

1 establishes a clear process by which disputes concerning furnished  
2 information are addressed.<sup>75</sup> There is no indication that the  
3 process has been employed with respect to this matter.

4 The Motion is properly granted to dismiss, without leave to  
5 amend, the claim for violation of the FCRA.

6 **Additional Statute of Limitations Grounds**

7 Further, DBNTC alleges that the FCRA claims are time-barred.  
8 According to 15 U.S.C. 1681p, "[A]n action to enforce any liability  
9 created under this title . . . may be brought . . . not later than  
10 the earlier of - (1) [two] years after the date of discovery by the  
11 plaintiff of the violation that is the basis for such liability; or  
12 (2) [five] years after the date on which the violation that is the  
13 basis for such liability occurs." Macklin admits that he first  
14 received a notice of default in December 2008, and did not commence  
15 the instant adversary proceeding until January 13, 2011, a month  
16 after the statute of limitations expired. No sufficient basis for  
17 tolling the statute of limitations as to a claim arising under the  
18 FCRA has been alleged or argued. Merely because Macklin chose to  
19 ignore information furnished by DBNTC to a consumer reporting  
20 agency until he decided to file a lawsuit alleging various claims  
21 is not sufficient.

22 Based upon the foregoing, the Third Cause of Action is  
23 dismissed without leave to amend.

24 **FRAUD - FOURTH CAUSE OF ACTION**

25 Macklin also alleges in his Fourth Cause of Action that DBNTC  
26 defrauded him by assigning the deed of trust to itself without  
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28 <sup>75</sup> 15 U.S.C. § 1681s-2(a)(2), (6), (8), and (b).

1 having authority to do so. Macklin asserts that he was not told  
2 that part of his loan payments would be used to pay service fees to  
3 the servicer and to buy insurance and other credit enhancements to  
4 be used by the servicer. Macklin asserts that "Defendants" were  
5 fiduciaries, and they breached their duty of care to Macklin by  
6 fraudulently inducing Macklin to enter into a mortgage transaction  
7 which was contrary to Macklin's intent and to his best interest.  
8 However, Macklin does not allege that any fees paid by him were for  
9 amounts other than as represented to him when obtaining the loan.  
10 At best, Macklin asserts that he should have the right to know how  
11 and direct how the lender intends to use those monies paid by him  
12 on the loan.

13 Macklin further contends that "Defendants" fraudulently  
14 misrepresented "its standing" to foreclose on Macklin's note and  
15 deed of trust to the State of California by falsely reporting a  
16 default on the loan to the Recorder's Office. Macklin states that  
17 Defendants made these representations with full knowledge that  
18 their representations were false as further evidenced by  
19 Defendant's production of two separate allonges to the Note, which  
20 derive from the same lender. Macklin asserts that because he was  
21 not an investment banker, securities dealer, mortgage lender or  
22 broker - (or, in other words, that he was unsophisticated with  
23 regards to financial matters) - he reasonably relied upon the  
24 misrepresentations made by "Defendants" when he agreed to execute  
25 the loan documents. According to Macklin, as a direct and  
26 proximate cause of "Defendants'" false representations and material  
27 omissions, his credit was ruined and he has either lost or is about  
28 to lose his home.

1 Under California law, the elements of fraud are a  
2 "misrepresentation, knowledge of its falsity, intent to defraud,  
3 justifiable reliance, and resulting damages."<sup>76</sup> Under Federal Rule  
4 of Civil Procedure 9(b), as made applicable to this adversary  
5 proceeding by Federal Rule of Bankruptcy Procedure 7009, fraud must  
6 be pled "with a high degree of meticulousness."<sup>77</sup> In fraud cases,  
7 "the who, what, when, where and how" of the misconduct must be  
8 alleged so as to give defendants sufficient information to defend  
9 the charge against them.<sup>78</sup>

10 Rule 9(b) prevents a complaint from merely lumping multiple  
11 defendants together; "plaintiffs [must] differentiate their  
12 allegations when suing more than one defendant . . . and inform  
13 each defendant separately of the allegations surrounding his  
14 alleged participation in the fraud."<sup>79</sup> "Rule 9(b) serves three  
15 purposes: (1) to provide defendants with adequate notice to allow  
16 them to defend the charge and deter plaintiffs from the filing of  
17 complaints 'as a pretext for the discovery of unknown wrongs';  
18 (2) to protect those whose reputation would be harmed as a result  
19 of being subject to fraud charges; and (3) to "prohibit []  
20 plaintiff[s] from unilaterally imposing upon the court, the parties  
21 and society enormous social and economic costs absent some factual  
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23 <sup>76</sup> *Gil v. Bank of America, N.A.* 138 Cal. App. 4th 1371, 1381  
24 (2006).

25 <sup>77</sup> *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1022-23 (9th Cir.  
26 2000); *Moore v. Brewster*, 96 F.3d 1240, 1245-46 (9th Cir. 1996).

27 <sup>78</sup> *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009).

28 <sup>79</sup> *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007)  
(citation and quotation omitted) (second alteration supplied).

