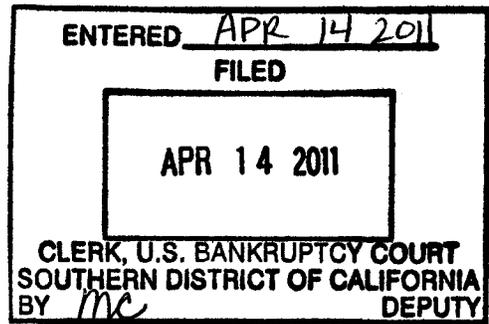


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WRITTEN DECISION – NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

In re: ) BANKRUPTCY NO: 10-11296-MM13  
)  
CESAR M. DOBLE ) CHAPTER: 13  
)  
Debtor, ) AP: 10-90308-MM  
)  
\_\_\_\_\_) MEMORANDUM DECISION RE MOTION  
) TO VACATE CLERK'S ENTRY OF  
CESAR M. DOBLE, ) DEFAULT AND MOTION TO DISMISS  
) COMPLAINT; ORDER TO SHOW CAUSE  
Plaintiff, ) FOR CONTEMPT OF COURT  
)  
v. ) DATE: February 3, 2011  
) TIME: 3:00 p.m.  
DEUTSCHE BANK NAT'L TRUST ) CRTRM: 1  
COMPANY, AS TRUSTEE OF THE )  
HARBORVIEW MORTGAGE LOAN TRUST ) JUDGE: Margaret M. Mann  
2005-5, MORTGAGE LOAN PASS- )  
THROUGH CERTIFICATES, SERIES 2005-5 )  
AND ONEWEST BANK, F.S.B. )  
)  
Defendants. )  
\_\_\_\_\_)

1 Defendants OneWest Bank, F.S.B. ("OneWest") and Deutsche Bank National Trust Company  
2 ("Deutsche Bank"), as Trustee of the HarborView Mortgage Loan Trust 2005-5, Mortgage Loan Pass-  
3 Through Certificates, Series 2005-5 Under the Pooling and Servicing Agreement Dated June 1, 2005,  
4 were defaulted by debtor Cesar Doble ("Doble") when they failed to timely respond to the complaint in  
5 this action ("Complaint"). The Complaint challenges Defendants' right to assert claims based upon a  
6 loan secured by Doble's residence, and seeks damages for Defendants' refusal to modify the loan.  
7 After the default, Defendants brought a Motion to Vacate Clerk's Entry of Default and a Motion to  
8 Dismiss Plaintiff's Complaint. The Court held several continued hearings on both motions, at which  
9 additional evidence and argument were presented.

10 Due to Defendants' misconduct in this case and others that threatens the integrity of the judicial  
11 process the Court declines to set aside the default. The Court also issues an order to show cause why  
12 Defendants should not be held in contempt and ordered to pay Doble's attorneys fees. Despite this  
13 ruling, the Court will not allow Doble relief he is not entitled to receive. The Court also grants much  
14 of the Defendants' Motion to Dismiss. Further proceedings will be scheduled to determine the  
15 judgment to be entered in this case.

16 **I. FACTUAL BACKGROUND**

17 **A. The Loan**

18 Doble and his wife Martha Doble own a residence located at 1466 Heatherwood Avenue in  
19 Chula Vista, California ("Property"). The Property is encumbered by a deed of trust ("DOT") securing  
20 a promissory note ("Note") payable on its face to Plaza Home Mortgage, Inc. ("Plaza"), executed in  
21 connection with a \$650,000 loan ("Loan") made by Plaza. The DOT identifies Plaza as "Lender," and  
22 Mortgage Electronic Registration Systems, Inc. ("MERS") as beneficiary. The DOT grants Lender the  
23 right to repayment of the Loan and performance of Borrower's covenants, explicitly stating that MERS  
24 "holds only legal title to the interests granted by Borrower" and MERS may exercise "any or all . . .  
25 interests, including . . . the right to foreclose and sell the Property" only "if necessary to comply with  
26 law or custom."<sup>1</sup>

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27 <sup>1</sup> See *infra* Part II.B.1.a.  
28

1 The Dobles defaulted on the Loan a few years later and sought to take advantage of the federal  
2 Home Affordable Mortgage Program ("HAMP") by modifying the Loan so they could afford the  
3 payments. After a trial loan modification was granted, the Dobles made two payments in the modified  
4 amount. Despite the last payment under the modified Loan being in default, the Dobles were offered a  
5 permanent modification to the Loan, which they attempted to accept. Thereafter, the Dobles made no  
6 more payments under the Loan.

7 **B. The Bankruptcies**

8 Martha Doble filed a chapter 13 bankruptcy case in 2009 (Case No. 09-16970-LA13, Bankr.  
9 S.D. Cal.), which was dismissed. Doble filed this Chapter 13 bankruptcy case on June 28, 2010. The  
10 Complaint filed by Doble the day after he filed bankruptcy seeks damages and equitable relief, alleging  
11 that Defendants have no secured or unsecured claims in this case, that they violated the automatic stay  
12 by seeking to foreclose on the DOT without owning the Loan, and that they failed to discharge their  
13 responsibilities regarding modifying the Loan. Based upon a slew of contradictory documents  
14 purporting to transfer interests in the Note and DOT among the Defendants, Plaza and MERS,  
15 OneWest and Deutsche Bank have each represented to the Court to be the owner of the Loan in both  
16 cases. OneWest has separately asserted it is the servicer of the Loan.

17 **C. Defendants' Failure to Respond to the Complaint**

18 The summons to the Complaint established a response date of July 29, 2010. Together with the  
19 Complaint, the summons was promptly served and received by Defendants. Pursuant to their servicing  
20 agreement, Deutsche Bank forwarded the Complaint to OneWest's legal headquarters in Pasadena on  
21 July 2. Deutsche Bank then apparently did nothing further to respond to the Complaint, and OneWest  
22 misplaced the Complaint, failed to calendar a response, and did not otherwise follow-up on the matter.

23 The Complaint resurfaced after a response was due. When it was found on August 4, OneWest  
24 compounded the error. It did not follow internal protocol, which would have required the Complaint  
25 be sent to its litigation office in Austin, Texas, for referral to outside counsel. Instead, OneWest  
26 forwarded the Complaint to an outside vendor, Lender Processing Services ("LPS"), which is retained  
27 by OneWest to handle routine legal matters, but not litigation. LPS then exacerbated the problem by  
28 assigning an incorrect response date and sending the Complaint to the wrong outside counsel. In a

1 final mishap, outside counsel neglected to look at the response date on the summons, and then waited  
2 another week until August 11 to request an extension. By this point, the default had already been  
3 entered.

