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

9 In re ) Case No. 10-91936-E-7  
10 )  
11 WALTER RALPH PINEDA, )  
12 )  
13 Debtor(s). )  
14 )  
15 WALTER RALPH PINEDA, ) Adv. Pro. No. 10-9060  
16 ) Docket Control No. TMT-3  
17 Plaintiff(s), )  
18 v. )  
19 )  
20 BANK OF AMERICA, N.A., et )  
21 al., )  
22 )  
23 Defendant(s). )  
24 )  
25 )  
26 )  
27 )  
28 )

19 This memorandum decision is not approved for publication and may  
20 not be cited except when relevant under the doctrine of law of the  
21 case or the rules of claim preclusion or issue preclusion.

22 MEMORANDUM OPINION AND DECISION

23 The court has been presented with the Motion to Dismiss the  
24 Second Amended Complaint. Walter Pineda, the Plaintiff and  
25 Chapter 7 debtor (Plaintiff-Debtor) alleges that jurisdiction  
26 exists for this proceeding in federal court pursuant to 28 U.S.C.  
27 §§ 1334 and 157, and that this is a core proceeding pursuant to  
28 28 U.S.C. § 157. No answer has been filed to this Complaint.

1 Defendants Bank of America Corp, L.P., Bank of American, N.A.  
2 ("BOA"), ReconTrust Company, N.A. ("ReconTrust"), Bank of New York  
3 Mellon, N.A., Inc. ("BNY"), Goldman Sachs, Inc. ("GS"), Goldman  
4 Sachs Mortgage Securities Corp. ("GSMSC"), and GSR Mortgage Loan  
5 Trust 2003-9 ("GSR Trust"), collectively "Defendants," filed a  
6 motion to dismiss the Second Amended Complaint for failure to state  
7 a claim pursuant to Rule 12(b), Federal Rules of Civil Procedure,  
8 and Rule 7012, Federal Rules of Bankruptcy Procedure. Proper  
9 notice has been provided for this motion. The Proof of Service  
10 states that the Motion and supporting pleadings were served on  
11 Plaintiff on September 26, 2011. By the court's calculation,  
12 37 days' notice was provided. Twenty-eight days' notice is  
13 required.

14 **Motion to Dismiss the Second Amended Complaint**

15 In response to the Second Amended Complaint in this Adversary  
16 Proceeding, Defendants filed a second motion to dismiss for failure  
17 to state a claim pursuant to Rule 12(b), Federal Rules of Civil  
18 Procedure, and Rule 7012, Federal Rules of Bankruptcy Procedure.  
19 Defendants argue that:

- 20 (1) Jurisdiction is not proper in this Court, citing to the  
21 court's ruling on the prior motion to dismiss, Dckt. 141,  
22 p. 31-32, that if the Plaintiff elected to file a second  
23 amended complaint to address why the court should not  
abstain from allowing the state law and federal law  
non-bankruptcy cases to be litigated in this bankruptcy  
court.
- 24 (2) Plaintiff's primary argument, which relies on the premise  
25 that the transfer or sale of the Note deprives Defendants  
26 of any interest in the Note and Deed of Trust, fails as  
a matter of law.
- 27 (3) Plaintiff has not credibly alleged tender.
- 28 (4) Plaintiff fails to state a claim for foreclosure fraud.

1 (5) Plaintiff's claim for rescission fails because rescission  
2 is not a cause of action, but a remedy, and Plaintiff has  
not tendered the amount owed on the loan.

3 (6) Plaintiff's claim for wrongful foreclosure fails because  
4 Defendants fully and lawfully complied with the  
non-judicial foreclosure process and the claim is  
5 premature as the property has not be foreclosed on.

6 (7) Plaintiff's claim for declaratory relief fails because  
7 Plaintiff alleges no new allegations, but instead raises  
identical issues already raised in other claims.

8 Because the court finds that the amended complaint fails to state  
9 a cognizable claim as currently drafted, the Court's decision is to  
10 grant the motion to dismiss as to all claims against all  
11 Defendants, without prejudice and without leave to amend.

12 Additionally, as addressed in detail in the Memorandum Opinion  
13 and Decision granting the Defendants' prior motion to dismiss, this  
14 litigation has no bearing on the administration of the Debtor's  
15 Chapter 7 bankruptcy estate. There is no reorganization being  
16 attempted by the Debtor. Rather, it appears that the only reason  
17 this matter is pending in this court is to use the automatic stay  
18 as to the estate in lieu of obtaining a preliminary injunction in  
19 state court or the district court, to the extent that  
20 non-bankruptcy federal jurisdiction exists.<sup>1</sup>

#### 21 **FACTS AS ALLEGED BY PLAINTIFF**

22 In the Plaintiff's second amended complaint, the Plaintiff  
23 alleges that he owns real property commonly known as 22550 Bennett  
24 Road, Sonora, California, (the "Property") and that BOA is  
25 attempting to foreclose on this property illegally. ReconTrust is  
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27 <sup>1/</sup> The Debtor having obtained his discharge on September 7,  
28 2010, the automatic stay has been terminated as to the Plaintiff-  
Debtor by operation of law. EDC Case No. 10-91936, Dckt. 31,  
11 U.S.C. § 362(c)(2)(C).