1 basis.'<sup>80</sup>

2 As stated in *Nymark v. Heart Fed. Savings & Loan Assn.*:<sup>81</sup>

3 [The court has found no] California case specifically  
4 addressing whether a lender has a duty of care to a  
5 borrower in appraising the borrower's collateral to  
6 determine if it is adequate security for a loan.  
7 However, as a general rule, a financial institution owes  
8 no duty of care to a borrower when the institution's  
9 involvement in the loan transaction does not exceed the  
10 scope of its conventional role as a mere lender of money.  
11 (*Wagner v. Benson* (1980) 101 Cal.App.3d 27, 34-35 [161  
12 Cal.Rptr. 516]; *Fox & Carskadon Financial Corp. v. San  
13 Francisco Fed. Sav. & Loan Assn.* (1975) 52 Cal.App.3d  
14 484, 488, 489 [125 Cal.Rptr. 549]; *Bradler v. Craig  
15* (1969) 274 Cal.App.2d 466, 473, 476 [79 Cal.Rptr. 401].)  
16 Thus, for example, a lender has no duty to disclose its  
17 knowledge that the borrower's intended use of the loan  
18 proceeds represents an unsafe investment. (*Wagner v.  
19 Benson, supra*, 101 Cal.App.3d at pp. 33-35.) 'The  
20 success of the [borrower's] investment is not a benefit  
21 of the loan agreement which the [lender] is under a duty  
22 to protect [citation].' (*Id.*, at p. 34.) 'Liability to  
23 a borrower for negligence arises only when the lender  
24 "actively participates" in the financed enterprise  
25 "beyond the domain of the usual money lender."' (*Id.*, at  
26 p. 35; quoting *Connor v. Great Western Sav. & Loan Assn.*  
27 (1968) 69 Cal.2d 850, 864 [73 Cal.Rptr. 369, 447 P.2d  
28 609, 39 A.L.R.3d 224].)

17 With respect to the alleged misrepresentations, Macklin does  
18 not allege that he did not receive what was represented to him at  
19 the time of the loan transaction. He sought, and obtained, monies  
20 on the terms he negotiated. All of the alleged misrepresentations  
21 occurred after he obtained the monies and given the note and deed  
22 of trust. There are no allegations of any reasonable reliance on

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24 <sup>80</sup> *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir.  
25 Cal. 2009) (quoting *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399,  
26 1405 (9th Cir. 1996) (quoting *Semegen v. Weidner*, 780 F.2d 727,  
731 (9th Cir. 1985)) (internal quotations omitted, brackets in  
original)).

27 <sup>81</sup> 231 Cal. App. 3d 1089, 1095-96 (1991); see also *Cross v.*  
28 *Downey S&L Ass'n*, 2009 U.S. Dist. LEXIS 17946, \*12-13 (C.D. Cal.  
Feb. 23, 2009).

1 the alleged misrepresentations to Macklin's detriment. He disputes  
2 DBNTC's interest in the Property and contends that  
3 misrepresentations were made to the County when DBNTC and its  
4 representatives proceeded with the steps necessary to notice and  
5 conduct a nonjudicial foreclosure sale. At least two of the  
6 necessary elements of fraud are missing - justifiable reliance on  
7 the alleged misrepresentation and damages arising from reliance on  
8 the alleged misrepresentation.

9 Accordingly, the Motion to Dismiss is granted as to the Fourth  
10 Cause of Action without leave to amend.

11 **UNJUST ENRICHMENT - FIFTH CAUSE OF ACTION**

12 Macklin asserts in his Fifth Cause of Action that Defendant  
13 DBNTC should have disclosed to him whatever fees were not applied  
14 to the payment of the loan. Macklin alleges that Defendant  
15 retained the benefits of charging a higher interest rate, rebates,  
16 kickbacks, and profits (from the resale of mortgages and notes  
17 using Macklin's identity, credit score, and reputation without  
18 consent, and as part of an illegal scheme). As a result,  
19 Defendants have been unjustly enriched at the expense of Plaintiff  
20 Macklin. What Macklin does not allege or explain is what "fees"  
21 are charged as a loan transaction which are applied to pay the loan  
22 (principal and interest). By their very nature, fees are owed in  
23 addition to the principal and interest.

24 According to *First Nationwide Savings v. Perry*:<sup>82</sup>

25 An individual is required to make restitution if he or  
26 she is unjustly enriched at the expense of another.  
27 (Rest., Restitution, § 1; *California Federal Bank v.*  
*Matreyek* (1992) 8 Cal.App.4th 125, 131 [10 Cal.Rptr.2d

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28 <sup>82</sup> 11 Cal.App.4th 1657, 1662 (Cal. App. 6th Dist. 1992)

1 58].) A person is enriched if the person receives a  
2 benefit at another's expense. (Rest., Restitution, supra,  
3 \$ 1, com. a.) Benefit means any type of advantage.  
(Rest., supra, \$ 1, com. b; *California Federal Bank v.*  
4 *Matreyek, supra*, 8 Cal.App.4th at p. 131.)

5 However, "it is of course the law that when one obtains a  
6 benefit which may not be justly retained, unjust enrichment  
7 results, and restitution is in order."<sup>83</sup> "However, the 'mere fact  
8 that a person benefits another is not of itself sufficient to  
9 require the other to make restitution therefor.'"<sup>84</sup>

10 DBNTC asserts that Macklin received the benefit of the  
11 bargain. He borrowed money to purchase a home. Although Macklin  
12 alleges that he received less than what he paid for because  
13 defendant extracted fees, he does not assert that he suffered an  
14 actual injury.

15 DBNTC asserts that as to a claim for unjust enrichment  
16 resulting in an implied-in-fact contract, "it is well settled that  
17 an action based on an implied-in-fact or quasi-contract cannot lie  
18 where there exists between the parties a valid express contract  
19 covering the same subject matter."<sup>85</sup> Here, there is a valid loan  
20 agreement (express contract) between Macklin and Defendant.