4 Defendants filed their Motion to Vacate the Default and their Motion to Dismiss the Complaint  
5 on August 31, 2010. Defendants initially offered a declaration of outside counsel to explain their  
6 failure to timely respond to the Complaint. Counsel averred that he received the assignment of the  
7 Complaint on August 4, with a referral form showing a due date of August 20, although Defendants'  
8 Motion to Vacate contrarily states Defendants mistakenly believed the due date was August 11.  
9 Counsel apparently relied upon the incorrect due date on the referral form calculated by the outside  
10 vendor, and did nothing to confirm the correct response date, which was apparent from the face of the  
11 summons. Not until August 11 did counsel contact Doble to request an extension. Defendants were  
12 already in default by this time, and the extension was denied.<sup>2</sup>

13 Because the Defendants initially provided no reason for their failure to respond to the  
14 Complaint until after the response was overdue, the Court asked a series of questions regarding the  
15 improper calendaring. In response to the Court's questions, Defendants submitted the declaration of  
16 OneWest employee, Charles Boyle, who was resident in the Austin, Texas office. This employee  
17 averred that, after receipt of the Complaint in Pasadena, the Complaint was inadvertently logged into  
18 an automated referral system by a non-legal staff employee who has since resigned. Boyle averred this  
19 error was discovered the first week of August by a supervisor who re-referred the Complaint to local  
20 counsel.

21 Since Defendants had still not answered many of the Court's questions, the Court again  
22 requested more information. Specifically, the Court requested Defendants provide more information  
23 regarding: 1) Boyle's personal knowledge of the events in Pasadena given his residence in Texas; 2)  
24 what happened to the Complaint during the first month after it was served, and 3) why outside counsel  
25 waited seven days to contact Doble after receiving the Complaint on August 4. Finally, at the hearing

26 \_\_\_\_\_  
27 <sup>2</sup> Doble's reason for not agreeing to set aside the default was his frustration with the "false documents"  
28 submitted regarding ownership of the Loan.

1 on December 16, 2010, in response to questions asked from the bench, counsel for Defendants  
2 provided a more complete story: the Complaint had been lost, there were multiple departures from  
3 protocol, and several attorneys had received the Complaint and not bothered to review it. After a final  
4 attempt to clarify some of the facts pertaining to ownership of the Loan and why Defendants failed to  
5 timely respond to the Complaint, the Court took the matter under submission on February 3, 2011.

6 **II. ANALYSIS**

7 **A. Defendants have not Demonstrated Good Cause to Vacate the Clerk's Default**

8 Rule 55(c) permits the Court to set aside an entry of default only "for good cause." Defaulting  
9 parties have the burden of proving good cause. *Franchise Holding II, LLC v. Huntington Restaurants*  
10 *Group, Inc.*, 375 F.3d 922, 926 (9th Cir. 2004) (quoting *TCI Group Life Ins. Plan, Life Ins. Co. of N.*  
11 *Am. v. Knoebber*, 244 F.3d 691, 697 (9th Cir. 2001)).

12 To determine whether good cause exists, courts consider (1) whether the default is the result of  
13 the defaulting party's "culpable conduct"; (2) whether the defaulting party has a "meritorious defense";  
14 or (3) whether reopening the default would "prejudice"<sup>3</sup> the innocent party. *United States v. Mesle*,  
15 615 F.3d 1085, 1091 (9th Cir. 2010).<sup>4</sup> The test for good cause is disjunctive, and the defaulting party  
16 must prove all three factors favor setting the default aside. *Franchise Holding*, 375 F.3d at 926; *Mesle*,  
17 615 F.3d at 1091. If any one factor favors upholding the default, the Court need not set it aside. *Id.*

18  
19 <sup>3</sup> To be prejudicial, reopening the default must result in greater harm than a mere delay in relief. *Mesle*,  
20 615 F.3d at 1095; *see also Franchise Holding II*, 375 F.3d at 926 (plaintiff was prejudiced where there was a  
21 possibility that a delay in judgment would allow defendant an opportunity to hide assets). Here, Defendants  
22 have asserted that Doble is not prejudiced by their delay and there is no evidence before the Court to the  
contrary. Ultimately, however, since Rule 55(c)'s good cause factors are disjunctive, and Defendants' conduct is  
culpable, a prejudice analysis is unnecessary.

23 <sup>4</sup> The Rule 55(c) good cause factors are identical to those used to consider whether relief should be  
24 granted from a default judgment under Rule 60(b). *See Mesle*, 615 F.3d at 1091; *TCI*, 244 F.3d at 696.  
25 However, while the factors are the same, the standards for evaluating the factors are distinct. *O'Brien v. R.J.*  
*O'Brien & Assocs., Inc.*, 998 F.2d 1394, 1401 (7th Cir. 1993). Rule 55(c)'s relief from default standard is less  
26 rigorous than the relief from judgment standard of Rule 60(b). *Hawaii Carpenters' Trust Funds v. Stone*, 794  
27 F.2d 508, 513 (9th Cir. 1986) ("The different treatment of default entry and judgment by Rule 55(c) frees a court  
28 considering a motion to set aside a default entry from the restraint of Rule 60(b) and entrusts determination to  
the discretion of the court."); *accord Tessill v. Emergency Physician Assocs.*, 230 F.R.D. 287, 289 (W.D.N.Y.  
2005).

1 However, all doubt should be resolved in favor of a trial on the merits. *Id.* While there was no  
2 prejudice to Doble for the delayed response, the Court is without doubt that Defendants' pervasive  
3 misconduct alone precludes a finding of good cause to set aside the default.

4 To determine whether Defendants have a meritorious defense, the Court has evaluated  
5 Defendants' Motion to Dismiss, including admitting evidence and taking judicial notice as requested of  
6 the documents of public record in the case. *See* Fed. R. Evid. 210; Fed. R. Civ. P. 55(b)(2); *Lee v. City*  
7 *of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001). The Court agrees that Doble cannot state a claim  
8 for relief on his third, fourth, and part of his first and second causes of action, and dismisses these  
9 claims with prejudice. Upon a proper motion to enter a default judgment under Rule 55(b)(2), the  
10 Court will exercise its discretion to permit the submission of evidence from all parties on whether  
11 Doble can prove his prima facie case on the other claims. However, Defendants will be prohibited  
12 from presenting a case in defense of Doble's claims because the default will be upheld.

13 **1. Defendants Are Culpable**

14 A defendant's conduct is culpable if it is consistent with a "devious, deliberate, willful, or bad  
15 faith failure to respond." *Mesle*, 615 F.3d at 1092. Where a defendant's actions are negligent, and not  
16 intentional, the defendant is not culpable. *Id.*; *TCI*, 244 F.3d at 698-99. For "legally sophisticated"  
17 defendants, however, intentionality is assumed because legally sophisticated parties are held to  
18 understand the consequences of their actions. *Mesle*, 615 F.3d at 1093. As large financial institutions,  
19 OneWest and Deutsche Bank are sophisticated parties.