1 alleged to be a subsidiary of BOA and is acting as the trustee  
2 under the deed of trust recorded against the property. The  
3 Plaintiff further alleges that BNY is a trustee for the GSR Trust,  
4 and GS is an investment banker who sold certificates for GSR Trust.  
5 Also, Plaintiff now alleges that USB is involved and may be the  
6 true holder of the note.

7 The dispute begins with a loan obtained by the Plaintiff in  
8 the amount of \$473,000.00, which is documented by a promissory note  
9 ("Note") and a deed of trust ("Deed of Trust") recorded against the  
10 Property for a loan obtained from BOA. The Deed of Trust names BOA  
11 as the lender and beneficiary, and nominates PRLAP, Inc. as  
12 Trustee. A Substitution of Trustee and Assignment of Deed of  
13 Trust, in which BOA substituted ReconTrust as trustee under the  
14 Deed of Trust was recorded February 9, 2010. The Plaintiff alleges  
15 that BOA attempted to foreclose on the Property due to an alleged  
16 default on the Note. The Plaintiff obtained the loan for the  
17 purchase and improvement of his residence and for a second  
18 residence on the Property.

19 Plaintiff then suffered from a serious illness which required  
20 extensive hospitalization. This medical condition prevented  
21 Plaintiff from meeting his financial obligations, and he requested  
22 a loan modification from BOA. This request for a home loan  
23 modification was through the Home Affordability Program ("HAMP").  
24 After one year without hearing about the application, Plaintiff  
25 filed a complaint to the Comptroller of the Currency. The  
26 particular facts surrounding that application are still in dispute.

27 Following Plaintiff's alleged default under the terms of the  
28 loan, ReconTrust, acting as agent for the Beneficiary under the

1 Deed of Trust (BOA), recorded a Notice of Default and Election to  
2 Sell Under Deed of Trust (Notice of Default).

3 **THE ADVERSARY PROCEEDING**

4 Plaintiff filed this adversary proceeding with the initial  
5 Complaint on August 20, 2010. The First Amended Complaint ("FAC")  
6 was filed February 11, 2011, and was dismissed without prejudice  
7 and with leave to amend pursuant to the Memorandum Decision and  
8 Order dated June 24, 2011. The Second Amended Complaint ("SAC")  
9 was filed July 26, 2011, alleges that:

- 10 (1) The court has jurisdiction over this adversary proceeding  
11 pursuant to 28 U.S.C. §§ 1334 and 157, 11 U.S.C. §§ 362,  
544, 550, 551, 157(b)(1)-(2), (I), (K), and (O).
- 12 (2) This adversary is a core proceeding pursuant to 28 U.S.C.  
13 § 1409 and involves a proceeding to determine the  
14 validity and extent of a lien on property of the  
15 bankruptcy estate and to recover money pursuant to Rule  
7001(1) and (2), Equitable Relief (6) and Declaratory  
Judgment (9).
- 16 (3) Defendants are illegally attempting to foreclose on the  
17 Plaintiff's property, commonly known as 22550 Bennett  
Road, Sonora, California, due to an alleged default on  
the Note.
- 18 (4) Defendants did not disclose to the Plaintiff the  
19 contractual agreements between the various  
20 investor/creditor at the time he signed the loan  
documents.
- 21 (5) Defendant BOA transferred the Note, Deed of Trust, and  
22 Substitution of Trustee on February 9, 2010, and thus had  
23 no authority to foreclose on the property in violation of  
California Civil Code § 2429(a)(1) et seq., which  
requires beneficial interest or agency relationship with  
the holder of the note.
- 24 (6) Wachovia Bank breached its duty to perform its obligation  
25 to receive, review property chain of title and recorded  
the documents.
- 26 (7) Defendant BOA breached its sub-servicer obligations in  
27 complying with their obligations to collect monthly loan  
payments and advance delinquent loan payments.