21 Accordingly, the Motion to Dismiss is granted as to the Fifth  
22 Cause of Action for unjust enrichment without leave to amend.  
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25 <sup>83</sup> *Marina Tenants Ass'n v. Deauville Marina Dev. Co.*, 181  
26 Cal. App. 3d 122, 134 (1986) (citations omitted).

27 <sup>84</sup> *Id.* (citation omitted).

28 <sup>85</sup> *Lance Camper Mfg. Corp. v. Republic Indem. Co.*, 44 Cal.  
App. 4th 194, 203 (1996).

1                   **RACKETEER INFLUENCED AND CORRUPT**  
2                   **ORGANIZATIONS ACT ("RICO")- SIXTH CAUSE OF ACTION**

3           Macklin's Sixth Cause of Action alleges violations of RICO  
4 arising under 18 U.S.C. §§ 1961-1968. Through his FAC, Macklin  
5 alleges that nonspecific "Defendants" used multiple corporate  
6 entities and parties to perpetrate a fraud against Macklin through  
7 the use of intentional nondisclosure, fraud, and the creation of  
8 fraudulent loan documents. As to DBNTC, Macklin asserts Defendant  
9 recorded fraudulent or false documents with the Placer County  
10 Recorder Officer in an attempt to take the Property. The specific  
11 acts at issue are the alleged use of false signatures on recorded  
12 documents which are alleged to violate federal mortgage lending  
13 laws, banking regulations, consumer credit laws, and various  
14 California state laws concerning conveyance of notes and deeds of  
15 trust.

16           According to 18 U.S.C. § 1962(c), "[i]t shall be unlawful for  
17 any person employed by or associated with any enterprise engaged in  
18 or the activities of which effect, interstate or foreign commerce,  
19 to conduct or participate, directly or indirectly, in the conduct  
20 of such enterprise's affairs through a pattern of racketeering  
21 activity or collection of unlawful debt." According to *Flores v.*  
22 *Emerich & Fike*:<sup>86</sup>

23           Section 1961 enumerates acts which are considered to be  
24 'racketeering activity' (i.e., 'predicate acts').  
25 Included is 'any act or threat involving murder,  
26 kidnaping, gambling, arson, robbery, bribery, extortion,  
27 dealing in obscene matter, or dealing in a controlled  
substance or listed chemical (as defined in Section 102  
of the Controlled Substances Act), which is chargeable  
under State Law and punishable by imprisonment for more

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28           <sup>86</sup> 416 F. Supp. 2d 885, 911 (E.D. Cal. 2006)

1 than one year.' § 1961(1)(A). Also included are any of  
2 more than twenty types of conduct indictable under  
3 enumerated provisions of the United States Code, ranging  
4 from mail fraud and wire fraud, through robbery and  
5 extortion, to white slave trade. § 1961(1)(B). Finally,  
6 a 'predicate act' may also be established by any offense  
7 involving fraud 'connected with' a bankruptcy case,  
8 'fraud in the sale of securities,' or any act related to  
9 a controlled substance or listed chemical "punishable"  
10 under federal law.' § 1961(1)(C).

11 A civil RICO complaint must at least allege: "(1) conduct  
12 (2) of an enterprise (3) through a pattern (4) of racketeering  
13 activity (known as 'predicate acts') (5) causing injury to  
14 plaintiff's business or property.'"<sup>87</sup> As a threshold matter,  
15 Federal Rule of Civil Procedure 9(b) applies to RICO Fraud  
16 allegations, including Mail Fraud and Wire Fraud.<sup>88</sup> "Rule 9(b)  
17 requires that the pleader state the 'time, place, and specific  
18 content of the false representations, as well as the identities of  
19 the parties to the misrepresentation.'"<sup>89</sup>

20 Here, Macklin has failed to allege a cause of action pursuant  
21 to RICO with the required specificity. Macklin asserts that "[a]t  
22 various times and places[,]" nonspecific "defendants" did acquire  
23 and maintain an interest in or control of a RICO enterprise of  
24 individuals who were associated, and who engaged in some type of  
25 interstate commerce in violation of RICO.<sup>90</sup> Macklin alleges that  
26 the notarizations on the Notice of Default and Notice of Trustee's  
27

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28 <sup>87</sup> *Flores*, F. Supp. 2d at 911 (quoting *Living Designs, Inc. v. E.I. Dupont de Nemours and Co.*, 431 F.3d 353, 361 (9th Cir. 2005)).

<sup>88</sup> *Id.* (citing *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir. 1989))

<sup>89</sup> *Id.*

<sup>90</sup> FAC ¶ 103.

1 Sale were not notarized properly under penalty of perjury, or were  
2 falsely attested to by someone.<sup>91</sup> Macklin alleges that during the  
3 "pertinent" time, Defendant participated in the commission of two  
4 or more of the RICO predicate acts. According to Macklin, it is  
5 alleged that DBNTC or its agents used false signatures of what are  
6 commonly known as "robo-signers." Macklin asserts that as a result  
7 of the Defendant's actions, he continues to suffer unspecified  
8 damages.

9 The RICO claim does not attribute specific conduct to  
10 individual defendants. The claim also does not specify either the  
11 time or the place of the alleged wrongful conduct, except to state  
12 that "[a]t all relevant times, Defendants have engaged in a  
13 conspiracy, common enterprise, and common course of conduct, the  
14 purpose of which is to engage in the violations of law alleged in  
15 the complaint."<sup>92</sup> This is insufficient. "[The Ninth Circuit has]  
16 interpreted Rule 9(b) to mean that the pleader must state the time,  
17 place, and specific content of the false representations as well as  
18 the identities of the parties to the misrepresentation."<sup>93</sup>

19 Because Macklin has failed to allege a civil RICO cause of  
20 action with the required specificity, the Motion to Dismiss is  
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22 <sup>91</sup> *Id.*

23 <sup>92</sup> *Id.* at ¶ 111.

