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5 UNITED STATES BANKRUPTCY COURT  
6 EASTERN DISTRICT OF CALIFORNIA  
7 SACRAMENTO DIVISION  
8

9 In re ) Case No. 10-44610-E-7  
10 )  
11 JAMES L. MACKLIN, )  
12 ) Debtor(s). )  
13 \_\_\_\_\_ )  
14 JAMES L. MACKLIN, ) Adv. Pro. No. 11-2024  
15 ) Docket Control No. HSB-3  
16 ) Plaintiff(s), )  
17 v. )  
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19 DEUTSCHE BANK NATIONAL TRUST )  
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**This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.**

**MEMORANDUM DECISION AND OPINION**

The court is presented with Debtor-Plaintiff James Macklin's motion for a preliminary injunction. He seeks an order enjoining Deutsche Bank National Trust Company "from taking any steps to sell [his] home, transfer title, or otherwise interfere with [his] possession and use of the home . . . ." Mr. Macklin's home is the real property commonly known as 10040 Wise Road, Auburn, California ("Wise Road Property"). The hearing was set pursuant to order of

1 the court and Deutsche Bank National Trust Company, as Trustee  
2 ("Deutsche Bank") of the Accredited Mortgage Loan Trust 2006-2  
3 Asset-Backed Notes ("2006-2 Trust"), filed its opposition. The  
4 hearing on the Motion was conducted on April 14, 2011.

5 As addressed by the court, Macklin has asserted various  
6 theories by which a note and deed of trust against the Wise Road  
7 Property ("Note" and "Deed of Trust") are unenforceable, and  
8 thereby he is entitled to own the property free and clear of the  
9 encumbrance. The court determines that Macklin has not shown a  
10 likelihood of prevailing on these theories. For purposes of this  
11 Motion for Preliminary Injunction, the court rejects the  
12 contentions and arguments that the Note and Deed of Trust have  
13 ceased to exist, have morphed into an obligation of some third-  
14 party, or that the certificate holders, servicer, or other third-  
15 parties have paid Macklin's obligation on the Note.<sup>1</sup>

16 Macklin has also attacked Deutsche Bank's documentation of  
17 ownership of the Note and compliance with applicable state law  
18 concerning the foreclosure sale. From the evidence provided to the  
19 court, a question has been raised as to whether Deutsche Bank and  
20 its agents proceeded with the foreclosure sale in compliance with  
21 California law. Though this does not terminate Macklin's  
22 obligation under the Note or the Note holder's interest in the  
23 Macklin property secured in the Note, compliance with California  
24 foreclosure law cannot be waived merely because an obligation is  
25 owed.

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27 <sup>1</sup> The issues have been presented to the court in connection with  
28 the Motion for Preliminary Injunction, and the court does not make any  
final determination of the issues in this Adversary Proceeding.

1 **BACKGROUND**

2 Macklin refinanced his Wise Road Property in April 2006 and  
3 executed a Note and Deed of Trust in favor of Accredited Home  
4 Lenders, Inc. It is alleged in the Complaint that subsequently the  
5 Note was transferred to unidentified parties and eventually  
6 transferred to Deutsche Bank. Several documents for the  
7 substitution of the trustee under the Deed of Trust were recorded,  
8 and the Deed of Trust was assigned to Deutsche Bank, as indenture  
9 trustee for the 2006-2 Trust. The Note and Deed of Trust transfers  
10 are summarized as follows:

11 a. April 14, 2006: \$532,000.00 Note. James Macklin  
12 Borrower, Accredited Home Lenders, Inc., Lender. Macklin  
Exhibit 1, Deutsche Bank Exhibit A.

13 b. April 28, 2006 (recorded) Deed of Trust. James Macklin  
14 Borrower/Trustor, Accredited Home Lenders, Inc. Lender,  
15 Financial Title Company Trustee, and Mortgage Electronic  
Registration Systems, Inc. ("MERS") Beneficiary solely as  
the nominee of Lender.

16 The Deed of Trust states that "Borrower understands and  
17 agrees that MERS holds only legal title to the interests  
18 granted by Borrower in this [Deed of Trust], but, if  
19 necessary to comply with law or custom, MERS (as nominee  
20 of Lender and Lender's successors and assigns) has the  
21 right to exercise any or all of those interests,  
including, but not limited to, the right to foreclose and  
sell the Property; and to take any action required of  
Lender including, but not limited to, releasing and  
cancelling this Security Instrument." Macklin Exhibit 2.

22 c. December 8, 2008 (recorded) Notice of Default and  
23 Election to Sell under Deed of Trust (dated December 4,  
2008). By Windsor Management Co., as agent for MERS.  
Deutsche Bank Exhibit E.

24 d. March 10, 2009, 9:31 a.m. (recorded) Substitution of  
25 Trustee (dated January 30, 2008, by MERS, notarized  
26 March 4, 2009, San Diego, California notary). By MERS,  
Windsor Management, Co. identified as new trustee under  
Deed of Trust. Deutsche Bank Exhibit F.

27 e. March 10, 2009, 9:32 a.m. (recorded) Notice of Trustee's  
28 Sale (dated March 9, 2009). By Windsor Management Co.  
Deutsche Bank Exhibit G.

- 1 f. November 25, 2009 (recorded) Notice of Trustee's Sale  
2 (dated November 12, 2009). By Quality Loan Service Corp.  
Deutsche Bank Exhibit I.
- 3 g. November 25, 2009 (recorded) Substitution of Trustee  
4 (dated August 21, 2009, notarized August 21, 2009,  
5 Dakota, Minnesota notary). Deutsche Bank, substituting  
Quality Loan Service Corporation as the trustee under the  
Deed of Trust. Deutsche Bank Exhibit H.
- 6 h. November 30, 2009 (recorded) Assignment of Deed of Trust  
7 (dated November 17, 2-[illegible], notarized November 17,  
8 2-[illegible], Salt Lake City, Utah notary) to Deutsche  
Bank. Deutsche Bank Exhibit J.
- 9 i. December 21, 2009 (recorded) Trustee's Deed Upon Sale.  
10 By Quality Loan Service Corporation as grantor/trustee,  
Deutsche Bank as grantee. Deutsche Bank Exhibit K.