20 Where sophisticated defendants are aware of the pendency of a suit, but are indifferent to the  
21 consequences of not responding, culpability may be found even when bad faith is absent. *Franchise*  
22 *Holding II*, 375 F.3d at 926 (defendant was culpable for failing to respond despite plaintiff's warning it  
23 would seek a default after side-agreement negotiations broke down); *Direct Mail Specialists, Inc. v.*  
24 *Eclat Computerized Technologies, Inc.*, 840 F.2d 685, 690 (9th Cir. 1988) (defendant was culpable in  
25 not responding due to a mistaken belief service was improper); *Oracle USA, Inc. v. Qtrax, Inc.*, No.  
26 C09-3334 SBA, 2010 U.S. Dist. LEXIS 97630, at \*12-\*13 (N.D. Cal. Sept. 3, 2010) (defendant's  
27 conduct was culpable when defendant did not respond to accommodate the convenience of the CEO,  
28

1 cost considerations, and its hope for a settlement); *Markel Ins. Co. v. Dahn Yoga & Health Ctrs., Inc.*,  
2 No. C09-1221RSM, 2010 U.S. Dist. LEXIS 58763, at \*11-\*15 (W.D. Wash. May 17, 2010)  
3 (defendants were culpable where one failed to keep registered service agent updated on its address and  
4 another failed to inform itself that the client had waived a service problem).

5 Defendants' conduct can only be described as an intentional disregard for their obligations to  
6 comply with Court procedures and provide candid answers to the Court's questions. As in *Franchise*  
7 *II*, *Oracle*, *Direct Mail*, and *Markel*, Defendants were aware of the suit and the consequences of the  
8 default, but repeatedly failed to follow their own protocols. Defendants have never explained why  
9 none of Defendants' three attorneys<sup>5</sup> properly calendared the response date. Whether due to apathy or  
10 profit maximizing considerations, Defendants relied exclusively upon a non-attorney outside vendor,  
11 contrary to protocol, and failed to properly implement litigation procedures. See *Franchise II*, 375  
12 F.3d at 926; *Oracle*, 2010 U.S. Dist. LEXIS 97630, at \*10-12 (defendants failed to appropriately  
13 allocate corporate resources to respond to the litigation). This misplaced reliance on a non-attorney to  
14 calculate a response time is similar to the conduct of the defendants in *Direct Mail* and *Markel*, who  
15 erred in their analysis that service was improper. See *Direct Mail*, 840 F.2d at 690; *Markel*, 2010 U.S.  
16 Dist. LEXIS 58763, at \*16 ("[Defendant] will not be heard to object that service was improper, nor  
17 blame its failure to respond . . . on poor document management policies."). Defendants' multiple errors  
18 are also thus distinguishable from *Park v. U.S. Bank Nat'l Ass'n*, No. 10cvf1546-WQH-WMc, 2010  
19 U.S. Dist. LEXIS 123119, at \*8-\*10 (S.D. Cal. Nov. 19, 2010), where the defendants' failure to answer  
20 was the result of an unintentional administrative error rather than culpable misconduct. While the  
21 Court appreciates that mistakes happen and isolated negligence can be excusable neglect, see *Pioneer*,  
22 507 U.S. at 407-08,<sup>6</sup> what happened here was not mere negligence.

23 \_\_\_\_\_  
24 <sup>5</sup> These three attorneys are the Deutsche Bank counsel who forwarded the Complaint to OneWest, the  
25 OneWest Corporate Legal Department who received both the OneWest Complaint it received on its own behalf  
26 and the Complaint sent by Deutsche Bank, and Burnett & Matthews, the first outside counsel who received the  
27 Complaint.

28 <sup>6</sup> This reading of culpability is consistent with the Supreme Court's interpretation of the analogous  
"excusable neglect" standard of Rule 60(b)(1). *Pioneer Inv. Serv.Co. v. Brunswick Assocs. Ltd.*, 507 U.S. 380,  
393, 395-97 (1993) (a party's failure to respond is excusable if inadvertent or negligent); *Mesle*, 615 F.3d at  
1092; *Franchise Holding II*, 375 F.3d at 927.

1 Compounding their culpability problems, the Court finds that Defendants' initial explanation of  
2 the default was neither candid nor credible. A "devious" failure to respond is culpable. *Mesle*, 615  
3 F.3d at 1092. The full story belies their initial characterization that their errors in handling the  
4 Complaint were minor and isolated. No less than six mistakes or breaches of protocol occurred in how  
5 the Complaint was handled: (1) both copies of the Complaint were not sent immediately to Boyle in  
6 Austin, Texas, where litigation was to be handled; (2) the Complaint was lost for a month; (3) when  
7 the Complaint was found on August 4, 2010, it was not sent to Austin as protocol demanded, but  
8 mistakenly logged into the non-attorney LPS system; (4) LPS miscalculated the response date for the  
9 Complaint; (5) LPS incorrectly assigned the response to a law firm who was not the appropriate  
10 counsel to handle litigation for OneWest; and (6) Outside counsel failed to check the correct response  
11 date and relied upon the LPS miscalculation. The Court cannot accept Boyle's claim that new intake  
12 protocols have solved OneWest's systemic problems. Defendants themselves could not fully explain  
13 what went wrong in their efforts to respond to the Complaint. Even after three tries, Defendants have  
14 left questions unanswered.

15 Defendants' disregard for their obligations of candor to the Court and compliance with Court  
16 procedures, not only in connection with the entry of default, but also in the presentation of numerous  
17 other documents to the Court on the merits, is culpable. The default will not be set aside.

18 **2. Defendants Acted in Bad Faith**

19 Defendants' conduct in presenting evidence on the merits of this case and others demonstrates a  
20 callousness towards their legal obligations that amounts to bad faith; an additional reason not to set  
21 aside the default. Defendants filed numerous pleadings in this case and in the Martha Doble case  
22 seeking the Court's assistance in enforcing the Loan.<sup>7</sup> This Court was forced to repeatedly request  
23

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24 <sup>7</sup> In the Martha Doble case, in a Declaration filed May 4, 2010, Deutsche Bank, through its purported  
25 power of attorney, OneWest, claimed to be the owner of the Loan based upon a chain of assignments. Deutsche  
26 Bank claimed the same in its proof of claim. However, in this case, OneWest filed the proof of claim for the  
27 Loan identifying itself as the creditor. In this adversary case, Defendants averred MERS assigned all beneficial  
28 interest under the DOT to OneWest on October 22, 2009 and OneWest assigned all beneficial interest to  
Deutsche Bank in an unrecorded assignment dated May 19, 2010. This assignment to Deutsche Bank on May  
19, 2010, however, is dated after Deutsche Bank averred to this Court on May 4, 2010 that it was the owner of

1 additional evidence from Defendants to evaluate their own motions.<sup>8</sup> Defendants' pleadings and  
2 transactional documents<sup>9</sup> tell a convoluted tale as to who owns the Loan and is thus entitled to enforce  
3 it.