24 <sup>93</sup> *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d  
25 1393, 1401 (9th Cir. Cal. 1986) (citing *Semegen v. Weidner*, 780 F.2d  
26 727, 731 (9th Cir. 1985) (citing *Miscellaneous Service Workers,*  
27 *Drivers & Helpers v. Philco-Ford Corp.*, 661 F.2d 776, 782 & n.16 (9th  
28 Cir. 1981)); *Bosse v. Crowell Collier & MacMillan*, 565 F.2d 602, 611  
(9th Cir. 1977); see also *Lewis v. Sporck*, 612 F. Supp. 1316, 1325  
(N.D. Cal. 1985) (allegations of mail fraud under section[s]  
1962(a)-1962(c) "must identify the time, place, and manner of each  
fraud plus the role of each defendant in each scheme").

1 granted as the Sixth Cause of Action, without leave to amend.

2 **UNFAIR COMPETITION LAW (CAL. BUS. & PROF. CODE § 17200)**  
3 **- SEVENTH CAUSE OF ACTION**

4 Macklin's Seventh Cause of Action, pursuant to California's  
5 Unfair Competition Law, assert that the foreclosing defendants  
6 engage in deceptive business practices with respect to mortgage  
7 loan servicing, assignments of notes and deeds of trust, and  
8 foreclosure of residential properties and related matters in a  
9 number of ways.<sup>94</sup> Macklin states that the foreclosing defendants  
10 engage in an uniform pattern and practice of overly-aggressive  
11 servicing that results in unfair and illegal foreclosure  
12 proceedings, generating unfair fees to California consumers and  
13 premature default.<sup>95</sup> Macklin asserts that the defendants have been  
14 unjustly enriched and should be enjoined from continuing in such  
15 practices pursuant to California Business & Professions Code  
16 §§ 17203 and 17204.<sup>96</sup> Macklin also asserts that he is entitled to  
17 injunctive relief and attorney's fees for defendant's violation of  
18 this Code Section.

19 In order to state a claim upon which relief may be granted, a  
20 claim under California's Unfair Competition Law<sup>97</sup> (the "UCL") a  
21 plaintiff must allege that the defendant committed a business act  
22 that is either fraudulent, unlawful or unfair.<sup>98</sup> A business act

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23 <sup>94</sup> FAC ¶ 117.

24 <sup>95</sup> *Id.* at ¶ 119.

25 <sup>96</sup> *Id.* at ¶ 122.

26 <sup>97</sup> Cal. Bus. & Prof. Code § 17200, et seq.

27 <sup>98</sup> *Levine v. Blue Shield of California*, 189 Cal.App.4th 1117,  
28 1136 (2010).

1 need only meet one of the three criteria - unlawful, unfair, or  
2 fraudulent, to be considered unfair competition under the UCL. In  
3 order for a business act to be considered "unlawful" there must be  
4 some underlying violation of a law.<sup>99</sup>

5 A "fraudulent" business act, for the purposes of the UCL, is  
6 unlike common law fraud or deception. A violation can be shown  
7 even if no one was actually deceived, relied upon the fraudulent  
8 practice, or sustained any damage. Instead, it is only necessary  
9 to show that members of the public are likely to be deceived.<sup>100</sup>

10 "Unfairness" under the UCL is an equitable concept that  
11 involves an examination of the impact of the business practice on  
12 the alleged victim, balanced against the reasons, justifications  
13 and motives of the alleged wrongdoer in order to weigh the utility  
14 of the defendant's conduct against the gravity of the harm to the  
15 alleged victim. For the purposes of a motion to dismiss, in order  
16 to state a claim for relief resulting from an allegedly unfair  
17 business practice under the UCL, the complaint must state "a *prima*  
18 *facie* case of harm, having its genesis in an apparently unfair  
19 business practice."<sup>101</sup> The complained of practice must be tethered  
20 to a legislatively-declared policy.<sup>102</sup>

21 In this case, the seventh claim for relief is dismissed  
22 because it does not state a claim under any of the three prongs of

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24 <sup>99</sup> See *Cisneros v. Instant Capital Funding Group*, 263 F.R.D. 595,  
610 (E.D. Cal. 2009).

25 <sup>100</sup> *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1167 (2000).

26 <sup>101</sup> *Motors, Inc. v. Times Mirror Co.*, 102 Cal. App. 3d 735, 740  
27 (1980); see also *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1167.

28 <sup>102</sup> *Lozano v. AT&T Wireless Servs., Inc.*, 405 F.3d 718, 736 (9th  
Cir. 2007).

1 the UCL. As to the "unlawful" prong, the Complaint does not allege  
2 the violation of any other law that would serve as an underlying  
3 violation for the UCL. As to the "unfair" prong, the Complaint  
4 does not allege any legislatively-declared policy to which  
5 allegedly wrongful conduct may be tethered.