11 Macklin stopped making payments on the loan in 2008. Deutsche  
12 Bank commenced nonjudicial foreclosure proceedings and asserts that  
13 it eventually purchased the home at a trustee sale held on  
14 December 14, 2009, and recorded its trustee's deed upon sale. In  
15 January 2010, Deutsche Bank posted a notice to vacate the premises  
16 and later commenced an unlawful detainer action in the California  
17 Superior Court.

18 Macklin filed for bankruptcy protection pursuant to Chapter 13  
19 of the Bankruptcy Code on September 16, 2010. His case (No. 10-  
20 44610) was subsequently converted to a proceeding under Chapter 7.  
21 Deutsche Bank sought relief from the automatic stay provided by  
22 11 U.S.C. § 362(a). After two hearings and permitting Macklin to  
23 offer supplemental arguments, the court granted relief from the  
24 automatic stay by an order entered on February 4, 2011. (Order,  
25 Bankr. E.D. Cal. No. 10-44610-E-7, Dckt. 100.) The fourteen-day  
26 stay of enforcement provided by Federal Rule of Bankruptcy  
27 Procedure 4001(a)(3) expired on Friday, February 18, 2011.

28 Macklin sought a temporary restraining order. The court held

1 an opposed hearing and announced its decision to issue a temporary  
2 restraining order after Macklin posted a \$5,000.00 bond as security  
3 pursuant to Federal Rule of Civil Procedure 65. To date, there is  
4 no evidence that the required security has been posted and the  
5 court has not issued the temporary restraining order.

6 **THE ADVERSARY PROCEEDING**

7 Macklin filed this adversary proceeding on January 13, 2011.  
8 The complaint seeks to (1) determine the nature, extent, and  
9 validity of any lien held by Deutsche Bank, (2) determine that the  
10 underlying Note has been satisfied or converted to unsecured debt,  
11 (3) damages for Deutsche Bank's purported violation of the Truth in  
12 Lending Act by failing to notify Macklin that it obtained an  
13 interest in the mortgage loan, (4) a declaration that the  
14 assignments of the trust deeds were a fraudulent conveyance,  
15 (5) damages for libel, and (6) to quiet title in the real property  
16 commonly known as 10040 Wise Road, Auburn, California. Macklin  
17 prays for \$1 million in general damages, \$750,000.00 special  
18 damages, punitive damages, attorneys' fees and costs, an order  
19 quieting title to the property in his favor, and other just relief.

20 **Standing to Bring Complaint**

21 Deutsche Bank argues in opposition that Macklin does not have  
22 standing to prosecute this adversary proceeding because it is an  
23 asset of the Chapter 7 Estate that has not been abandoned by the  
24 Chapter 7 Trustee. Standing is a Constitutional standard which  
25 requires there to be an actual case or controversy between the  
26 parties.

27 Article III of the Constitution confines federal courts  
28 to decisions of "Cases" or "Controversies." Standing to  
sue or defend is an aspect of the case-or-controversy

1 requirement. (Citations omitted.) To qualify as a party  
2 with standing to litigate, a person must show, first and  
3 foremost, "an invasion of a legally protected interest"  
4 that is "concrete and particularized" and "actual or  
5 imminent." (Citations omitted.) . . . Standing to defend  
6 on appeal in the place of an original defendant, no less  
7 than standing to sue, demands that the litigant possess  
8 'a direct stake in the outcome.' (Citations omitted.)

9 *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64, 117  
10 S.Ct. 1055 (1997).

11 Deutsche Bank asserts that when the Plaintiff filed this  
12 Chapter 7 case, the Bankruptcy Code created the bankruptcy estate  
13 which includes all of the claims at issue in this Adversary  
14 Proceeding. 11 U.S.C. § 541(a). In a Chapter 7 case, the Chapter  
15 7 Trustee alone has the ability to sue on behalf of the bankruptcy  
16 estate. *Estate of Spirtos v. One San Bernardino County Superior  
17 Court Case Numbered SPR 02211 (In re Estate of Spirtos)*, 443 F.3d  
18 1172, 1176 (9th Cir. 2006); 11 U.S.C. § 323(b). As one court  
19 stated,

20 [A]ny unliquidated lawsuits initiated by a debtor  
21 prepetition (or that could have been initiated by the  
22 debtor prepetition) become part of the bankruptcy estate  
23 subject to the sole direction and control of the trustee,  
24 unless exempted or abandoned or otherwise revested in the  
25 debtor. The debtor lacks standing in a chapter 7 case to  
26 prosecute claims that are property of the estate.

27 *In re Bailey*, 306 B.R. 391, 392-93 (Bankr. D.D.C. 2004) (citations  
28 omitted).

29 The Wise Road Property is listed as an asset of the Debtor on  
30 Amended Schedule A.<sup>2</sup> On Amended Schedule C, Macklin claims a  
31 \$75,000.00 exemption in the Wise Road Property. The claim secured  
32 by the Deed of Trust at issue in this adversary proceeding is in

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33 <sup>2</sup> The Amended Schedules reference are found in bankruptcy case  
34 No. 10-44610, Docket Entry 56, Eastern District of California.