- 1 (8) Defendant BOA fraudulently instructed Defendant  
2 ReconTrust to file a Notice of Default, knowing it was  
not the payee of Plaintiff's Note and Deed of Trust.
- 3 (9) Defendant BOA instructed T. Sevillano, a low level clerk,  
4 to prepare and execute an assignment of deed of trust,  
note, and substitution of trustee, knowing it did not  
5 have the right to enforce the note, and which was  
defectively notarized by Janet Koch.
- 6 (10) Defendant BOA failed to comply with its obligations as  
7 sub-servicer that resulted in Plaintiff's reliance that  
his home modification applications were in the process of  
8 evaluation that could result in complete forbearance as  
reported in the financial news and media.
- 9 (11) Defendant BOA obtained the services of DocX Inc. to  
10 fabricate the assignment of deed of trust, note and  
substitution of trustee, and then instructed low level  
11 clerk T. Sevillano to execute them.
- 12 (12) Defendant BOA, through its spokesperson, admitted to  
13 "robo signers" who executed documents without knowledge  
of their contents.
- 14 (13) Defendant failed in correcting Plaintiff's victimization  
15 by "robo signer" T. Sevillano which subjected Plaintiff  
to imminent foreclosure and eviction.
- 16 (14) Defendant BOA then instructed Defendant ReconTrust to  
17 record the fabricated documentation with the Tuolumne  
County Recorder after it was defectively notarized.
- 18 (15) The submission of fraudulent documents to the court and  
19 county recorders violate both State and Federal civil and  
criminal codes.
- 20 (16) Defendant BOA's violation of the notice requirement of  
21 California Civil Code § 2934(b)(4) constitutes wrongful  
foreclosure for lack of notice and two trustees for one  
deed of trust.
- 22 (17) The fraudulent foreclosure attempt by Defendant BOA and  
23 Defendant ReconTrust constitutes bad faith and unclean  
hands conduct that precludes relief of imposing tender  
24 prior to contesting the lack of prudential standing to  
foreclose.
- 25 (18) Defendants GS and GSSC's filing of form 15D with the  
26 Securities and Exchange Commission notifying all parties  
of its termination of registration and suspension of its  
27 duty to file reports, prohibits the collection, sale, or  
transfer of certificates during the suspension period;  
28 this includes foreclosure proceedings related to the  
securities mortgage loan certificates.

1 (19) Defendant GS's purchase of sub-prime loans that were  
2 predicted by Defendant GS to default within two to five  
3 years was part of Defendants' deceptive business  
4 practice.

5 (20) Defendant BOA's inducement to accept the credit funds of  
6 the loan believing the funds were provided by Defendant  
7 BOA created an illusory contract that did not identify  
8 the proper parties, terms and conditions, obligations of  
9 all the parties involved, constitutes absence of mutual  
10 assent, giving rise to Plaintiff's claim of rescission.

11 (21) Defendants have not only violated the consumer protection  
12 laws including Unlawful Competition Law Bus. Professional  
13 Code § 17200 by its deceptive business practice that has  
14 resulted in the loss of Plaintiff's property value, but  
15 has also caused Plaintiff emotional distress.

16 (22) The alleged note failure to disclose the parties involved  
17 and their contractual obligations, the credit to  
18 "Tranche" accounts from Plaintiff's monthly payments, and  
19 the substantial difference in amounts owned by Plaintiff  
20 as reflected in the notice of default and monthly  
21 statements are proof of no mutual assent by Plaintiff and  
22 violation of accounting disclosure requirements under  
23 RESPA.

24 Plaintiff prays for an Order for evidentiary hearing for  
25 determination of the rights and obligations of the parties through  
26 a declaratory judgment, finding of foreclosure fraud that gives  
27 rise to punitive damages, finding of wrongful foreclose, finding of  
28 rescission of contract for absence of consideration and no mutual  
29 assent, declaration that the adjustable rate note executed by  
30 Plaintiff as an unsecured note subject to 11 U.S.C. § 506 et seq.,  
31 punitive damages, finding Defendants' actions constitute a material  
32 breach of contract and violate RESPA, UCL Cal. Bus. Prof. Code  
33 17200, and other just relief, including the issuance of a  
34 preliminary injunction during the evidentiary hearing proceedings.

35  
36 **FEDERAL COURT JURISDICTION AND ENTRY**  
37 **OF ORDER BY BANKRUPTCY COURT**

38 Jurisdiction for this matter arises under 28 U.S.C. § 1334(b)

1 which provides for original but not exclusive federal court  
2 jurisdiction for all civil proceedings arising under Title 11 (the  
3 Bankruptcy Code), or arising in or related to cases under Title 11.  
4 Federal court jurisdiction is exclusive for all property, wherever  
5 located, of a debtor as of the commencement of the case and of  
6 property of the estate. 28 U.S.C. § 1334(e)(1). The United States  
7 District Court for the Eastern District of California has referred  
8 to this bankruptcy court all matters arising under, arising in or  
9 related to Title 11 as authorized in 28 U.S.C. § 157(a). This  
10 bankruptcy court may thereon enter final judgments and orders on  
11 all cases under Title 11, core proceedings arising under Title 11  
12 or arising in a case under Title 11, and non-core proceedings to  
13 which the parties have consented, with all such rulings being  
14 subject to appellate review. 28 U.S.C. § 157(b)(1)(2), and (C)(2).

15 This court is authorized to consider whether, in the interests  
16 of justice or comity with state courts, from abstaining to hearing  
17 a proceeding related to a case under Title 11. 28 U.S.C.  
18 § 1334(c)(1). Abstention may be raised by the court *sua sponte* or  
19 on motion of a party. *Smith v. Wall Mart Stores*, 305 F.Supp.2d 652  
20 (SD MISS 2003). The Plaintiff's Chapter 7 bankruptcy case was  
21 filed on May 20, 2010. The Chapter 7 Trustee filed a Report of No  
22 Distribution on August 21, 2010. Dckt. 28. On September 7, 2010,  
23 the Plaintiff obtained his discharge. The discharge terminated the  
24 automatic stay as to the Plaintiff and property of the Plaintiff,  
25 but not property of the bankruptcy estate. 11 U.S.C. § 362(c) (2)  
26 (C). It was not until almost three months after the discharge was  
27 entered that the Plaintiff amended his Schedule B to list the  
28 claims in this lawsuit as an asset and claim them as exempt.