6 Accordingly, the Motion to Dismiss is granted as to the  
7 Seventh Cause of Action, without leave to amend.

8 **BREACH OF TRUST INSTRUMENT - EIGHT CAUSE OF ACTION**

9 In the Eighth and Ninth Causes of Action, Macklin asserts that  
10 the Deed of Trust is the document which permits a nonjudicial  
11 foreclosure sale to proceed and gives Power of Sale to the duly  
12 appointed Trustee.<sup>103</sup> According to Macklin, only the Lender can  
13 invoke the foreclosure, and may appoint a Trustee. Macklin alleges  
14 that the substitution of Trustee in this case is void due to fraud,  
15 and was not executed in compliance with California Civil Code  
16 § 2934(a). Macklin further argues that the substitution of Trustee  
17 was invalid because it was not executed by the lender. As of the  
18 recording of the Notice of Default on December 8, 2008, the duly  
19 appointed Trustee was Financial Title Company. Quality Loan was  
20 substituted as Trustee on November 25, 2009. Macklin asserts that  
21 the Notice of Default was obtained prior to the assignment, but the  
22 California Civil Code requires that a trustee under a deed of trust  
23 property be appointed prior to commencing the nonjudicial  
24 foreclosure. Macklin asserts that in the case of a deed of trust  
25 with a power of sale, an assignee can only enforce the power of  
26 sale if the assignment is recorded, since the assignee's authority

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27  
28 <sup>103</sup> FAC ¶ 123.

1 to conduct the sale must appear in the public records. According  
2 to Macklin, a nonjudicial foreclosure sale under the power of sale  
3 in a deed of trust or mortgage must be conducted in strict  
4 compliance with its provisions and applicable statutory law.

5 Macklin asserts that the notice of acceleration and notice to  
6 cure are conditions precedent to nonjudicial foreclosure of the  
7 power of sale.<sup>104</sup> Macklin further asserts that if the lender fails  
8 to carry out the foregoing obligation, any subsequent foreclosure  
9 sale is invalid. Macklin alleges that the Defendant has trespassed  
10 "upon the Deed of Trust and Plaintiff's property," and the  
11 foreclosure sale must be rendered void and rescinded pursuant to  
12 California Civil Code § 3513. Macklin contends that because the  
13 law was established for public reason, it cannot be contravened by  
14 a private agreement pursuant to California Civil Code § 3514.

15 In support of his claim for breach of the trust instrument,  
16 Macklin alleges that Quality Loan Service Corp. ("QLS") filed the  
17 Notice of Default before it was substituted as trustee.<sup>105</sup> However,  
18 Windsor Management Co. recorded the default "[a]s agent for the  
19 current beneficiary,"<sup>106</sup> arguably rendering the notice proper under  
20 California Civil Code § 2924(a)(1), which authorizes the  
21 beneficiary, trustee, or their agents to record the Notice of  
22 Default.

23 Macklin also alleges that Defendant breached the trust  
24

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25 <sup>104</sup> *Id.* at ¶ 124.

26 <sup>105</sup> The Substitution of Trustee by DBNTC recorded on November 29,  
27 2009, purporting to substitute Quality Loan Service Corp for Windsor  
Management Co. as trustee under the Deed of Trust, states that it was  
signed by DBNTC on August 21, 2009.

28 <sup>106</sup> Dckt. 154 at 23.

1 instrument by failing to follow the provisions regarding notice of  
2 acceleration and notice to cure. The Notice of Default, however,  
3 clearly states that Macklin could bring his account into good  
4 standing by paying the past-due amounts no later than five days  
5 before the foreclosure sale. The Deed of Trust contained an  
6 acceleration clause, and the Notice of Default was therefore  
7 allowed to contain a notice of acceleration.

8 Because the text of the Notice of Default contradicts  
9 Macklin's claim that Defendant did not to inform him of the  
10 possibility of acceleration and his right to cure, the Motion is  
11 granted and the Eighth Cause of Action is dismissed, without leave  
12 to amend.

13 **WRONGFUL FORECLOSURE- NINTH CAUSE OF ACTION**

14 In the Ninth Cause of Action Macklin asserts that the  
15 foreclosure sale was improper. This focuses on whether the  
16 Defendant has complied with California law for conducting a  
17 nonjudicial foreclosure sale. The court throughly addressed the  
18 issue of the filing of the notice of default prior to the filing of  
19 the notice of assignment in connection with issuing the preliminary  
20 injunction. The court's view on the issue has not changed.<sup>107</sup> The  
21 Assignment of the Deed of Trust was recorded on November 30, 2009.  
22 However, the Substitution of Trustee by DBNTC recorded on  
23 November 29, 2009, purporting to substitute Quality Loan Service  
24 Corp. for Windsor Management Co. as trustee under the Deed of  
25 Trust.

26 Civil Code § 2932.5 provides that, where a power of sale for  
27

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28 <sup>107</sup> Memo. Opinion & Decision, Dckt. 98.

1 real property is given to a mortgagee or other encumbrancer to  
2 secure an obligation, such power of sale may be exercised by the  
3 assignee who is entitled to receive payment of the obligation "if  
4 the assignment is duly acknowledged and recorded." If the  
5 assignment has not been recorded, then the power cannot be  
6 exercised. The application of Civil Code § 2932.5 to all  
7 encumbrances, including deeds of trust, works to protect the  
8 borrower (trustor), lender (beneficiary), trustee, purchaser at a  
9 foreclosure sale, and subsequent owners of the property. Before  
10 persons purport to take action and exercise rights under a Deed of  
11 Trust, the assignment documenting the acquisition of those rights  
12 is recorded with the county recorder. This results in the real  
13 property records clearly and unambiguously stating who held the  
14 rights and who asserted the rights. This minimizes title disputes  
15 years later as to whether a notice of default or notice of sale was  
16 given by a properly authorized party and whether the purported sale  
17 under the Deed of Trust is void. This imposes a minimal burden on  
18 the beneficiary acquiring a Note secured by a Deed of Trust –  
19 merely recording the notice of assignment before purporting to  
20 change the trustee or authorize a foreclosure.