4 The most disconcerting misrepresentation to the Court was Defendants' submission of multiple  
5 "true and correct" copies of the Note under penalty of perjury without any endorsement from Plaza.  
6 Whether the Note was endorsed is central to the merits of this case. When Defendants finally  
7 submitted an endorsed copy of the Note on November 8, 2010, they attempted to pass off the first three  
8 unendorsed copies of the Note as "illegible." The first three copies of the Note were fully readable, so  
9 the phantom endorsement page was not a problem with legibility. The timing of this tardily produced  
10 endorsement, produced after several requests, suggests it was added only in response to the litigation.  
11 To add to the Court's incredulity, Defendants have never answered the Court's specific questions as to  
12 when and under what circumstances this newly proffered endorsement was executed. For the purpose

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14 the Loan. Separately, Deutsche Bank has also claimed it owned the Loan as of 2008 without evidentiary  
15 support.

16 <sup>8</sup> The Court on October 5, 2010 issued a tentative ruling continuing the hearing on the Motions and  
17 seeking additional evidence regarding who had the right to foreclose the Loan, and whether the Loan  
18 Modification Agreement, which Doble alleges he executed on June 3, 2010, was also executed by Defendants.  
19 The Court issued another tentative ruling on December 15, 2010 seeking an "explanation from Defendants  
20 regarding the contradictory statements submitted by Defendants under penalty of perjury in both Debtor's and  
21 Martha Doble's bankruptcy cases regarding the identity of the owner of the Note," the role of OneWest, and the  
22 circumstances of the endorsement of the Note. The Court inquired twice more regarding the circumstances of  
23 the alleged loan modification and the Defendants' default.

24 <sup>9</sup> Defendants provided the Court with an "Assignment of Deed of Trust" executed on June 26, 2009  
25 through which MERS, as the original beneficiary, purports to assign to OneWest all beneficial interest under the  
26 DOT, "together with the Note" ("Assignment 1"). However, OneWest did not record its interest until after its  
27 foreclosure proceedings were started. On July 14, 2009, a Notice of Default on the loan was recorded by  
28 OneWest, even though OneWest lacked any recorded interest in the Loan at the time. Only when OneWest  
recorded a Notice of Sale on the Loan on October 22, 2009, did it finally record Assignment 1.

On November 24, 2009, OneWest executed, but did not record, an Assignment of Deed of Trust to  
Deutsche Bank "together with the Note" ("Assignment 2"). Then on May 19, 2010, OneWest executed but did  
not record another Assignment of Deed of Trust "together with the Note" ("Assignment 3") to Deutsche Bank.  
Deutsche Bank curiously produced a copy of a power of attorney it granted to OneWest regarding ownership of  
the Loan. Whatever significance this power of attorney has, it does not support the assignment from OneWest  
to Deutsche Bank because Deutsche Bank had no apparent rights to the Loan before it received them from  
OneWest.

1 of its analysis on the merits, the Court finds that the endorsement was not made until it was presented  
2 to the Court on November 8, 2010.<sup>10</sup>

3 This lack of candor in the presentation of evidence on the merits supports a finding of bad faith  
4 in regard to the default. The court system can only function if parties take their representations and  
5 responsibilities seriously. *Chambers v. NASSCO, Inc.*, 501 U.S. 32, 43, 47 (1991); *see also In re*  
6 *Snyder*, 472 U.S. 634, 641 (1985). Courts have held that a lender's actions amount to bad faith where  
7 the lender is shown to have routinely misrepresented its role in bankruptcy cases, caused unnecessary  
8 litigation, or prejudiced another party. *See Ameriquest Mortg. Co. v. Nosek (In re Nosek)*, 609 F.3d 6,  
9 9 (1st Cir. 2010). In two previous cases before this Court, Defendant OneWest has been ordered to  
10 show cause for failing to comply with its obligations as a party before the Court. *See In re Carter*, Ch.  
11 13 Case No. 10-10257-MM13 (Bankr. S.D. Cal.); *In re Telebrico*, Ch. 13 Case No. 10-07643-LA13  
12 (Bankr. S.D. Cal.). Not only in this action, but in others as well, OneWest has demonstrated a  
13 "confusion and lack of knowledge, or perhaps sloppiness, as to their roles." *Ameriquest*, 609 F.3d at  
14 9.<sup>11</sup>

15  
16 <sup>10</sup> This sanction is similar to the entry of a default judgment against Defendants for their bad faith failure  
17 to comply with the orders of this Court. *See, e.g., Carter v. Brooms (In re Brooms)*, No. NC-10-1117-KiSah,  
18 2011 Bankr. LEXIS 648, at \*21 (B.A.P. 9th Cir. Jan. 18, 2011) (upholding the court's default judgment pursuant  
19 to 7016(d) for a party's failure to comply with a pre-trial order).

20 <sup>11</sup> Specifically, an inability to coherently prove ownership is both endemic to the industry, and a common  
21 problem. *Ameriquest*, 609 F.3d at 9; *see also, e.g., U.S. Bank Nat'l Ass'n v. Ibanez*, 458 Mass. 637 (2011)  
22 (holding US Bank did not sufficiently demonstrate it held title to a mortgage under Massachusetts law prior to  
23 foreclosure where US Bank alleged it received title pursuant to a trust agreement and did not provide the trust  
24 agreement but, instead, provided an unsigned offer of mortgage-backed securities to potential investors that did  
25 not specifically identify the mortgage in question).

26 The Court's finding here is consistent with the findings of the academics and reporters who note this  
27 pattern of behavior is common in the mortgage industry. Studies have shown that mortgage holders and  
28 servicers routinely file inaccurate claims, some of which may not be lawful. *See Katherine Porter, Misbehavior*  
*and Mistake in Bankruptcy Mortgage Claims*, 87 Tex. L. Rev. 121, 123-24 (2008); Andrew J. Kazakes,  
*Developments in the Law: the Home Mortgage Crisis*, 43 Loy. L.A. L. Rev. 1383, 1430 (2010) (citing David  
Streitfeld, *Bank of America to Freeze Foreclosure Cases*, N.Y. Times, Oct. 2, 2010, at B1) (reporting that after  
revelation of Porter's study several Banks froze foreclosures); Eric Dash, *A Paperwork Fiasco*, N.Y. Times,  
Oct. 24, 2010, at WK5 (reporting the repeal of the initial freeze and the problems banks faced in clearing up  
foreclosure paperwork). The Inspector General overseeing the recent financial crisis has studied this issue and  
concluded:

1 Because Defendants' conduct in not responding to the Complaint was intentional and in bad  
2 faith, the Court will not set aside the default.