1 Dckt. 33. On July 18, 2011, Chapter 7 Trustee, Gary Farrar,  
2 entered into a Stipulation to Abandon with Plaintiff, authorizing  
3 him to prosecute and abandon the claims alleged in the adversary  
4 proceedings to the Debtor. Dckt. 163, filed in the Adversary  
5 Proceeding and not the Chapter 7 bankruptcy case or noticed to  
6 creditors.

7 The Plaintiff has chosen to proceed in a Chapter 7 case and  
8 immediately discharge his debts, rather than consummate a plan of  
9 reorganization and make provisions for some payments to creditors.  
10 Thus, this litigation has no bearing on the treatment of creditors,  
11 payment of claims, or administration of property of the bankruptcy  
12 estate. There appears to be no connection or reason for this  
13 adversary proceeding to be before this court other than it is a  
14 remnant of the completed Chapter 7 proceeding. No Bankruptcy Code  
15 issues appear to remain in this case, nor any assets to be  
16 administered by the trustee or the Plaintiff through any plan.

17 Furthermore, Defendants dispute Plaintiff's assertion that  
18 this adversary proceeding is a core proceeding within the meaning  
19 of 28 U.S.C. § 157(b). The adversary proceeding here seeks to  
20 determine the validity of the note and deed of trust.

21 Among the types of proceedings Congress has denoted as "core,"  
22 are "determinations of the validity, extent, or priority of liens."  
23 28 U.S.C. § 157(b)(2)(K). Core proceedings, by definition, are  
24 matters that arise in or under Title 11. *Stern v. Marshall*, 564  
25 U.S. \_\_\_, 131 S. Ct. 2594, 2605, 180 L. Ed. 2d 475, 490 (2011).  
26 This court, therefore, may enter final orders subject to review  
27 pursuant to 28 U.S.C. § 158. See 28 U.S.C. § 157(b)(1). Arguably,  
28 the validity of the deed of trust, which creates the secured claim,

1 is an issue that would plainly be resolved in the claims allowance  
2 process. However, no assets of the estate are being administered  
3 for distribution to creditors.

4 The Adversary Proceeding is at a minimum a "related  
5 proceeding" and could be a core proceeding relating to the  
6 administration of the bankruptcy estate assets. However, given  
7 that the Adversary Proceeding is not being prosecuted by the  
8 Trustee as part of the administration of the estate, but by the  
9 Debtor to recover for himself personally, the court proceeds with  
10 this as a related to proceeding.

11 This bankruptcy court may conduct a related to proceeding  
12 pursuant to 28 U.S.C. § 157(c)(1) or (2). The Defendants have  
13 filed the present motion to dismiss, requesting that this  
14 bankruptcy court dismiss the adversary proceeding. The Motion does  
15 not assert that proposed findings of fact and conclusions of law  
16 are to be submitted by this court to the district court, but that  
17 "this (bankruptcy) court grant the Motion and dismiss all claims  
18 asserted against Defendants with prejudice." Motion to Dismiss,  
19 p.3:1-2, Dckt. 173.<sup>2</sup>

20 The Plaintiff having affirmatively requested relief from this  
21 bankruptcy court, rather than filing the Second Amended Complaint  
22 in the state court or district court, and the Defendants having  
23 affirmatively requested relief from this bankruptcy court on this  
24 Motion to Dismiss, and not asserting that proposed findings of fact  
25 and conclusions of law are to be submitted to the district court,  
26 the bankruptcy court shall issue the order on this Motion to

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27  
28 <sup>2/</sup> The Plaintiff-Debtor erroneously stated at the hearing  
that the Defendants had not submitted the present motion for a  
ruling by the judge of the bankruptcy court.

1 Dismiss the Adversary Proceeding.

2 **ANALYSIS**

3 In considering a motion to dismiss, the court starts with the  
4 basic premise that the law favors disputes being decided on their  
5 merits, and a complaint should not be dismissed unless it appears  
6 beyond doubt that the plaintiff can prove no set of facts in  
7 support of his claim which would entitle him to the relief.  
8 *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt  
9 with respect to whether a motion to dismiss is to be granted should  
10 be resolved in favor of the pleader. *Pond v. General Electric*  
11 *Company*, 256 F.2d 824, 826-827 (9th Cir. 1958). For purposes of  
12 determining the propriety of a dismissal before trial, allegations  
13 in the complaint are taken as true. *Kossick v. United Fruit Co.*,  
14 365 U.S. 731, 731 (1961).

15 The complaint must provide more than labels and conclusions,  
16 or a formulaic recitation of a cause of action; it must plead  
17 factual allegations sufficient to raise more than a speculative  
18 right to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555  
19 (2007). Federal Rule of Civil Procedure 8, made applicable to this  
20 adversary proceeding by Federal Rule of Bankruptcy Procedure 7008,  
21 requires that complaints contain a short, plain statement of the  
22 claim showing entitlement to relief and a demand for the relief  
23 requested. Fed. R. Civ. P. 8(a). As the Court held in *Bell*  
24 *Atlantic*, the pleading standard under Rule 8 does not require  
25 "detailed factual allegations," but it does demand more than an  
26 unadorned accusation or conclusion of a cause of action. *Bell*  
27 *Atlantic*, 550 U.S. at 555.