1 the amount of \$659,000.00, Amended Schedule D, and the value of the  
2 Wise Road Property is listed at \$659,000.00.<sup>3</sup> If these numbers are  
3 accurate, then there is no value in the property for the Estate. On  
4 December 24, 2010, the Chapter 7 trustee filed his report of no  
5 distribution. (Bankr. E.D. Cal. No. 10-44610 Dckt. 71.) The  
6 bankruptcy discharge was entered on February 2, 2011. (Bankr. E.D.  
7 Cal. No. 10-44610 Dckt. 101.)

8 While an exemption does not remove the asset from the  
9 bankruptcy estate, the Plaintiff has rights in the Wise Road  
10 Property. The Trustee has manifested his intention to take no  
11 action as to the alleged rights and asserted defect in the  
12 prepetition foreclosure. Such is the Trustee's prerogative, and  
13 may well reflect his determination that the various asserted claims  
14 are of such dubious merit that the ultimate resolution will be a  
15 foreclosure under the Deed of Trust. That does not preclude  
16 Macklin from asserting those rights, or investing the time and  
17 money in making Deutsche Bank, 2006-2 properly conduct the  
18 trustee's sale. Macklin may seek a formal abandonment from the  
19 Trustee.

20 The contention that Macklin does not have standing to bring  
21 this action is overruled.

## 22 ANALYSIS

23 The Ninth Circuit Court of Appeals recently addressed the  
24 standard for issuing a preliminary injunction, citing to the  
25 Supreme Court ruling in *Winter v. Natural Res. Def. Council, Inc.*:  
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28 <sup>3</sup> Based on the statements of Macklin at the hearing, it appears  
that he is actually contending that the value of the Wise Road  
Property is less than \$659,000.00.

1 A plaintiff seeking a preliminary injunction must  
2 establish that he is likely to succeed on the merits,  
3 that he is likely to suffer irreparable harm in the  
4 absence of preliminary relief, that the balance of the  
equities tips in his favor, and that an injunction is in  
the public interest.

5 555 U.S. 7, 129 S. Ct. 365, 374 (2008). In a subsequent ruling, a  
6 Ninth Circuit panel expressly disapproved prior Ninth Circuit  
7 decisions suggesting a lesser, sliding scale standard than the  
8 plaintiff being likely to prevail both on the merits and suffer  
9 irreparable harm. *American Trucking Associations, Inc. v. City of*  
10 *Los Angeles, et. al.*, 559 F.3d 1046, 1052 (9th Cir. 2009).

11 However, another Ninth Circuit Panel, *Alliance For the Wild*  
12 *Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011), determined that  
13 a sliding scale standard remains under *Winter*. Joining the Second  
14 and Seventh Circuits in interpreting *Winter*, this Ninth Circuit  
15 Panel ruled that the "serious questions" version of the sliding  
16 scale test for preliminary injunctions remains viable. In the  
17 Ninth Circuit, this test is stated as, "A preliminary injunction is  
18 appropriate when a plaintiff demonstrates . . . that serious  
19 questions going to the merits were raised and the balance of  
20 hardships tips sharply in the plaintiff's favor." *Alliance For the*  
21 *Wild Rockies v. Cottrell*, 632 F.3d at 1134-35, quoting *Lands*  
22 *Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc). The  
23 plaintiff must also establish the other two prongs for the issuance  
24 of a preliminary injunction - that the balance of the equities tips  
25 in his favor, and that an injunction is in the public interest.

26 Macklin must establish the right to a preliminary injunction  
27 under either of the two standards in the Ninth Circuit.

28 ///

1 **Choice of Law**

2 As a preliminary matter, the court must determine which law  
3 applies to the interpretation of the Note and Deed of Trust at  
4 issue in this case. Macklin urges that the court must apply New  
5 York law because the Master Sales and Servicing Agreement – one of  
6 the governing documents of the trust – elects the application of  
7 New York law for its interpretation. Deutsche Bank offers no  
8 arguments in opposition.

9 The simple fact is that California law applies to the  
10 interpretation of the Note and Deed of Trust entered into by this  
11 Plaintiff. First, the Deed of Trust expressly elects to apply  
12 California law. “This Security Instrument shall be governed by  
13 federal law and the law of the jurisdiction in which the Property  
14 is located.” (Ex. 2 to the Decl. of James Macklin, Dckt. 29 p. 21.)  
15 The Note, which is silent as to choice of law, relates to property  
16 located in California and was executed in California. Macklin  
17 sights to no authority which supports the proposition that a later  
18 agreement, to which he was not a party, somehow requires the  
19 application of New York law.

20 **Success on the Merits**

21 Macklin argues in a twenty-two-page brief that he presents a  
22 “compelling case on the merits.” Macklin’s case centers on three  
23 basic theories. The contentions are that the Note and Deed of  
24 Trust are void because of substantive defects, that the Note and  
25 Deed of Trust were not properly transferred into the trust, and the  
26 nonjudicial foreclosure sale was defective. Though many of these  
27 arguments are based on patent misstatements of the law, an issue  
28 has been raised concerning whether the nonjudicial foreclosure sale

1 was in compliance with California law and effective to transfer  
2 title from Macklin to Deutsche Bank.

3 **Attack on Validity of the Note and Deed of Trust**

4 The substance of Macklin's argument is that the Note and the  
5 Deed of Trust have been rendered void or there has been a  
6 transmogrification<sup>4</sup> of the Note and Deed of Trust into something  
7 other than a debt for which Macklin has an obligation to pay for  
8 the monies he borrowed. A variant of this argument is one in which  
9 Macklin contends that other persons have paid his debt for him  
10 through default swaps or investors who purchased interests in 2006-  
11 2 Trust. The conclusion reached in all of these arguments is that  
12 Macklin owns the property free and clear of the Deed of Trust and  
13 has no obligation for the monies he borrowed. Macklin fails to  
14 show a legal basis for these arguments or likelihood of success on  
15 the merits for any of these grounds.