21 In the present case, Macklin and DBNTC have demonstrated that  
22 the recording of the assignment of the Deed of Trust postdated  
23 DBNTC recording documents purporting to change the trustee to  
24 Windsor Management and then Windsor Management purporting to give  
25 a notice of sale. While DBNTC missed its obligation to record the  
26 assignment of the trust deed by a few days, a record has been  
27 created that someone not of record title purported to take action  
28 on a Deed of Trust prior to compliance with Civil Code § 2932.5.

1 The court will not sanction conduct by this Defendant which  
2 puts into question the validity of the nonjudicial foreclosure  
3 process and California real property records. Though this issue  
4 could have been simply addressed by the recording of a new notice  
5 of default months ago, the ninety days under the new notice of  
6 default allowed to run and this creditor be on the door step of  
7 conducting a nonjudicial foreclosure sale consistent with the  
8 California statues, it has elected to continue with the existing  
9 notice of default, subsequent substitution of trustee, and sale.<sup>108</sup>

10 While titled as "wrongful foreclosure," this cause of action  
11 reads in substance as a breach of contract action. The contract  
12 between the parties is the Note and Deed of Trust. Macklin has  
13 certain obligations and rights under these contracts and law  
14 applicable to the contract, and DBNTC as the current owner of the  
15 Note and beneficiary under the Deed of Trust has certain rights and  
16 obligations in connection with exercising those rights. Macklin  
17 contends that DBNTC has not met its obligations in connection with  
18 exercising those rights and has improperly asserted that it  
19 acquired title to the Property. This has necessitated Macklin  
20 bringing this action and seeking to quite title as between their

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21  
22 <sup>108</sup> The Chinese proverb that the best time to plant a tree was  
23 20 years ago, and the next best time is now, provides guidance in  
24 compliance with statutory schemes. To the extent that an error  
25 occurred in the handling of the substitution of trustee (having not  
26 done it correctly in the past), the time to correct it is now. This  
27 avoids future lawsuits and significant costs and expenses if a dispute  
28 based on noncompliance with the statute is raised later. Examples of  
not taking a proactive approach to correcting defects include the Ford  
Motor Company decision in the 1970's not to replaced an inexpensive  
bolt on the fuel tank mount for the Ford Pinto, instead electing to  
pay for the deaths and disfiguring injuries resulting from the gas  
tank exploding when the Pinto was involved in minor rear-end  
collisions. See *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757  
(1981).

1 competing claims.

2 The Motion to dismiss the Ninth Cause of Cause of Action for  
3 wrongful foreclosure is denied.

4 **QUIET TITLE - TENTH CAUSE OF ACTION**

5 The Tenth Cause of Action seeks to quiet title in the  
6 Property. Macklin argues that he holds superior title to the  
7 Property than DBNTC. DBNTC seeks to dismiss this cause of action,  
8 arguing that the cause of action fails to properly plead the  
9 elements of quiet title.

10 According to *Matracia v. JP Morgan Chase Bank, NA*,<sup>109</sup> "[t]he  
11 purpose of a quiet title action is to establish one's title against  
12 adverse claims to real property. A basic requirement of an action  
13 to quiet title is an allegation that plaintiffs 'are the rightful  
14 owners of the property, i.e.,[ ] that they have satisfied their  
15 obligations under the Deed of Trust.'"<sup>110</sup> California Code of Civil  
16 Procedure § 761.020 states that a claim to quiet title requires:  
17 (1) a verified complaint, (2) a description of the property,  
18 (3) the title for which a determination is sought, (4) the adverse  
19 claims to the title against which a determination is sought,  
20 (5) the date as of which the determination is sought, and (6) a  
21 prayer for the determination of the title.

22 Though not artfully done, Macklin sufficiently explains that  
23 he asserts a superior title to the Property over the Trustee's Deed  
24 through which DBNTC asserts its interest in the Property. Given  
25

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26 <sup>109</sup> No. \_\_\_\_\_, 2011 U.S. Dist. LEXIS 84066, \*15 (E.D. Cal.  
27 July 29, 2011).

28 <sup>110</sup> *Kelley v. Mortg. Elec. Registration Sys., Inc.*, 642 F. Supp.  
2d 1048, 1057 (N.D. Cal. 2009).

1 that Macklin has asserted that DBNTC cannot show that it complied  
2 with the minimal requirements for properly conducting a nonjudicial  
3 foreclosure sale, the motion to dismiss the Tenth Cause of Action  
4 to Quiet Title is denied.

5 Accordingly, the Motion to Dismiss is denied as to the Tenth  
6 Cause of Action.

7 **DISCRETIONARY ABSTENTION**

8 Pursuant to 28 U.S.C. § 1334(c)(1), this court may abstain  
9 from any matter arising under, arising in, or related to the case  
10 under Title 11 in the interests of justice, comity with state  
11 courts, or respect for state law. In this case the Chapter 7  
12 Trustee has "sold" the estate's interest in the Property for a  
13 contingent future recovery if Macklin succeeds in this case.  
14 Macklin is asserting, enforcing, and attempting to recover for the  
15 benefit of creditors the Estate's interest in the Property.

16 Though Macklin is not attempting to prosecute a Chapter 11 or  
17 Chapter 13 reorganization which incorporates this adversary  
18 proceeding, the Estate has a continuing economic interest in the  
19 litigation. Further, through this motion to dismiss the parties  
20 and court have substantially focused the issues to those of  
21 substance. For the court to abstain at this point would throw out  
22 all of the time and money invested by the parties, in addition to  
23 significant judicial resources, in coming to this point in the  
24 litigation.