28 To survive a motion to dismiss, a complaint must contain

1 sufficient factual matter, accepted as true, to state a claim to  
2 relief that is plausible on its face. A claim has facial  
3 plausibility when the plaintiff pleads factual content that allows  
4 the court to draw the reasonable inference that the defendant is  
5 liable for the misconduct alleged.

6 *Ashcroft v. Iqbal*, 556 U.S. \_\_\_, 129 S. Ct. 1937, 1949, 173 L. Ed.  
7 2d 868, 884 (2009) (citations and quotation marks omitted). Rule 8  
8 also requires that allegations be "simple, concise, and direct."  
9 Fed. R. Civ. P. 8(d)(1).

10 In ruling on a 12(b)(6) motion to dismiss, the Court may  
11 consider "allegations contained in the pleadings, exhibits attached  
12 to the complaint, and matters properly subject to judicial notice."  
13 *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court  
14 need not accept unreasonable inferences or conclusory deductions of  
15 fact cast in the form of factual allegations. *Sprewell v. Golden*  
16 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the  
17 court required to "accept legal conclusions cast in the form of  
18 factual allegations if those conclusions cannot be reasonably drawn  
19 from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d  
20 752, 754-55 (9th Cir. 1994).

#### 21 **A. Declaratory Relief**

22 Declaratory relief is an equitable remedy distinctive in that  
23 it allows adjudication of rights and obligations on disputes  
24 regardless of whether claims for damages or injunction have arisen.  
25 "In effect, it brings to the present a litigable controversy, which  
26 otherwise might only be tried in the future." *Societe de*  
27 *Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th  
28 Cir. 1981). The party seeking declaratory relief must show (1) an

1 actual controversy and (2) a matter within federal court subject  
2 matter jurisdiction. *Calderon v. Ashmus*, 523 U.S. 740, 744 (1998).  
3 There is an implicit requirement that the actual controversy relate  
4 to a claim upon which relief can be granted. *Earnest v. Lowentritt*,  
5 690 F.2d 1198, 1203 (5th Cir. 1982). The court may only grant  
6 declaratory relief where there is an actual controversy within its  
7 jurisdiction. *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th  
8 Cir. 1994). The controversy must be definite and concrete. *Aetna*  
9 *Life Ins. Co. v. Haworth*, 300 U.S. 2271 240-41 (1937).

10 Plaintiff includes a number of different allegations and  
11 requests in the declaratory relief. Essentially, the Plaintiff  
12 seeks a determination of which party actually holds the note and  
13 that the obligation owing on the note is dischargeable in this  
14 bankruptcy case. Further, Plaintiff asks that the lien held by GRS  
15 Trust is determined to be void and unenforceable. Additionally,  
16 the Plaintiff requests monetary damages, special damages, and  
17 punitive damages. Plaintiff requests a determination that the  
18 substitution of trustee and notice of default were invalid.

19 The Court cannot determine which Defendants, if any, are  
20 actually asserting interest in the note and deed of trust and which  
21 are persons that the Plaintiff is asserting may claim an interest  
22 in the note of the deed of trust. Plaintiff maintains that the  
23 purported transfer of the Note to GSR Trust was invalid and BOA did  
24 not have the authority to file a Notice of Default on Plaintiff's  
25 property, as they did not have an interest in the note. This  
26 echoes the argument submitted to the court in the FAC. If the note  
27 was transferred to GSR Trust, as the documentation submitted to the  
28 court provides, the note, then GSR Trust has the beneficial

1 interest in the deed of trust. GSR Trust can elect to act through  
2 agents, such as a loan servicer, to take actions such as  
3 foreclosures. *See, Baisa v. Indymac Fed. Bank*, No CIV-09-1464 WBS  
4 JMR, 2009 WL 3756682, \*3 (E.D. Cal. Nov. 6, 2009) (MERS had the  
5 right to assign its beneficial interest to a third party);  
6 *Weingartner v. Chase Home Finance, LLC*, 7202 F. Supp. 2d 1276, 1280  
7 (D. Nev. 2010) (Courts often hold that MERS does not have standing  
8 as a beneficiary because it is not one, regardless of what a deed  
9 of trust says, but that it does have standing as an agent of the  
10 beneficiary where it is the nominee of the lender [who is the  
11 "true" beneficiary].)

12 The Declaratory Relief Cause of Action does not reflect how it  
13 impacts the bankruptcy case. Rather, the Plaintiff seeks to  
14 address non-bankruptcy issues, attempting to invoke federal  
15 jurisdiction and the power of this court through his Chapter 7  
16 liquidation. While the Plaintiff discusses confusion over the  
17 parties, there is no allegation that there is a dispute between the  
18 various parties as to the right to enforce the Note. While the  
19 Plaintiff asserts that there are issues of prudential standing, no  
20 one other than the Plaintiff has sought to assert any rights in  
21 connection with the bankruptcy case. As stated by the Plaintiff in  
22 the First Cause of Action, the dispute is over whether BOA can  
23 proceed with a nonjudicial foreclosure which occurs outside of this  
24 bankruptcy case, and which the court notes does not impact the  
25 administration of this estate.