3 **B. Resolution of the Merits of the Case**

4 To uphold the default entered against Defendants, the Court must consider both the merits of  
5 Defendants' defense and the merits of Plaintiff's case, as challenged in Defendants' Motion to Dismiss.  
6 *Mesle*, 615 F.3d at 1094 (defaulting party must present a valid defense before court can set aside a  
7 default); Fed.R. Civ. P. 55(b); *Eitel v. McColl*, 782 F.2d 1470, 1471 (9th Cir. 1986); *Cashco Fin.*  
8 *Servs. v. McGee (In re McGee)*, 359 B.R. 764, 771 (B.A.P. 9th Cir. 2006) (default judgment requires  
9 assessment of the merits of plaintiff's claims).<sup>12</sup> This task is made more difficult since neither Doble's  
10 Complaint, nor Defendants' Motion to Dismiss, is a model of clarity. Five causes of action are alleged  
11 in the Complaint, but more than five are presented.

12 Defendants' Motion to Dismiss complicates the analysis further since it questions a few, but not  
13 all, of Doble's claims. Defendants claim MERS had authority to transfer the Loan as a matter of law,  
14 but not that the assignment was properly executed or acknowledged. Defendants dispute Doble's  
15 attempt to employ 11 U.S.C. §544(a) to set aside the MERS' assignment to OneWest. They also argue

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16  
17 Anecdotal evidence of [loan servicers'] failures [have] been well chronicled. From the repeated  
18 loss of borrower paperwork, to blatant failure to follow program standards, to unnecessary  
19 delays that severely harm borrowers while benefiting servicers themselves, stories of servicer  
negligence and misconduct are legion, and . . . they too often have financial interests that don't  
align with those of either borrowers or investors.

20 Office of the Special Inspector General for the Troubled Asset Relief Program, Quarterly Report to  
21 Congress 12 (Jan. 26, 2011), *available at* <http://www.sigtar.gov/> (follow link for "Quarterly Report to  
Congress").

22 <sup>12</sup> After entry of a default, a court may exercise its discretion to enter a default judgment on the merits of  
23 the case. Fed. R. Civ. P. 55(b); *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). The Ninth Circuit in  
*Eitel* identified the following factors for a court to consider in exercising that discretion:

24 (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive  
25 claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action;  
26 (5) the possibility of a dispute concerning material facts; (6) whether the default was  
due to excusable neglect, and (7) the strong policy underlying the Federal Rules of  
Civil Procedure favoring decisions on the merits.

27 *Eitel*, 782 F.2d at 1471-72.

1 HAMP does not provide a private cause of action. Defendants do not, however, address the state law  
2 claims contained in the fifth cause of action.

3         Sorting the parties' claims and defenses, the Court concludes some of Doble's claims lack merit,  
4 and others require further evaluation. Even though the Court will uphold the default entry resulting  
5 from Defendants' culpable conduct, it will nevertheless dismiss with prejudice Doble's third and fourth  
6 causes of action, and part of Doble's first and second causes of action relating to New York Trust law  
7 and 11 U.S.C. § 544(a). *See Moore v. United Kingdom*, 384 F.3d 1079, 1090 (9th Cir. 2004) (invalid  
8 causes of action may be dismissed despite default). The Court will hold further proceedings on the  
9 remaining claims to respect the due process rights of Defendants. *Danning v. Lavine*, 572 F.2d 1386,  
10 1388-89 (9th Cir. 1978) (default judgment proceedings should be consistent with due process).

11  
12                 **1. Defendants' Secured and Unsecured Claims (1st and 2nd Causes of Action)**

13         The first two causes of action seek damages and disallowance of Defendants' secured and  
14 unsecured claims for lack of standing on four separate grounds: (a) MERS' assignment of the DOT to  
15 OneWest and, in turn, OneWest's assignment to Deutsche Bank, were invalid; (b) Defendants have no  
16 interest in the Note nor any right to enforce it under California law; (c) the assignment of the DOT to  
17 Deutsche Bank was not of public record; and (d) Defendants violated New York Trust law so that  
18 Deutsche Bank cannot be the owner of the Loan as a matter of law. Where a secured creditor cannot  
19 establish a right to enforce a loan, it has no standing to file or defend a claim, or to seek relief from  
20 stay. *In re Gavin*, 319 B.R. 27, 32 (B.A.P. 1st Cir. 2004); *In re Hayes*, 393 B.R. 259, 269-70 (Bankr.  
21 D. Mass. 2008).

22         Although the Court rejects Doble's New York Trust claims and his avoiding power claim, the  
23 record here supports Doble's first three standing claims. MERS had no authority to assign the DOT,  
24 under its terms and as a matter of law, without the authority to assign the Note. The Note was not  
25 assigned until it was endorsed by Plaza. Until that endorsement, the MERS' assignments were a  
26 nullity. Deutsche Bank currently lacks authority to enforce the Loan as the assignee of Plaza, and will  
27 continue to lack authority until it records its assignment.

1 **a. MERS Cannot Transfer DOT Enforcement Rights to Defendants**

2 Defendants' Motion to Dismiss relies upon MERS' status as nominal beneficiary of the DOT<sup>13</sup>  
3 to establish their standing to enforce the Loan. They cite several cases which have so held. *Lane v.*  
4 *Vitek Real Estate Indus. Group*, 713 F. Supp. 2d 1092, 1099 (E. D. Cal. 2010); *Hafiz v. Greenpoint*  
5 *Mortg. Funding, Inc.*, 652 F. Supp. 2d 1039, 1043 (N.D. Cal. 2009); *Pantoja v. Countrywide Home*  
6 *Loans, Inc.*, 640 F. Supp. 2d 1177, 1190 (N.D. Cal. 2009); *see also Perry v. Nat'l Default Servicing*  
7 *Corp.*, No. 10-CV-03167-LHK, 2010 U.S. Dist. LEXIS 92907, at \*11 (N.D. Cal. Aug. 20, 2010).<sup>14</sup>  
8 The Court does not disagree with these cases to the extent they hold MERS need not have physical  
9 possession of the note to commence a foreclosure, and securitization of a mortgage note need not  
10 impact the enforceability of the mortgage itself. The key issue before the Court is different: whether  
11 MERS had statutory authority to assign the DOT under its terms, particularly when MERS held no  
12 rights under the Note. To decide this issue, the Court rejects Defendants' invitation to overlook the  
13 statutory foreclosure mandates of California law, and rely upon MERS as an extra-judicial commercial  
14 alternative.<sup>15</sup>

15 The DOT is a four party instrument among the Dobles as Borrowers, Plaza as Lender, First  
16 American Title as trustee, and MERS as beneficiary. The Lender's rights regarding the Loan are  
17 pervasive. The Lender (Plaza) is entitled to receive all payments under the Note, to control  
18  
19  
20

21 <sup>13</sup> The DOT states "MERS is a separate corporation that is acting solely as a nominee for Lender and  
Lender's successors and assigns. MERS is the beneficiary under this Security Instrument." DOT at p. 1.