16 Macklin argues that the Deed of Trust is void because it  
17 granted Mortgage Electronic Registration System ("MERS") the  
18 beneficial interest in the trust deed. Because MERS was not named  
19 in the Note, Macklin argues that the Note is voidable since the  
20 agency relationship between MERS and the lender and its successors  
21 must appear within the four-corners of the Note. In advancing the  
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23 <sup>4</sup> Though people may associate the term "transmogrification" with  
24 the Calvin and Hobbs comic strip, it is a long-standing term in the  
25 English language for the act of changing something or someone with  
26 fantastic or grotesque effect. THE MERRIAM-WEBSTER DICTIONARY AND THESAURUS  
27 available at <http://www.merriam-webster.com>. For Macklin's arguments  
28 to succeed, there must be a fantastic transformation of his Note (a  
negotiable instrument) into an equity participation interest of third-  
parties acquiring interests in the 2006-2 Trust. For attorneys  
schooled in the Commercial Code and transactions involving  
instruments, such a transformation is a grotesque distortion of the  
law.

1 recently-developed, novel legal theory, Macklin offers no citation  
2 to any legal authority. The court cannot find any support for this  
3 illogical conclusion that Macklin is forgiven his debt because of  
4 future agency relationships involving holders of the Note. To  
5 accept Macklin's argument would require overthrowing hundreds of  
6 years of well-established agency law.

7       Additionally, courts have widely found that MERS may act as an  
8 agent for the owner of a Note secured by the Deed of Trust,  
9 including assigning the beneficial interest in the Deed of Trust.  
10 *See Baisa v. Indymac Fed. Bank*, No. CIV-09-1464 WBS JMR, 2009 WL  
11 3756682, at \*3 (E.D. Cal. Nov. 6, 2009) ("MERS had the right to  
12 assign its beneficial interest to a third party"); *Weingartner v.*  
13 *Chase Home Finance, LLC*, 702 F. Supp. 2d 1276, 1280 (D. Nev. 2010)  
14 (Courts often hold that MERS does not have standing as a  
15 beneficiary because it is not one, regardless of what a Deed of  
16 Trust says, but that it *does have standing as an agent of the*  
17 *beneficiary* where it is the nominee of the lender (who is the  
18 'true' beneficiary). (emphasis added)). Where the recording of the  
19 assignment of the beneficial interest in the Deed of Trust is to  
20 the party that now owns the underlying Note, there is little reason  
21 to believe that the assignment is not proper. *See Henley v.*  
22 *Hotaling*, 41 Cal. 22, 28 (1871) (holding the Note and Deed of Trust  
23 are inseparable); *accord Seidell v. Tuxedo Land Co.*, 216 Cal. 165,  
24 170 (1932); Cal. Civ. Code § 2936.

25       Macklin's next argument that the "securitization of the Note"  
26 destroyed Deutsche Bank's security interest is equally  
27 unpersuasive. This argument is based on a reading of California  
28 Commercial Code § 9336 which relates to security interests and

1 priorities in commingled goods. A Note and Deed of Trust are not  
2 "goods" as that term is used in the Commercial Code. See Cal. Com.  
3 Code § 9102(44).<sup>5</sup> Since the Note and Deed of Trust do not qualify  
4 as goods under California law, Commercial Code § 9336 is  
5 inapplicable and Macklin's argument fails.

6 Further, Macklin's argument would eviscerate the Commercial  
7 Code and the concept of negotiable instruments. Division 3 of the  
8 California Commercial Code establishes a comprehensive body of law  
9 addressing instruments and negotiable instruments (such as a  
10 promissory Note), the negotiation of such instruments, and the  
11 rights of persons acquiring instruments. Division 3 is  
12 substantially the same as Article 3 of the Commercial Codes enacted  
13 in other states. By this argument, Macklin attempts to rewrite  
14 commercial law, Division 3 of the Commercial Code, and alter the  
15 Note he executed and delivered to obtain the loan monies he  
16 desired. The fact that the Note is purchased by entities which  
17 sell securities does not alter the Note. Thus Macklin's contention  
18 that the Note and collateral were destroyed does not have merit.

#### 19 **Attack on Transfer into the Trust**

20 Macklin argues that the Note itself was not properly  
21 transferred into the Accredited Mortgage Loan Trust 2006-2 Asset-  
22 Backed Notes. This argument centers on the alleged failure of the  
23 parties to transfer the beneficial interest in the trust deed until

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25 <sup>5</sup> "'Goods' means all things that are movable when a security  
26 interest attaches. The term includes (i) fixtures, (ii) standing  
27 timber that is to be cut and removed under a conveyance or contract  
28 for sale, (iii) the unborn young of animals, (iv) crops grown,  
growing, or to be grown, even if the crops are produced on trees,  
vines, or bushes, and (v) manufactured homes. . . ." Cal Com. Code  
§ 9012(44). Division 3 of the California Commercial Code expressly  
addresses instruments and negotiable instruments.

1 nearly two years after the closing date of the Trust. Macklin  
2 argues that the Master Sale and Servicing Agreement required that  
3 the Note and deed be transferred no less than four times<sup>6</sup> and each  
4 of these assignments must be acknowledged in the county land  
5 records. However, the plain language of the Agreement contemplated  
6 that the transfers would not be accompanied by an assignment of the  
7 beneficial interest in the Deed of Trust. The agreement provides:

8 Section 2.05. Delivery of Mortgage Loan Documents. (a) In  
9 connection with the transfer and assignment of the  
10 Mortgage Loans, the Depositor shall, on or before the  
11 Closing Date, in the case of a Closing Date Mortgage Loan  
12 and two business days prior to the related Subsequent  
13 Transfer Date in the case of a Subsequent Mortgage Loan,  
14 deliver, or cause to be delivered, to the Indenture  
15 Trustee (as pledgee of the Issuing Entity pursuant to the  
16 Indenture), the following documents or instruments  
17 constituting the Indenture Trustee's Mortgage File with  
18 respect to each Mortgage Loan so transferred or assigned:

19 . . .