26 Again, as with the FAC, the Plaintiff fails to state a  
27 plausible claim that BOA has no right to enforce the Deed of Trust  
28 which secures the Note. The possibility that the monies owed on

1 the Note to be paid for by the collateral may go to the principal  
2 of the Bank (GSR Trust) does not preclude BOA from fulfilling  
3 obligations as the servicer. Thus, this claim is dismissed without  
4 prejudice and without leave to amend.

5 **B. Foreclosure Fraud**

6 Plaintiff asserts a number of actions by Defendants that  
7 constituted fraud including, failing to provide accounting, failing  
8 to disclose the relevant parties on the note, recording the deed of  
9 trust, note and substitution of Trustee knowing they were not the  
10 holders of the note. Essentially, Plaintiff's fraud argument is  
11 that Defendant BOA knew assigning the property documents was a  
12 misrepresentation, intended to induce Plaintiff into believing that  
13 BOA was the beneficiary, which he relied on to make payments to GSR  
14 Trust.

15 The Ninth Circuit Court of Appeals interprets Federal Rule of  
16 Federal Procedure 9(b), as made applicable to this adversary  
17 proceeding by Federal Rule of Bankruptcy Procedure 7009, to require  
18 that the complaint (1) specify the fraudulent representations;  
19 (2) specify the representations were false when made; (3) identify  
20 the speaker; (4) state when and where the statements were made; and  
21 (5) state the manner in which the representations were false and  
22 misleading. *Decker v. GlenFed Inc.*, (*In re Glenfed, Inc. Sec.*  
23 *Litig.*), 42 F.3d 1541, 1547 n.7 (9th Cir. 1994) (*en banc*),  
24 superseded by statute on other grounds as stated in *In re Silicon*  
25 *Graphics, Inc.*, 970 F. Supp. 746, 754 (N.D. Cal. 1997); *Lancaster*  
26 *Cnty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397,405 (9th  
27 Cir. 1991); *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1103-04 (9th  
28 Cir. 2003). This is consistent with common law fraud in

1 California. *Seeger v. Odell*, 18 C.2d 409 (1941), and *Manderville*  
2 *v. PCG&S Group*, 146 Cal. App. 4th 1486 (2007). Merely because a  
3 dispute exists between the parties does not support a claim for  
4 fraud. The Plaintiff must at least plead more to survive a motion  
5 to dismiss.

6 A fraud claim is subject to the additional pleading  
7 requirements of Fed. R. Civ. P. 8(b) and Fed. R. Bankr. P. 7008.  
8 The Plaintiff may not merely recite the statutory elements for  
9 fraud, but must plead a plausible case based on the alleged facts  
10 in this case.

11 Plaintiff's fraud argument is similar to the first amended  
12 complaint and is similarly flawed. The Plaintiff alleges that  
13 Defendants committed fraud in securitizing his note. It is  
14 contended, without support, that any potential subsequent sale or  
15 transfer of the Note (an instrument, and likely a negotiable  
16 instrument) must have been first disclosed to the Plaintiff prior  
17 to his borrowing the money from BOA. No legal basis for this  
18 contention has been presented to the court. More significant to  
19 the court is that the Debtor never alleges that he intended to be  
20 part of a further transaction concerning the potential sale or  
21 transfer of the Note. The only transaction between the Plaintiff  
22 and BOA was the Plaintiff obtaining loan proceeds from the Bank.  
23 The Debtor obtained a loan and had set terms by which he had to  
24 repay the obligation. Irrespective of what further transactions  
25 occurred with the Note, the Plaintiff's obligations and rights  
26 would did not change.

27 Plaintiff further alleges that this securitization somehow  
28 stripped off the security interest. As to the first allegation,



1 Plaintiff fails to state how having his note sold or transferred to  
2 the GSR Trust caused him any harm or what fraud was committed to  
3 this Plaintiff. If there is no harm, there is no relief that the  
4 court can grant. It is not alleged that any of the Plaintiff's  
5 rights and obligations under the Note were altered. Again, any  
6 fraud claim in relation to the UCL (California Unfair Competition  
7 Law) also requires that Plaintiff suffer an actual injury.  
8 California Business and Professions Code § 17204, *Kwikset Corp. v.*  
9 *Superior Court*, 51 Cal. 4th 310 (2011).

10 The SAC fails to state with particularity the circumstances or  
11 facts showing the misrepresentations that resulted in harm or  
12 injury to him. Again, with limited exception, all of the conduct  
13 of the Defendants complained about arose after the Plaintiff  
14 obtained the monies he wanted from BOA through the loan. Though  
15 the Plaintiff received everything he was entitled to receive from  
16 the loan (the money), Plaintiff believes that because of subsequent  
17 financial transactions involving the Note were entered into by BOA  
18 and others, any obligation to Plaintiff on the Note were  
19 extinguished. The SAC still does not allege any claim or grounds  
20 by which the Note, the negotiable instrument, has been destroyed.  
21 Whoever the owner of the Note may be, the Plaintiff still has the  
22 obligation to pay under the note, and this obligation did not  
23 change through these subsequent transactions. No harm or injury to  
24 the Plaintiff has been pled as to the conduct of the Defendants in  
25 these transactions.