25 The court concludes that discretionary abstention is not  
26 appropriate in this case.

27 **CONTENTIONS OF INABILITY TO SUFFICIENTLY RESPOND**

28 While this matter was under submission, Macklin filed a motion

1 for further argument on this Motion to Dismiss, arguing that he  
2 recently substituted the Law Offices of Allan R. Frumkin, Inc. as  
3 his counsel of record in this case. It is not alleged that there  
4 is any additional law or authorities which Macklin intends to  
5 present to the court. Macklin has been represented by counsel,  
6 with his arguments and theories effectively presented, since the  
7 commencement of this Adversary Proceeding 12 months ago, as well as  
8 in the Chapter 7 case itself filed on September 16, 2010.

9 Two declarations were filed in support of the motion. The  
10 first is by Mr. Frumkin, Macklin's new counsel in this Adversary  
11 Proceeding. The substance of Mr. Frumkin's testimony is that after  
12 reviewing the court's tentative ruling, he concludes that the First  
13 Amended Complaint did not contain necessary allegations to  
14 withstand the motion to dismiss. He believes that unspecified  
15 additional allegations could be made, however, he does not state,  
16 nor does the motion allege, any such allegations. This declaration  
17 leaves it to the court to either divine the additional allegations  
18 which may exist or blindly accept that such allegations will not be  
19 made in the case after two motions to dismiss.

20 Macklin has also provided his declaration in support of the  
21 motion for further argument. He first testifies that when he went  
22 to sign the original loan application, he was not allowed to review  
23 the application because the notary had to leave. Macklin offers no  
24 explanation why a loan application was being notarized - something  
25 which is not common in California loan transactions. Macklin  
26 testifies that he instead relied on his loan broker's  
27 representations that the application reflected the information in  
28 Macklin's tax returns. He further testifies that only later did he

1 discover that the information in the loan application that he was  
2 "pressured" into signing did not contain accurate information.  
3 Macklin offers no testimony as to why and how he was "pressured"  
4 into signing a loan application. He merely states that the notary  
5 had to leave.

6 Macklin further testifies that in June 2011, he contacted his  
7 former attorney regarding the status of the First Amended Complaint  
8 and was told that it was not ready for review. Then, on June 17,  
9 2011, he was contacted by his former counsel to come to her office  
10 and verify the First Amended Complaint. Once again, he was  
11 "forced" to sign a document without reviewing it because it had to  
12 be filed immediately. As with the loan application, Macklin states  
13 that he was not provided adequate time to review the document  
14 before signing it.<sup>111</sup> Macklin states that he subsequently reviewed  
15 the complaint and drew the legal conclusion that many of the causes  
16 of action had not been adequately pled, but was told by his former  
17 counsel that it was too late to file a corrected First Amended  
18 Complaint.<sup>112</sup> Macklin further states that he tried at the hearing

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19  
20 <sup>111</sup> Notwithstanding this declaration having been prepared with  
21 the assistance of his present counsel and clearly stating under  
22 penalty of perjury that "I signed the verification," the First Amended  
23 Complaint does not contain any verification. Dckt. 120. A  
24 verification, dated June 17, 2011, is separately filed on June 21,  
2011. Dckt. 132. Attached to the First Amended Complaint are a  
series of exhibits, Dckts. 121-129. The Complaint, with exhibits  
attached, runs 606 pages (46 of which constitute the unverified First  
Amended Complaint).

25 <sup>112</sup> In finding that the FAC did not adequately plead claims, and  
26 as is continued through the exhibit of what would be a second amended  
27 complaint, Macklin and his counsel continue the "more is better" theme  
28 of pleading. The FAC is 46 pages in length and has over 200 pages of  
exhibits. The second amended complaint is 45 pages in length, and  
continues the using dense text in attempting to communicate the  
grounds upon which the relief is based, including single paragraphs

1 on the Motion to Dismiss the First Amended Complaint to instruct  
2 his prior counsel of the issues and corrections, "but she did not  
3 appropriately or persuasively address them in open court."<sup>113</sup>

4 Macklin and his new counsel filed a document titled Second  
5 Amended Complaint without obtaining leave from the court.<sup>114</sup> The  
6 court deemed this to be an exhibit to the motion for further  
7 argument, rather than Macklin intentionally filing pleadings which  
8 do not comport with the Federal Rules of Civil Procedure and prior  
9 orders of this court.<sup>115</sup>

10 The Second Amended Complaint filed as an exhibit states  
11 conclusions that New York Trust law controls over California Real  
12 Property law, that the Note and Deed of Trust have been rendered  
13 unenforceable, that because the transfer of the Note to a trust as  
14 part of a securitized loan portfolio may not have complied with the  
15 Internal Revenue Code no obligation is enforceable against Macklin,  
16 MERS is named as the nominee of the lender and the Deed of Trust is  
17 ineffective, Macklin's loan was funded with monies obtained other  
18 than the Lender named in the Note, the Note has been separated from  
19 the Deed of Trust, and that the Note and Deed of trust have been  
20 forfeited, rendered unenforceable, and a nullity. Therefore, for  
21 these various grounds, Macklin owns the Property free and clear of

22 \_\_\_\_\_  
23 running more than a page in length. Rather than alleging the basis  
24 for a claim, the FAC is written more as an editorial and argumentative  
25 treatise in support of Macklin's contention that he owns the Property  
and has no obligation to pay for the monies he received as part of the  
loan transaction.