20 (ii) the related original Mortgage with evidence of  
21 recording indicated thereon or a copy thereof certified  
22 by the applicable recording office and if the Mortgage  
23 Loan is registered on the MERS System, such Mortgage or  
24 an assignment of the mortgage shall reflect MERS as the  
25 mortgagee of record and shall include the MIN for such  
26 Mortgage Loan; . . . .

27 (Ex. 2 to the Decl. of Daniel Edstrom, Dckt. 30, Bates Stamp  
28 000097.) The plain language of the document provides that the Note  
and Deed of Trust were to be transferred to Deutsche Bank by that  
date, not that the beneficial interest was to be formerly  
transferred on the county land records. In fact, the agreement  
contemplated that MERS would remain listed as the holder of the

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<sup>6</sup> Macklin argues that the Note and Deed of Trust must have been transferred from Accredited Home Lenders, Inc. to MERS, from MERS to Accredited Mortgage Loan REIT Trust, from Accredited Mortgage Loan REIT Trust to Accredited Mortgage Loan Trust 2006-2, and then from Accredited Mortgage Loan Trust 2006-2 to Deutsche Bank National Trust Company as Indenture Trustee.

1 beneficial interest on the county's records.

2 Macklin also misses the mark in this argument since he is  
3 attempting to assert compliance with contractual provisions for  
4 which he has no right or interest. He has not asserted that he is  
5 a party to the Master Sale and Servicing Agreement or a third-party  
6 beneficiary of that Agreement. He does not assert any basis for  
7 claiming rights under those agreements to which he is not a party.  
8 Further, he does not show any basis for asserting rights to the  
9 extent that certificate holders in of the 2006-2 Trust have claims  
10 against the promoters of that trust or Deutsche Bank, the 2006-2  
11 Trust, or servicers working for the 2006-2 Trust.

12 At the hearing Macklin offered another novel theory: since the  
13 Note has been transferred into the 2006-2 Trust, there is no  
14 "beneficiary" for the Deed of Trust since Deutsche Bank does not  
15 have a beneficial interest in that trust. No legal basis was  
16 asserted by Macklin that assets of a trust were effectively  
17 abandoned unless the trustee of the trust was also a beneficiary of  
18 the trust. Macklin's argument ignores the legal rights and powers  
19 of the trustee of a trust.

20 **Issues Relating to Transfer of the Note to Deutsche Bank,**  
21 **2006-2 Trustee and the Nonjudicial Foreclosure**

22 However, Macklin does raise an issue concerning the  
23 documentation of any transfer of the Note and whether the statutory  
24 foreclosure procedures were followed by Deutsche Bank and its  
25 agents. Though not the focus of his contentions, the court must  
26 seriously consider how parties come to the interests they purport  
27 to assert in these proceedings. Though prevailing on this issue  
28 may be a pyrrhic victory since it does not destroy Macklin's

1 obligation secured by the Property, there is no "the-debtor-  
2 actually-owes-the-money" exception for compliance with the Civil  
3 Code for a nonjudicial foreclosure.

4 This issue relates to the basic premise that it is the owner  
5 of the Note who has the right to enforce the security for the Note.  
6 Irrespective of how transfer of collateral is purported to be made  
7 it is well-established law in California that a Deed of Trust does  
8 not have an identity separate and apart from the Note it secures.  
9 "The Note and the mortgage are inseparable; the former as  
10 essential, the later as an incident. An assignment of the Note  
11 carries the mortgage with it, while an assignment of the latter  
12 alone is a nullity." *Carpenter v. Longan*, 83 U.S. 271, 274 (1872);  
13 *Accord Henley v. Hotaling*, 41 Cal. 22, 28 (1871); *Seidell v. Tuxedo*  
14 *Land Co.*, 216 Cal. 165, 170 (1932); Cal. Civ. Code § 2936.  
15 Therefore, if one party receives the Note and another receives the  
16 Deed of Trust, the holder of the Note prevails regardless of the  
17 order in which the interests were transferred. *Adler v. Sargent*,  
18 109 Cal. 42, 49-50 (1895).

#### 19 **Assignment to Deutsche Bank**

20 The first issue raised is whether the Note has been  
21 transferred to Deutsche Bank. If the Note has been transferred,  
22 then the security will follow. For this Note, two competing  
23 allonges to the Note have been presented to the court. The first  
24 allonge offered by Macklin is represented to have been obtained  
25 through discovery in a related civil action.<sup>7</sup> This allonge,  
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27 <sup>7</sup> The production of this allonge was not contested at the  
28 hearing, with it being represented by Deutsche Bank, that it was part  
of general discovery and most likely was a copy of an allonge which  
was in a file.

1 Exhibit 10 to the Macklin Declaration, reads:

2 PAY TO THE ORDER OF:

3 [illegible mark]  
4 WITHOUT RECOURSE

5 Assistant Secretary  
6 Accredited Home Lenders, Inc., A California Corporation

7 Macklin argues that this allonge is fatally defective because it is  
8 not notarized or dated. However, he fails to cite to any authority  
9 imposing such a requirement.<sup>8</sup> The court will not create  
10 requirements for the negotiation of instruments which do not  
11 otherwise exist at law. It is not for the court to create  
12 requirements on a case-by-case basis, which would have the effect  
13 of rendering otherwise negotiable instruments non-negotiable in the  
14 business community because of the uncertainty as to what courts may  
15 require on an *ad hoc* basis.