26 As such, Plaintiff's claim for fraud is dismissed without  
27 prejudice and without leave to amend.

28 ///

1           **C. Wrongful Foreclosure/Tender**

2           A plaintiff cannot challenge a foreclosure proceeding (whether  
3 it is pending or has already occurred) without first credibly  
4 alleging tender. *Karlsen v. American Savings and Loan Assoc.*,  
5 15 Cal. App. 3d 112, 117-18 (1971); *FPCI RE-HAB 01 v. E & G*  
6 *Investments, Ltd.*, 207 Cal. App. 3d 1018, 1021 (1989). A valid and  
7 viable offer of tender means that it is made in good faith, the  
8 party making the tender has the ability to perform, and the tender  
9 is unconditional. See, MILLER & STARR, CALIFORNIA REAL ESTATE, §§  
10 1493-1495 (3d ed. 1989). A failure to allege such tender makes the  
11 claim deficient on its face. *Alicea v. GE Money Bank*, 2009 WL  
12 2136969 (N.D. Cal. 2009). However, the requirement of tender may  
13 be waived. *Standley v. KNAPE*, 113 Cal. App. 91, 102 (1031);  
14 *Humboldt Sav. Bank v. McCleverty*, 161 Cal. 285, 291 (1911); and  
15 MILLER & STARR, CALIFORNIA REAL ESTATE 1 § 10:212 (3d ed.).

16           First, Plaintiff states in the SAC that there was an offer of  
17 tender for the purchase of the Property, but does not state the  
18 circumstances of such an offer. 2d Amend. Complaint P 29. Then,  
19 Plaintiff argues that tender is inapplicable because Defendants'  
20 "bad faith and unclean hands conduct" precludes relief of imposing  
21 tender. 2d Amend. Complaint P 61. Further, Plaintiff argues in  
22 his response that tender may not be required where it "would be  
23 inequitable to require tender." Opposition P 10.

24           Essentially, to the extent Plaintiff properly allege that the  
25 foreclosure was procured through fraud or that the sale is void as  
26 defective, then he is not required to tender. As Plaintiff has  
27 failed to properly allege in the amended complaint that the  
28 foreclosure was procured through fraud, as described above, this

1 claim for relief is dismissed, without prejudice.

2 Even if the fraud claim was properly pled, the amended  
3 complaint fails to describe how the deed of trust has become  
4 invalid. The complaint attacks the assignment of the trust deed  
5 and therefore concludes that the trust deed itself is now invalid.  
6 No discussion of specific facts that lead to this novel legal  
7 conclusion is offered. Further, no specific facts regarding the  
8 attempt to tender are set forth in the complaint. The Complaint is  
9 deficient on its face and must be denied.

10 As such, Plaintiff's Third Cause of Action for Wrongful  
11 Foreclosure is dismissed without prejudice and without leave to  
12 amend.

#### 13 **D. Rescission of Contract**

14 The claim for rescission of contract in Count IV of the SAC  
15 includes a number of assertions. The Plaintiff argues there was no  
16 mutual assent between the mortgagor and mortgagee when the  
17 agreement was first signed because Defendant BOA, the initial  
18 lender, immediately sold the loan after the transaction and  
19 converted it into certificates. Plaintiff had no knowledge of the  
20 various intermediaries involved in this process. Plaintiff claims  
21 that BOA induced Plaintiff to accept the funds for the loan by  
22 making him believe BOA was providing the funds. This is alleged to  
23 have created an illusory contract which did not identify the proper  
24 parties, terms and conditions, obligations of the parties and  
25 created the absence of mutual assent from which Plaintiff can  
26 rescind the contract.

27 However, it is not contended that the Plaintiff did not borrow  
28 the money on the terms as provided in the note. Plaintiff asserts

1 that he should be allowed to rescind the Note and Deed of Trust  
2 because the Note was negotiated or transferred. This is the  
3 hallmark of negotiable instruments under the Commercial Code.  
4 Plaintiff further asserts that he should know who all of the  
5 investors were who may have provided money to BOA to fund his loan.

6 For all of the creative gyrations in attempting to assert a  
7 right of rescission, the Plaintiff fails to state grounds under  
8 which the court may order the remedy of rescission. No matter how  
9 he twists and turns in attempting to attack his loan, he borrowed  
10 money from BOA, obtained the money he desired, and was obligated to  
11 repay the debt on the terms as provided in the Note.

12 The Fourth Cause of Action for Rescission of Contract is  
13 denied without prejudice and without leave to amend.

#### 14 **E. Additional Requests**

15 Plaintiff rehashes some of the arguments that the Court  
16 previously dismissed in the First Amended Complaint, but does not  
17 include them in clear claims of action as before. These claims are  
18 included in counts which do necessarily address them on their face.