22 <sup>14</sup> Under Ninth Circuit law this Court may decline to follow these decisions because it is not bound. *State*  
23 *Compensation Ins. Fund v. Zamora (In re Silverman)*, 616 F.3d 1001, 1005 (9th Cir. 2010). While the Ninth  
24 Circuit reserved the issue of whether bankruptcy courts are bound by district court decisions within the district  
where the bankruptcy court sits, it recognized that such a requirement "could create the same problem of  
25 subjecting bankruptcy courts to a non-uniform body of law." *Id.*

26 <sup>15</sup> The Court notes that circumventing the public recordation system is, in fact, the purpose for which the  
MERS system was created. *Merscorp, Inc. v. Romaine*, No. 179, 2006 NY Slip Op. 9500, slip op. 6 (Ct. of  
27 Appeals 2006). Creation of a private system, however, is not enforceable to the extent that it departs from  
California law as explained in this Memorandum Decision.  
28

1 enforcement of the DOT under its terms, and only the Lender is entitled to conduct a nonjudicial  
2 foreclosure.<sup>16</sup>

3 MERS has none of these rights under the DOT and is not even mentioned in the Note. MERS  
4 is not given any independent authority to enforce the DOT under its terms, and its status as beneficiary  
5 under the DOT is only "nominal." While the Borrowers acknowledge in the DOT that MERS can  
6 exercise the Lender's rights as "necessary to comply with law or custom,"<sup>17</sup> this acknowledgement is  
7 not accompanied by any actual allocation of authority to nonjudicially foreclose on the Property, nor is  
8 such authority allocated in any other document in the record. *See also, e.g., LaSalle Bank Nat'l Ass'n*  
9 *v. Lamy*, No. 030049/2005, 2006 NY Slip Op 51534U, slip op. 2 (N.Y. Sup. Ct. 2006); *MERS v.*  
10 *Saunders*, 2 A.3d 289, 295 (Me. 2010) ("MERS' only right is to record the mortgage. Its designation  
11 as the 'mortgagee of record' in the document does not change or expand that right..."). Defendants'  
12 authority to foreclose cannot, therefore, be derived from MERS because MERS never held such  
13 authority.<sup>18</sup> *Shannon v. General Petroleum Corp.*, 47 Cal. App. 2d 651, 661 (1941) (assignment can  
14 only carry rights owned by the assignor.)

15  
16 <sup>16</sup> Under the DOT, the Lender is secured the right to: "(i) the repayment of the Loan, and all renewals,  
17 extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements  
18 under this Security Instrument and the Note." In addition, under the covenants executed between the Lender and  
19 Doble, the Lender is granted exclusive authority to accelerate repayment, "give notice to Borrower prior to  
acceleration," "invoke the power of sale" through written notice to the Trustee in the event of default, and  
appoint successor trustees. DOT at pp. 2, 11, 12.

20 <sup>17</sup> The DOT provides, "Borrower understands and agrees that MERS holds only legal title to the interests  
21 granted by Borrower in this Security Instrument, but, *if necessary to comply with law or custom*, MERS (as  
22 nominee of Lender and Lender's successors and assigns) has the 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 or cancelling this Security Instrument." DOT at p. 3 (emphasis  
added).

23 <sup>18</sup> Since the briefing on this matter was completed, *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal.  
24 App. 4th 1149, 1151-58 (4th Dist. 2011) was decided. *Gomes* held that there is no cause of action under Civil  
25 Code section 2924(a)(1) that would permit a borrower to test MERS' authority to initiate a nonjudicial  
foreclosure without a specific factual basis for the challenge. Neither *Gomes* nor Civil Code section 2924(a)(1)  
26 however, address Civil Code section 2932.5, applicable when an assignee forecloses. *Id.* at 1155. Instead,  
*Gomes* relied upon the borrower's acknowledgement of MERS' authority in the DOT to allow MERS to  
27 foreclose as nominal beneficiary. *Gomes*, 192 Cal. App. 4th at 1157-58. MERS, here, had no such authority  
under the DOT. The Lender, not MERS, has the right to "invoke the power of sale" under the DOT.

1 Even though MERS' status as the nominal beneficiary of the DOT may have allowed it to  
2 assign that limited status, this authority does not convey a right to enforce the Loan. An assignment of  
3 a mortgage without assignment of the corresponding debt is a nullity under controlling law. *Carpenter*  
4 *v. Longan*, 83 U.S. 271, 275 (1872); *Kelley v. Howarth*, 39 Cal. 2d 179, 192 (1952); *Johnson v. Razy*,  
5 181 Cal. 342, 344 (1919) ("A mortgage is mere security for the debt, and it cannot pass without  
6 transfer of the debt."); *Polhemus v. Trainer*, 30 Cal. 686, 688 (1866) (interest in the collateral subject  
7 to the mortgage does not pass "unless the debt itself [is] assigned."). Within California's  
8 comprehensive statutory nonjudicial foreclosure scheme found at Civil Code sections 2920-2955, four  
9 separate statutes corroborate that the secured debt must be assigned with the deed of trust.<sup>19</sup>

10 Since MERS could not assign any enforcement rights under the Note or DOT because it held  
11 none, Defendants could not rely on the invalid MERS assignment to enforce the DOT. *Polhemus*, 30  
12 Cal. at 688; *see also U.S. Bank Nat'l Ass'n v. Ibanez*, 458 Mass. 637, 651 (2011). They had to receive  
13 an assignment from Plaza as the payee of the Note before the MERS assignment of its nominal interest  
14 in the DOT could have any enforceable impact.

15  
16 **b. Defendants' Right to Enforce the Note**

17 A negotiable promissory note such as the Note can only be enforced in accordance with Article  
18 3 of the Commercial Code ("CCC"), Cal. Com. Code §§ 1101-16104 (Deering 2011). The CCC  
19 permits enforcement of a note by a party who: (1) holds a directly endorsed note (section 1205(21) );  
20 (2) previously had the ability to enforce the note, but it was lost, destroyed, or stolen (section 3309);  
21 (3) has possession of an endorsed-in-blank instrument (section 1205(21)); or (4) can prove both  
22 possession of the enforcement rights received from its transferor (section 3301). *Id*; *In re McMullen*  
23 *Oil Co.*, 251 B.R. 558, 568 (Bankr.C.D. Cal. 2000); *In Re Carlyle*, 242 B.R. 881, 887 (Bankr. E.D. Va.