16 Moreover, any argument that the allonge is ineffective, since  
17 space remains on the Note itself for the placement of an  
18 endorsement, also fails. California law clearly permits the use of  
19 an allonge even if there is space on the Note. Cal. Com. Code  
20 § 3204 ("For the purpose of determining whether a signature is made  
21 on an instrument, a paper affixed to the instrument is a part of  
22 the instrument."); see also Official Comment to Cal. Com. Code  
23 § 3204 ("The last sentence of subsection (a) is based on  
24 subsection (2) of former Section 3-202. An indorsement on an  
25 allonge is valid even though there is sufficient space on the

26 \_\_\_\_\_  
27 <sup>8</sup> Though the law rewards creativity and hard work, merely  
28 stating contentions without any support only works to diminish the  
credibility of the party. Even when making new law, the courts  
establish a legal basis and consistent theory to support change.



1 establish a likelihood of prevailing on the issue that there is not  
2 an allonge documenting the transfer of the Note to Deutsche Bank.

3  
4 **Issue of Compliance with California Law For Notice of Default,  
Notice of Sale, and Conducting a Nonjudicial Foreclosure**

5 Generally, when attacking a foreclosure sale, the trustor-  
6 debtor must tender the amount he owes on the Note. *Arnolds*  
7 *Management Corp. v. Eischen*, 158 Cal. App. 3d 575, 578 (1984).  
8 However, if a foreclosure sale is void or it is otherwise  
9 inequitable, the tender requirement may be waived. *Standley v.*  
10 *Knapp*, 113 Cal. App. 91, 102 (1931); *Humboldt Sav. Bank v.*  
11 *McCleverty*, 161 Cal. 285, 291 (1911); see also 4 MILLER & STAR  
12 CALIFORNIA REAL ESTATE § 10:212 (3d ed.). Therefore, to the extent  
13 Macklin properly alleges that the foreclosure was procured through  
14 fraud, then he is not required to tender the cure in this adversary  
15 proceeding.

16 If Deutsche Bank did not properly own the Note, then it and  
17 its agents could not exercise authority under the Deed of Trust.  
18 To the extent this represents fraud, the state court's decision in  
19 the unlawful detainer action does not have preclusive effect. *Vella*  
20 *v. Hudgins*, 20 Cal. 3d 251, 254-57 (1977).<sup>10</sup>

21 Macklin asserts that Deutsche Bank was acting beyond its  
22 authority when it conducted the nonjudicial foreclosure sale and  
23 such is a misrepresentation of Deutsche Bank's powers. Macklin  
24 argues that the Trust Indenture requires Deutsche Bank to obtain a  
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27 <sup>10</sup> Additionally, the unlawful detainer proceeding does not have  
28 preclusive effect in that the summary judgment in the state court  
action was entered against Macklin's son. It is not contended that  
Macklin acquired his interest in the property from his son or is  
otherwise bound by a summary judgment not entered against him.

1 majority vote of the Noteholders before it may conduct foreclosure  
2 proceedings. The Agreement patently provides the opposite:

3 [I]f an Event of Default occurs and is continuing, the  
4 Indenture Trustee *may*, and shall at the written direction  
5 of the Holders of Notes representing at least 50% of the  
6 Class Note Balance of the Outstanding Notes, proceed to  
7 protect and enforce its rights and the rights of the  
8 Noteholders by any Proceedings the Indenture Trustee  
deems appropriate to protect and enforce any such rights,  
whether for the specific enforcement of any covenant or  
agreement in this Indenture or in aid of the exercise of  
any power granted herein, or enforce any other proper  
remedy.

9 (Ex. 1 to the Decl. of Daniel Edstrom, Dckt. 30, Bates Stamp 000022  
10 (emphasis added).) The language is clear; Deutsche Bank *may*  
11 proceed to protect and enforce its rights and the rights of the  
12 Noteholders if a default occurs, but Deutsche Bank *must* do so if at  
13 least half of the Noteholders so instruct it. Macklin's focus on  
14 the "shall at the written direction" language does not change the  
15 fact that Deutsche Bank had the authority to act to enforce rights  
16 in the event of a default.

17 Macklin's arguments also fail a plain reading of the  
18 Indenture. Admittedly, some of Macklin's confusion could be  
19 attributed to the convoluted nature of the Indenture and the  
20 underlying transactions.<sup>11</sup> This is a detailed, legal document which  
21 creates specifically defined terms which are similar to the terms  
22 used in Macklin's transaction. The "Notes" referenced in the  
23 Indenture are not Notes held in the trust (such as Macklin's Note),  
24 but Notes issued under the Indenture to the investors. Section  
25 2.01, 2.05, Exhibit 1. The "issuing entity" for the Notes is

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26  
27 <sup>11</sup> While Macklin may personally be clinging to every desperate  
28 and ill-founded argument to keep the property for free, this does not  
explain any "confusion" of Macklin's counsel in submitting a patently  
invalid argument.

1 defined to be the 2006-2 Trust. (Appendix 1 to Ex. 1 to the Decl.  
2 of Daniel Edstrom, Dckt. 30, Bates Stamp 000069.) An "event of  
3 default" is defined in Section 5.01 of the Indenture to be a  
4 default by the Issuer, the 2006-2 Trust, for a Note it issues.  
5 (Ex. 1 to the Decl. of Daniel Edstrom, Dckt. 30, Bates Stamp  
6 000021.) This argument by Macklin, that Deutsche Bank cannot  
7 enforce the Macklin Note and Deed of Trust which are assets of the  
8 2006-2 Trust, is baseless.