19 Plaintiff claims breach of contract because of the violations  
20 of consumer protection laws. The standard elements for a breach of  
21 contract claim are "(1) the contract, (2) plaintiff's performance  
22 or excuse for nonperformance, (3) defendant's breach, and  
23 (4) damage to plaintiff therefrom." *Wall Street Network, Ltd. v.*  
24 *New York Times Co.*, 164 Cal. App. 4th 1171 (2008). If this is what  
25 Plaintiff meant to claim, it fails on its face for a number of  
26 reasons. As discussed above, Plaintiff failed to perform on the  
27 contract - he stopped paying on the note and provides no reason why  
28 this nonperformance should be excused. Further, Plaintiff has not

1 pled any damages flowing from the alleged breach of contract.  
2 Thus, the claim for breach of contract is dismissed without  
3 prejudice and without leave to amend.

4 Plaintiff also alleges violations of the Real Estate  
5 Settlement Procedures Act (RESPA) as Defendants failed to disclose  
6 accounting documentation to Plaintiff. From this amended  
7 complaint, it is still difficult to tell what harm Plaintiff  
8 suffered as a result of not obtaining a full accounting, as stated  
9 in the FAC. As there are no new allegations of harm, this claim is  
10 dismissed without prejudice and without leave to amend.

11 Plaintiff claims Defendants were involved in deceptive  
12 business practices in violation of consumer protection laws  
13 including Unlawful Competition Law Bus. Professional Code § 17200.  
14 The 2004 Amendments to the UCL specifically require that the  
15 Plaintiff have suffered an actual injury. Cal. Bus. & Prof. Code  
16 § 17204. The allegations stated in the SAC do not show the harm  
17 caused by the Defendants and how it resulted in actual injury to  
18 the Plaintiff. As such, this claim is dismissed without prejudice  
19 and without leave to amend.

#### 20 **ABSTENTION**

21 In granting broad federal court jurisdiction for arising  
22 under, arising in, and related to proceedings, Congress also  
23 granted this court the authority to abstain from hearing a matter  
24 in the interests of justice or comity, or respect for state law.  
25 28 U.S.C. § 1334(c)(1). A decision to abstain is not reviewable on  
26 appeal under 28 U.S.C. §§ 158(d), 1291, 1292, or 1254.

27 In ruling on the motion to dismiss the FAC, the court  
28 specifically addressed the issue of abstention and directed the

1 Plaintiff to address that issue if he filed a second amended  
2 complaint. Memorandum Opinion and Decision, Dckt. 141. The  
3 Plaintiff's opposition to the present Motion fails to address this  
4 fundamental issue of federal court jurisdiction for related to  
5 bankruptcy proceedings. While using a heading called  
6 "Jurisdiction" in his opposition, it merely makes reference to  
7 28 U.S.C. § 157 and contains a number of factual allegations as to  
8 the alleged improper conduct of BOA.

9 The SAC continues the Plaintiff's theme that great social  
10 wrongs have been done which he will vindicate through this  
11 Adversary Proceeding. These arguments make it crystal clear that  
12 this Adversary Proceeding has nothing to do with the Chapter 7  
13 bankruptcy case, any of the Plaintiff's rights as a Chapter 7  
14 debtor, or the administration of the bankruptcy case.

15 The Plaintiff fails to provide the court with any substantial  
16 arguments as to why his litigation of state and non-bankruptcy  
17 issues should be tried in this specialized court rather than  
18 properly in either the state court or district court, each being  
19 courts of general jurisdiction. Though bankruptcy courts regularly  
20 preside over matters arising under state law, such is done to  
21 further the purposes of the Bankruptcy Code and statutory scheme  
22 providing for debtors and creditors enacted by Congress.

23 In the present case, it is appropriate for the court to  
24 abstain from determining the state law and non-bankruptcy federal  
25 law issues raised and referenced by the Plaintiff. All of his  
26 issues and claims can, and should, be properly resolved in the  
27 appropriate state or district court. The bankruptcy court must be  
28 cognizant of the broad reach of 28 U.S.C. § 1334 jurisdiction, the

1 special role of the bankruptcy court, and the exercise of that  
2 jurisdiction as necessary and appropriate to enforce the Bankruptcy  
3 Code.

4       Though the parties have not asserted abstention for this  
5 Adversary Proceeding, the court shall issue an order to show cause  
6 why it does not abstain from further proceedings in this court in  
7 favor of the Plaintiff bringing any claims in the state court or  
8 district court.

9                                   **CONCLUSION**

10       The Motion to Dismiss the Second Amended Complaint is granted  
11 and the case is dismissed without prejudice with respect to each  
12 and every claim stated therein against each and every Defendant.  
13 The dismissal is without prejudice and without leave to amend.

14       This Memorandum Opinion and Decision constitutes the court's  
15 findings of fact and conclusions of law.   A separate order  
16 consistent with this ruling shall be issued by the court.

17 Dated: December 6, 2011

18  
19                                   /S/ RONALD H. SARGIS  
20                                   RONALD H. SARGIS, Judge  
21                                   United States Bankruptcy Court  
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