26 <sup>113</sup> Dckt. 200.

27 <sup>114</sup> Dckt. 201.

28 <sup>115</sup> Dckt. 213.

1 any lien, has no obligation to repay the money he borrowed, and  
2 DBNTC is obligated to pay him damages.

3 In opposing the motion to dismiss, the motion for a temporary  
4 restraining order, the motion for preliminary injunction (which was  
5 granted and then dissolved when Macklin did not comply with the  
6 minimal conditions imposed by the court for creating a cash bond  
7 funded through a monthly payment which approximated a monthly loan  
8 payment), and proceedings in the Chapter 7 case, Macklin has not  
9 provided the legal authority for the underlying proposition that  
10 the Note (personal property) and Deed of Trust (interest in real  
11 property) have been destroyed, forfeited, or otherwise been  
12 rendered null and void.

13 If Macklin and his counsel intend to file a motion for leave  
14 to file a second amended complaint, such motion shall be  
15 accompanied by a points and authorities providing the legal basis  
16 underlying an allegation, as well as the proposed amended complaint  
17 being filed as an exhibit. In this Adversary Proceeding Macklin  
18 has been afforded the opportunity to file two Complaints (Original  
19 and FAC) and put DBNTC to the test of initiating motions to dismiss  
20 to challenge the legal sufficiency of the allegations and law  
21 underlying the allegations. Such is the privilege of a plaintiff  
22 for the original complaint and first amended complaint. However,  
23 the complaint amendment process is not one in which repeated,  
24 unsupported contentions are made with impunity. It is not too much  
25 for any second or further amended complaint to be allowed only  
26 after counsel and Macklin have shown that they have engaged in at  
27 least the minimal legal research and base the claims on actual  
28 existing legal authorities and principles, or the good faith

1 extension or reversal of existing authorities.

2 In considering seeking leave to file a further amended  
3 complaint, and in addition to providing the legal authorities which  
4 are identified to support their good faith contentions, Macklin and  
5 his counsel should preemptively address established California law  
6 that the deed of trust always follows the note;<sup>116</sup> the California  
7 Commercial Code (negotiation, enforceability, and enforcement of  
8 notes); forfeiture of property rights not favored; how payments  
9 made by insurance companies; loan servicers or others pursuant to  
10 agreement not including Macklin provide for the payment of  
11 Macklin's obligations under the Note and the principles of  
12 subrogation do not apply; and the holding of the Ninth Circuit  
13 Court of Appeals in *Cervantes v. Countrywide Home Loans, Inc.*<sup>117</sup>

14 Finally, if Macklin and his counsel intend to seek leave to  
15 file a second amended complaint, rather than merely patching the  
16 bloated FAC, they would be well served to draft a complaint which  
17 clearly states the relevant alleged grounds upon which each cause  
18 of action is based. While the practice of each cause of action  
19 indiscriminately incorporating all of the prior paragraphs of the  
20 complaint by reference may be easier, it does not lead to the court  
21 and other parties being able to clearly understand the "short and  
22 plaint statement of the claim showing that the pleader is entitled  
23 to relief" as required by Federal Rule of Civil Procedure 8(a)(2)  
24 and Federal Rule of Bankruptcy Procedure 7008. The court and

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26 <sup>116</sup> *Henley v. Hotaling*, 41 Cal. 22, 28 (1871); *Seidell v. Tuxedo*  
27 *Land Co.*, 216 Cal. 165, 170 (1932); *Adler v. Sargent*, 109 Cal. 42,  
49-50 (1895); Cal. Civ. Code § 2936.

28 <sup>117</sup> 650 F.3d 1034 (9th Cir. 2011).

1 opposing parties should be able to step through each allegation and  
2 understand the factual basis for each claim, rather than being  
3 presented with an argumentative treatise and re-regurgitated  
4 allegations which may or may not be relevant to the identified  
5 claim.

6 **CONCLUSION**

7 The court grants the motion to dismiss, without leave to amend  
8 for the first (Truth in Lending Act), second (Real Estate  
9 Settlement Procedures Act), third (Fair Credit Reporting Act),  
10 fourth (Fraud), fifth (Unjust Enrichment), sixth (Civil RICO),  
11 seventh (Business and Professions Code § 17200), and eighth (Breach  
12 of Security Agreement) causes of action.

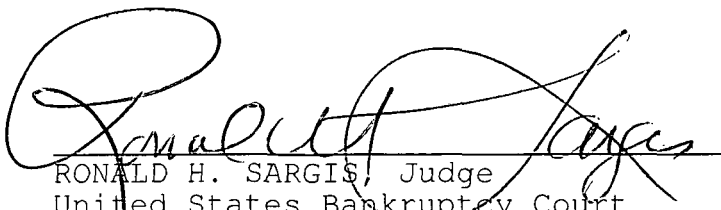
13 The motion is denied as to the ninth cause of action (Wrongful  
14 Foreclosure) and tenth cause of action (Quiet Title).

15 DBNTC shall file and serve its answer on or before  
16 **February 28, 2012.**

17 This Memorandum Opinion and Decision constitutes the court's  
18 findings of fact and conclusions of law pursuant to Federal Rules  
19 of Civil Procedure 7052 and Federal Bankruptcy Rules of  
20 Procedure 7052.

21 The court shall issue a separate order consistent with this  
22 Memorandum Opinion and Decision.

23 Dated: February 16, 2012

24  
25   
26 RONALD H. SARGIS, Judge  
27 United States Bankruptcy Court  
28

This document does not constitute a certificate of service. The parties listed below will be served a separate copy of the attached document(s).

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