9 Macklin also argues that the trustee's sale is void because  
10 Deutsche Bank, 2006-2 Trust, and the trustees, Windsor Management  
11 and Quality Loan Servicing, were acting outside of their authority  
12 when they foreclosed because they were not in physical possession  
13 of the Note. As Deutsche Bank points out, California law has no  
14 such requirement. *Alvara v. Aurora Loan Services*, No. C-09-1512 SC,  
15 2009 WL 1689640, at \* 6 (N.D. Cal. June 16, 2009) ("[U]nder  
16 California law, trustee need not possess a Note in order to  
17 initiate foreclosure under a Deed of Trust."); *Farner v.*  
18 *Countrywide Home Loans, Inc.*, No. 08-CV 2193, 2008 WL 189025, at  
19 \* 2 (S.D. Cal. Jan. 29, 2009) ("[T]here does not appear to be any  
20 requirement under California law that the original Note be produced  
21 in order to render the foreclosure proceedings valid."); *Quintos v.*  
22 *Decision One Mortgage Co., LLC*, No. 08-CV-1757 JM (POR), 2008  
23 WL5411636, at \* 3 (S.D. Cal. Dec. 29, 2008) ("Cal. Civ. Code § 2924  
24 outlines the requirements for non-judicial foreclosures in  
25 California, and does not include providing the original Note prior  
26 to the sale").

27 Almost lost in the clutter of misstatements about the  
28 Indenture, allegations without any support in law or fact, and the

1 selective reading of documents, Macklin does raise an issue  
2 concerning how Deutsche Bank conducted the noticing of the  
3 foreclosure sale. The court starts with the basic premise that for  
4 Deutsche Bank to proceed with a foreclosure it had to be entitled  
5 to payment on the Note. Cal. Civ. Code §§ 2932.5, 2936; Cal. Comm.  
6 Code § 3301.

7 Deutsche Bank presents the Note with an allonge to document  
8 the transfer of the Note. However, the allonge is undated. The  
9 Assignment of the Deed of Trust, which was recorded on November 30,  
10 2009, has an illegible date as to when it was executed.  
11 Presumably, it was executed on or about November 17, 2009, shortly  
12 before it was recorded. Further, one could presume that a November  
13 17, 2009 date for the Assignment of the Deed of Trust would  
14 correspond with the allonge to transfer the Note to Deutsche Bank.

15 But the Substitution of Trustee by Deutsche Bank recorded on  
16 November 29, 2009, purporting to substitute Quality Loan Service  
17 Corp. for Windsor Management Co. as trustee under the Deed of  
18 Trust, states that it was signed by Deutsche Bank on August 21,  
19 2009. This would be well in advance of the November 17, 2009  
20 assignment of the Deed of Trust. No explanation has been provided  
21 for these apparently inconsistent dates. The court will not merely  
22 assume that Deutsche Bank acquired the Note much earlier but did  
23 not record the Notice of Assignment of Deed of Trust until a later  
24 date.

25 Recent cases have discussed whether a Deed of Trust is subject  
26 to various provisions of the Civil Code which reference mortgages,  
27 mortgagees, or other encumbrancers. Several trial courts have  
28 concluded that Civil Code § 2932.5 does not apply when the

1 encumbrancer is enforcing rights pursuant to a Deed of Trust.  
2 Though of persuasive value, these trial court cases are not  
3 binding precedent for this court.

4 In considering what is mean by "mortgagee or other  
5 encumbrancer" holding a power of sale, the court first considers  
6 the distinction between a "mortgage" and a "Deed of Trust." For a  
7 Deed of Trust, title is vested in the trustee, who has a power to  
8 sell the property upon the event of specified contractual defaults.  
9 This allows for the sale of the collateral without judicial  
10 intervention. But this is a limited "title" in the trustee. As  
11 addressed by the California Supreme Court in *Bank of Italy Nat.*  
12 *Trust & Sav. Assn. v. Bentley*, 217 Cal. 644, 656 (1933), the legal  
13 title held by the trustee is to the extent necessary for execution  
14 of the trust, but does not carry with it the incidents of  
15 ownership. In practical effect, a Deed of Trust is a mortgage with  
16 a power to convey, with the incidents of ownership retained by the  
17 trustor. The Deed of Trust is treated as an encumbrance on the  
18 real property, and given protection as a lien rather than an  
19 interest in the land subject to a materialman's lien. *Hollywood*  
20 *Lumber Co. v. Love*, 155 Cal. 270 (1909).<sup>12</sup>

21 Over the years, courts and the Legislature have continued to  
22 diminish the distinction between a Deed of Trust and mortgage,  
23 other than the fundamental difference that the power of sale under  
24 the Deed of Trust is exercised nonjudicially, while the mortgage

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27 <sup>12</sup> At the time of the *Hollywood Lumber Co.* decision, the term  
28 "encumbrances" includes taxes, assessments, and all liens upon real  
property, which continues to be the definition today. Cal. Civ. Code  
§ 1114.

1 still requires judicial intervention.<sup>13</sup> The Legislature has made  
2 both deeds of trust and mortgages subject to time limitations on  
3 enforcement, Civil Code §§ 880.02-887.09 (Marketable Record Title  
4 Act) and created a right of redemption following a judicial sale  
5 under either a mortgage or Deed of Trust, Cal. Civ. Proc. Code  
6 § 729.010. In stating its intent behind the Marketable Record  
7 Title Act, the Legislature confirmed that real property is a basic  
8 resource of the people and title transactions should proceed with  
9 economy and expediency. For this to be achieved, real property  
10 records must clearly and accurately document title to the property.  
11 Cal. Civ. Code § 880.020. Because there is no judgment or order  
12 supporting a nonjudicial foreclosure sale, documentation of  
13 compliance with California law for a nonjudicial foreclosure sale  
14 is essential. Only the official record contains the documentation  
15 of who was entitled to enforce the rights under the Deed of Trust.

