

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 3 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

WAYNE BARBER; GEORGE WHITE,

No. 16-56282

Plaintiffs-Appellants,

D.C. No. 5:16-cv-00695-R-AGR

v.

MEMORANDUM\*

U.S. BANK, successor trustee to Bank of  
America, NA, successor in interest to  
LaSalle Bank NA, as trustee on behalf of the  
Holders of the WAMU Mortgage Pass-  
Through Certificates, Series 2007-OA1; et  
al.,

Defendants-Appellees.

Appeal from the United States District Court  
for the Central District of California  
Manuel L. Real, District Judge, Presiding

Submitted September 26, 2017\*\*

Before: SILVERMAN, TALLMAN, and N.R. SMITH, Circuit Judges.

Wayne Barber and George White appeal from the district court's judgment  
dismissing their action alleging federal and state law claims arising from non-

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\* This disposition is not appropriate for publication and is not precedent  
except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision  
without oral argument. *See* Fed. R. App. P. 34(a)(2).

judicial foreclosure proceedings. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's dismissal under Fed. R. Civ. P. 12(b)(6). *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1032, 1040 (9th Cir. 2011). We may affirm on any ground supported by the record. *Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir. 2001). We affirm.

The district court properly dismissed plaintiffs' wrongful foreclosure and Cal. Civ. Code § 2924(a)(6) claims because they are pre-foreclosure challenges. *See Saterbak v. JPMorgan Chase Bank, N.A.*, 199 Cal. Rptr. 3d 790, 795-96 (Cal. Ct. App. 2016) (noting that preemptive challenges to foreclosure are not allowed under California law, and *Yvanova v. New Century Mortgage Corp.*, 365 P.3d 845 (Cal. 2016) is expressly limited to the post-foreclosure context), *review denied* July 13, 2016.

Dismissal of plaintiffs' breach of implied covenant of good faith and fair dealing claim was proper because the covenant only protects express covenants or promises of the contract. *See Foley v. Interactive Data Corp.*, 765 P.2d 373, 394 (Cal. 1988) ("The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest . . .").

The district court did not abuse its discretion in denying leave to amend because amendment would have been futile. *See Cervantes*, 656 F.3d at 1041

(setting forth standard of review and noting that a court may dismiss without leave to amend where amendment would be futile).

We reject as without merit plaintiffs' contentions regarding the district court's grant of defendants' request for judicial notice and its consideration of the judicially noticed documents.

We do not consider matters not specifically and distinctly raised and argued in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

**AFFIRMED.**