24  
25  
26 <sup>19</sup> These statutes are: Civil Code sections 2932.5 (assignee of secured debt cannot nonjudicially foreclose  
27 without right to payment and a recorded assignment), 2935 (notice of an assignment of a mortgage does not  
28 change the borrowers' obligation to make payments to the holder of the note), 2936 (transfer of a note carries  
with it an assignment of the debt, not vice versa), and 2937 (borrowers must be notified of transfers of servicing  
rights).

1 1999). These requirements apply to every link in the chain of transfer of the note. Where a note has  
2 been assigned several times, each assignment in the chain must be valid or the party claiming the note  
3 cannot enforce it. *In re Gavin*, 319 B.R. 27, 32 (B.A.P. 1st Cir. 2004); *In re Wells*, 407 B.R. 873  
4 (Bankr. N.D. Ohio 2009). Even if a party is the owner of a promissory note, it is not entitled to enforce  
5 the note unless it meets the statutory criteria for enforcement. Cal.Com. Code §3203(b) cmt. 2.

6 Enforcement option 1 is not applicable. The Note is not payable to Defendants, but to Plaza.  
7 Neither Defendant can enforce the Note as a direct payee or endorsee. *In re Wilhelm*, 407 B.R. 392,  
8 402 (Bankr. D. Idaho 2009); *Chicago Title Ins. Co. v. Allfirst Bank*, 905 A.2d 366, 374 (Md. 2006).  
9 No claim was made that the Note was lost or stolen, which eliminates option 2.  
10

11 As to option 3, not until November 8, 2010 did Defendants produce the Note endorsed in blank  
12 by Plaza. An endorsement is not effective until it is signed. Com.Code §3203(c); *Security Pacific Nat.*  
13 *Bank v. Chess*, 58 Cal. App. 3d 555, 564 (1976). Until the note is properly endorsed, assignments of  
14 the deed of trust do not serve to transfer enforcement rights. *Id.* The endorsement must be on the note  
15 or attached. *Lopez v. Puzina*, 239 Cal. App. 2d 708, 714 (1st Dist. 1966).  
16

17 Defendants did not attempt to demonstrate the requirements of option 4; that they had  
18 possession of the Note and that Plaza had transferred to them the right to enforce it even without an  
19 endorsement. Instead, they erroneously relied upon the MERS assignment. Com.Code § 3203 (1), (2)  
20 n.17; *In re McMullen Oil Co.*, 251 B.R. 558, 567 (Bankr. C.D. Cal. 2000); *In re Agard*, No. 10-77338-  
21 reg, 2011 Bankr. LEXIS 488, at \*58 (Bankr. E.D.N.Y. Feb.10, 2011) ("[E]ven if MERS had assigned  
22 the Mortgage acting on behalf of the entity which held the Note at the time of the assignment, this  
23 Court finds that MERS did not have authority, as "nominee" or agent to assign the Mortgage absent a  
24 showing that it was given specific written directions by its principal."). Under the circumstances of  
25 this case, the Court declines to give the Defendants another chance to "prove the transaction." Instead,  
26  
27  
28

1 the Court finds that Defendants did not have any right to enforce the Note before November 8, 2010,  
2 when they produced an endorsement of the Note from Plaza.

3 **c. Deutsche Bank's Assignment of the DOT Must Still be Recorded**

4  
5 Although Deutsche Bank met the first of the foreclosure prerequisites to enforce the power of  
6 sale in the DOT under Civil Code section 2932.5<sup>20</sup> when it became the holder of the Note on  
7 November 8, 2010, it still failed to meet the second. Civil Code section 2932.5 requires that the  
8 assignee of the secured debt record its interest before it can exercise the power of sale under the DOT  
9 and nonjudicially foreclose. Deutsche Bank admits it has recorded neither of the two assignments  
10 from OneWest to Deutsche Bank. Deutsche Bank, therefore, still lacks authority to enforce the DOT,  
11 and any enforcement actions taken thus far are void. *Ibanez*, 458 Mass. at 651; *Polhemus*, 30 Cal. at  
12 688.

13  
14  
15 <sup>20</sup> Civil Code section 2932.5 provides:

16 Where a power to sell real property is given to a mortgagee, or other  
17 encumbrancer, in an instrument intended to secure the payment of money, the  
18 power is part of the security and vests in any person who by assignment  
19 becomes entitled to payment of the money secured by the instrument. *The*  
*power of sale may be exercised by the assignee if the assignment is duly*  
*acknowledged and recorded.*

20 Civ. Code § 2932.5 (Deering 2011) (emphasis added). While the exact language of Civil Code section 2932.5  
21 mentions mortgages and not deeds of trust, the distinction between the two instruments is obsolete. *N. Brand*  
*Partners v. Colony GFP Partners, L.P. (In re 240 N. Brand Partners)*, 200 B.R. 653, 658 (B.A.P. 9th Cir. 1996)  
22 ("The terminology creates a difference without distinction."); *Yulaeva v. Greenpoint Mortg. Funding, Inc.*, No.  
23 S-09-1504, 2009 U.S. Dist. LEXIS 79094, at \*4 (E.D. Cal. Sept. 3, 2009) (citing 4 B.E. Witkin, *Summary of*  
*California Law*, ch. VIII, § 5 (10th ed. 2005)); *Bank of Italy Nat. Trust & Sav. Assn. v. Bentley*, 217 Cal. 644,  
24 656 (1933) (legal title under a deed of trust, though held by the trustee to the extent necessary for execution of  
25 the trust, does not carry any "incidents of ownership of the property"); see also 1 Roger Bernhardt, *California*  
*Mortgages, Deeds of Trust, and Foreclosure Litigation*, § 1.35 (4th ed. 2009); *Bank of Italy Nat. Trust & Sav.*  
*Assn. v. Bentley*, 217 Cal. 644, 656 (1933) (legal title under a deed of trust, though held by the trustee to the  
26 extent necessary for execution of the trust, does not carry any "incidents of ownership of the property"); 4 Harry  
27 D. Miller & Marvin B. Starr, *Miller & Starr California Real Estate*, § 10:1 n. 9 (3d 2010) (citing *Domarad v.*  
*Fisher & Burke, Inc.*, 270 Cal. App. 2d 543, 553 (1st Dist. 1969)) (mortgages and deeds of trust have the same  
28 effect and economic function and are "subject to the same procedures and limitations on judicial and nonjudicial  
foreclosure").

