and *Dowers v. Nationstar Mortgage, LLC* (9th Cir. 2017) 852 F.3d 964, 971, to contend that defendants are subject to liability for "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property [where] there is no present right to possession of the property claimed as collateral through an enforceable security interest . . . ." Plaintiff argues FDCPA liability can be alleged because AWL did not exist and also that the assignments of the trust deeds, following her initial loan transactions, constituted breaks in the chains of title because MERS could not hold beneficial interests in plaintiff's loan documents. According to the latter argument, any present beneficiary of the loan documents would lack the legal authority to foreclose because preceding assignments by MERS were ineffective.

Plaintiff's proffered FDCPA claim fails to justify leave for amendment. We find plaintiff has conceded defendants' counterarguments, as set forth in their respective respondent's briefs, by not replying to them. (See *Johnson v. English, supra,* 113 Cal.App. at p. 677 ["[a]ppellant, by failing to file a reply brief, concedes that respondent's position is unassailable"].) Specifically, plaintiff has conceded Bayview's first counterargument that, given the only foreclosure conduct that occurred was a 2012 notice of default which was rescinded within the same month, plaintiff's complaint, filed in 2016, cannot allege any actionable taking or threat that violated title 15 United States Code section 1692f. (See 15 U.S.C. § 1692k(d) [one-year statute of limitations for FDCPA violations].) Next, plaintiff has also conceded Bayview's second counterargument, that plaintiff's proffered FDCPA claim fails because it depends upon unmeritorious arguments that the loan documents are void.[12] Third, plaintiff has also conceded BoA's counterargument that violated title 15 United States Code section 1692f(6), does not apply to it because BoA is not a "`debt collector'" as defined by title 15 United States Code section 1692a(6). (See *Schlegel v. Wells Fargo Bank, NA (In re Schlegel)*(9th Cir. 2013) 720 F.3d 1204, 1208-1210 [rejecting home mortgagors arguments for finding assignee Wells Fargo to be a "debt collector" under the FDCPA].)

In sum, plaintiff's proffered FDCPA claim under the circumstances of this case amounts merely to an abstract right, at best. Plaintiff has not demonstrated the trial court abused its discretion in denying leave to amend as the issue was argued to that court. On appeal, plaintiff has not met her burden to demonstrate she should be granted leave to amend her complaint to include a claim under the FDCPA. (*Rossberg v. Bank of America, N.A., supra,* 219 Cal.App.4th at p. 1491.)

III

DISPOSITION

The judgment is affirmed. Defendants are entitled to recover their costs on appeal.

BEDSWORTH, Acting P. J. and THOMPSON, J., concurs.

[1] Not material to this appeal, the registration denotes it was cancelled in 2016 with a last listed owner of "BANK OF AMERICA CORPORATION."

[2] The substitution was filed with the Orange County Clerk Recorder's Office a little over three months later, in January 2007.

[3] Although the procedural point is immaterial because of plaintiff's subsequent third amended complaint, Bayview's demurrer was not ruled upon because plaintiff dismissed Bayview (and another individual defendant) without prejudice, prior to the hearing on its demurrers to the second amended complaint.

[4] The special demurrers—that the complaint failed for uncertainty with respect to claims against BoA and because plaintiff failed to secure the court's leave to re-include Bayview as a defendant—are not relevant to this appeal because of our findings discussed *infra*.

[5] Specifically, the trial court granted plaintiff's request with respect to several matters. First, the court took judicial notice of the existence and legal effects of the documents recorded at the Orange County Clerk Recorder's Office described above. Second, the court took notice of search results on the Web sites of the California Secretary of State and the Division of Corporations of the New York Department of State, which showed two corporations named "America's Wholesale Lender" and "America's Wholesale Lender, Inc." having statuses of "SURRENDER" and "INACTIVE," respectively. Third, the court took notice of the existence of a Florida trial court judgment purportedly involving BoA, but not as to the truth of the statements within the judgment. Fourth, the court took notice of the first three pages of a prospectus for the securitized trust that the first trust deed was assigned to after plaintiff's initial loan with AWL, but only as to the fact that the pages were obtained from the Web site of the United States Securities and Exchange Commission.

[6] A judgment in favor of BoA was entered in November 2017 and another in favor of Bayview and Mellon was entered in December 2017.

[7] The correctness of this conclusion is also consistent with the sham pleading doctrine, which is implicated by the facts that plaintiff's initial complaint alleged that AWL was a trade name of Countrywide but her third amended complaint, now denying this relationship, offered no explanation as to the change in position from the original allegation. (See *Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1248 ["**a plaintiff cannot avoid allegations that are determinative to a cause of action simply by filing an amended complaint which omits the problematic facts or pleads facts inconsistent with those alleged in the original complaint**"].)

[8] Plaintiff explicitly claims that "[s]he need not plead tender" because tender would only be required by her causes of action if the at issue documents were voidable as opposed to void. Accordingly, our analysis *infra* does not consider any potentially implicated theories for finding a loan document voidable.

[9] *Lopez v. Charles Schwab & Co., Inc., supra,* 118 Cal.App.4th at pages 1226-1228, involved a dispute about the enforcement of an arbitration agreement signed by a securities broker's client based upon a question of mutual assent between two otherwise competent parties. The case did not involve any issue regarding the parties' capacities to contract.

[10] All further undesignated statutory references are to the Corporations Code.

[11] Plaintiff's other case citation is to *Palm Valley Homeowners Assn., Inc. v. Design MTC* (2000) 85 Cal.App.4th 553, 560, which dealt with litigation sanctions and whether suspension of a corporation's powers, rights, and privileges under section 2205 should be construed the same as a suspension under Revenue and Taxation Code section 23301. (*Palm Valley Homeowners Assn., Inc.,* at pp. 556, 558.) The case did not involve section 2105 and we are not persuaded it compels any conclusion material to Oh's argument in this case.

[12] Plaintiff has also conceded BoA's similar, but narrower, counterargument that her profferred FDCPA claim lacks merit because it rests on plaintiff's unmeritorious argument that AWL did not exist at the time of her loan documents.