16 On previous occasions, the California Supreme Court has  
17 applied a statute referencing a "mortgage" to deeds of trust when  
18 it impacts the rights of the borrower. In *Security Pacific*  
19 *National Bank v. Wozab*, 51 Cal. 3d 991, 998, the court applied the  
20 one-action rule, Code of Civil Procedure 726(a), to obligations  
21 secured by a Deed of Trust as well as other personal property. See  
22 also *Walker v. Community Bank*, 10 Cal. 3d 729, 732 n.1 (1974).

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24 <sup>13</sup> The respected treatise on California law, MILLER AND STARR,  
25 CALIFORNIA REAL ESTATE, 3RD EDITION, echos the erosion of the distinction  
26 between mortgages and deeds of trust on all but the basic nonjudicial  
27 power of sale. For all practical purposes a mortgage with a power of  
28 Trust. *Id.* at § 10:1. While placing "title" in the trustee, the Deed  
of Trust works as a lien on the real property. The trustor (Macklin in  
this case) retains all incidents of ownership, including the ability  
to transfer title. *Id.* at § 10.2.

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

22 In the present case, Macklin and Deutsche Bank have  
23 demonstrated that the recording of the assignment of the Deed of  
24 Trust post-dated Deutsche Bank recording documents purporting to  
25 change the trustee to Windsor Management and then Windsor  
26 Management purporting to give a notice of sale. Though there are  
27 only days by which Deutsche Bank, 2006-2 failed to record the  
28 assignment of the trust deed, a record has been created that

1 someone not of record title purported to take action on a Deed of  
2 Trust prior to compliance with Civil Code § 2932.5. Issues of  
3 title and the record upon which future generations of owners will  
4 reply cannot be subject to a would-you-believe-I-missed-it-by-that-  
5 much implied waiver of this statutory requirement.

6 Macklin has shown a likelihood of prevailing on the issue of  
7 the purported foreclosure sale not having been properly conducted,  
8 thereby resulting in a void deed. The court issues the preliminary  
9 injunction on this ground.

#### 10 **GRANTING OF PRELIMINARY INJUNCTION**

11 Solely on the grounds asserting that Deutsche Bank, 2006-2 did  
12 not properly follow the procedures for substituting the trustee  
13 under the Deed of Trust and noticing the sale, the court finds a  
14 likelihood of Macklin prevailing on the merits. In that case,  
15 Macklin would still be the owner of the Wise Road Property and  
16 entitled to possession of the Wise Road Property. Allowing  
17 Deutsche Bank, 2006-2 to obtain possession of the Wise Road  
18 Property from Macklin would result in an irreparable harm to  
19 Macklin in the loss of the occupancy and possession of the  
20 property. As between Macklin and Deutsche Bank, 2006-2, the  
21 equities are in Macklin's favor and Deutsche Bank must properly  
22 comply with the law to foreclose on Macklin's interest in the Wise  
23 Road Property. The issuance of a preliminary injunction in this  
24 case furthers public policy of not only upholding California law as  
25 to proper nonjudicial foreclosure sales under a Deed of Trust, but  
26 also protects the real property title records from inconsistent and  
27 untimely recording of documents.

28 In this case the grounds established by Macklin are for a

1 determination that the purported trustee's deed is void. Not only  
2 is this potential to void foreclosure grounds to not require a  
3 tender by the plaintiff, *Bank of America N.A. v. La Jolla Group II*,  
4 129 Cal. App. 4th 706, 710, 717 (2005), but it is also grounds for  
5 not requiring a bond. Federal Rule of Bankruptcy Procedure 7065  
6 expressly provides that the court may issue a preliminary  
7 injunction without requiring a bond. In this adversary proceeding,  
8 the court determines that security is required, but will not order  
9 the posting of a third-party bond.<sup>14</sup> Macklin shall fund a cash bond  
10 with the Clerk of the Court in the amount of \$1,500.00 a month,  
11 with the first payment due on May 10, 2011, and continuing to be  
12 made by the tenth day of each month until a total of \$18,000.00 has  
13 been deposited by Macklin with the court. This cash bond  
14 constitutes the security required by the court pursuant to Federal  
15 Rule of Civil Procedure 65(c). This amount is subject to  
16 adjustment by further order of the court.

17 Because the Motion for Preliminary Injunction is packed with  
18 claims, contentions, arguments, and inflammatory comments indicting  
19 the mortgage system, rather than focused on the one ground which  
20 provides a likelihood of prevailing (or showed any merit) at this  
21 juncture, either party may seek relief from this order pursuant to  
22 Federal Rule of Civil Procedure 60(b) and Federal Rule of  
23 Bankruptcy Procedure 9024. This is to allow the parties to focus  
24 on the actual grounds for the preliminary injunction. Both parties  
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26  
27 <sup>14</sup> Earlier in this adversary proceeding the court was prepared to  
28 issue a temporary restraining order upon the posting of a \$5,000.00  
bond, but none was posted. Rather than risking the issuance of this  
order not being effective due to an inability to post a bond, the  
court requires the posting of a cash bond with the Clerk of the Court.

1 must recognize that such a motion is not merely an opportunity to  
2 re-tread old arguments in the hopes that the court may find merit  
3 where none exists. Further, if the cash bond payments are not  
4 timely made, Deutsche Bank, 2006-2 may seek an order vacating the  
5 preliminary injunction, which shall be set for hearing as provided  
6 in Local Bankruptcy Rule 9014-1(f) (1) or (f) (2).

7 This Memorandum Opinion and Decision constitutes the court's  
8 findings of fact and conclusions of law in support of issuing the  
9 preliminary injunction. The court shall issue a separate order for  
10 the preliminary injunction.

11 Dated: May 19, 2011

12 /s/ Ronald H. Sargis  
13 RONALD H. SARGIS, Judge  
14 United States Bankruptcy Court  
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