1                    **d. New York Trust Law**

2                    As part of the first and second causes of action, Doble alleges that Deutsche Bank cannot own  
3 the Loan because the Loan was not properly transferred to it in accordance with New York Trust law  
4 and the trust documents. Under the terms of the Purchase and Servicing Agreement ("PSA"), Doble  
5 alleges all assets to be part of the trust had to be conveyed before June 1, 2005. Since none of the  
6 assignments of the Loan met that deadline, Doble claims Deutsche Bank has no interest in the Loan.  
7 Defendants, in turn, claim Doble has no standing to challenge the trust, citing *Rogan v. Bank One, N.A.*  
8 (*In re Cook*), 457 F.3d 561, 567 (6th Cir. 2006). While the Court agrees that Doble has no standing to  
9 interfere with trust administration, he does have standing to challenge Defendants' assertion they had  
10 standing to file a claim and to seek to foreclose the Loan. *Wilhelm*, 407 B.R. at 400.

11                    The Court nevertheless finds the allegations of this claim to be too flawed to remain a part of  
12 this suit. *See Eitel*, 782 F.2d at 1471. Based on the allegations of the Complaint, the Court cannot  
13 determine whether the Loan was validly conveyed to the trust, whether the trust is invalid, or what  
14 effect such an invalidation would have on Defendants' claim.<sup>21</sup> Doble has provided no legal support  
15 for his claims. His citation to New York Estate Powers and Trusts Law section 7-2.4 (Consol. 2010),  
16 to support that any "sale, conveyance, or other act" in "contravention" of the trust is void, is incorrect.<sup>22</sup>

17  
18 <sup>21</sup> Specifically, the Court is unclear as to (1) whether the PSA intended to transfer the Loan to the trust  
19 (Was Doble's Loan listed on the mortgage schedule?); (2) whether, if the PSA did intend to transfer the Loan to  
20 the trust, whether it made the transfer and documentation of the transfer was lost or whether the Loan was never  
21 transferred at all (Was the mortgage file conveyed to the trustee? Did the trustee certify the receipt of the  
22 mortgage file? Did the trustee attempt to exercise the Repurchase Provisions of the trust?); (3) whether, if the  
23 PSA intended to transfer the Loan, the parties failed to properly transfer it or whether the Loan was properly  
24 transferred but subsequent documentation was lost; and (4) whether, if the PSA did not intend to transfer the  
25 Loan to the trust, a subsequent transfer to the trust is valid under the terms of the PSA (Did the trustee receive an  
26 REMIC opinion? Did the trustee make other arrangements prior to the subsequent transfer to protect the trust's  
27 REMIC status? Does a violation of the trust's REMIC status negate the transfer or simply leave the trust  
28 vulnerable to an REMIC adverse event for purposes of the Tax Code?)

<sup>22</sup> New York Estate Powers and Trusts Law is not relevant here. Under section 11-1.1(a), New York  
Estate Powers and Trusts Law explicitly excludes business trusts. The Trust here is registered with the SEC,  
and the PSA provides for the issuance of certificates and the election of REMIC status with the IRS. Trusts  
whose shares are traded on the American Stock Exchange and that qualify as "real estate investment trusts"  
under the Internal Revenue Code are considered business trusts. *Prudent Real Estate Trust v. Johncamp Realty,*  
*Inc.*, 599 F.2d 1140, 1141 (C.A.N.Y. 1979). As a business trust, New York's Estate Powers and Trusts Law  
does not govern Deutsche Bank's ownership of the Loan. Rather, the ownership issue is governed by law

1 Doble's New York trust claim within the first and second causes of action therefore will be  
2 dismissed with prejudice.

3 **2. The Assignments May Not be Avoided (2<sup>nd</sup> Cause of Action)**

4 The Court agrees that Doble has no viable avoiding power claim to assert as a result of  
5 Defendants' recordation of assignments after the Martha Doble bankruptcy case was filed. Doble was  
6 provided constructive notice of Defendants' lien from the recordation of the DOT, regardless of  
7 whether interests in the Loan were later transferred. *In re Cook*, 457 F.3d at 568; *Kapila v. Atl. Mortg.*  
8 *& Inv. Corp. (In re Halabi)*, 184 F.3d 1335, 1338 (11th Cir. 1999); *see also In re Probasco*, 839 F.2d  
9 1352, 1354 (9th Cir. 1988) (applying California law, a bona fide purchaser who records prevails over a  
10 prior transferee who failed to record). The Court also notes these claims are property of the Martha  
11 Doble bankruptcy estate, not this case. Doble thus lacks standing to assert this claim. *See Estate of*  
12 *Sirtos v. One San Bernardino County*, 443 F.3d 1172, 1176 (9th Cir. 2006) (husband does not have  
13 authority to assert claims on the part of wife without substantial proof of standing). This part of the  
14 second cause of action is also dismissed with prejudice.

15 **3. Violation of Stay (3rd Cause of Action)**

16 Doble's third cause of action alleges<sup>23</sup> that Assignments 2 and 3 from OneWest to Deutsche  
17 Bank were executed post-petition in Martha Doble's case, and are void and in violation of his co-debtor  
18 stay under 11 U.S.C. §1301. In response, Defendants assert that the stay is not violated by assignments  
19 of their mortgage interests post-petition, because those interests do not belong to Martha Doble's  
20 bankruptcy estate.

21 The Court agrees that this is not a valid cause of action. Because the automatic stay only  
22 applies to transfers of a debtor's property interests under 11 U.S.C. § 362(a)(3), Defendants' transfers

23  
24  
25 applicable to trusts generally. *See, e.g., Fogelin v. Nordblom*, 521 N.E.2d 1007, 1012 (Mass 1988); *In re Great*  
26 *Northern Iron Ore Props.*, 263 N.W.2d 610 (Minn. 1978).

27 <sup>23</sup> While Doble does not limit the cause of action to just this allegation, and instead states "the actions of  
28 [Defendants] as set forth hereinabove" constitute violations of the stay, these allegations are too diffuse to  
address without more specificity.

1 of their interests in the Loan do not violate the automatic stay. *Halabi*, 184 F.3d at1337; *Cook*, 457  
2 F.3d at 568. This cause of action will be dismissed with prejudice.

3 **4. Violation of Bankruptcy Code (4<sup>th</sup> Cause of Action)**

4 Doble specifically seeks damages and sanctions relating to Defendants' proof of claim and false  
5 declaration filed in the relief from stay motion in Martha Doble's case. Defendants' only response to  
6 this is to reiterate that the unrecorded assignment is not avoidable under § 544(a). Defendants fail to  
7 address any other allegations in this cause of action.

8 Despite Defendants' failure to cogently respond to this cause of action, the Court finds Doble  
9 has no standing to assert damages in his wife's bankruptcy case. Doble was not a joint debtor in that  
10 case, and Martha Doble is not a party in this case. *See In re Scott*, 437 B.R. 376, 379-80 (B.A.P. 9th  
11 Cir. 2010). This cause of action is not viable to the extent it seeks damages for Doble in his wife's  
12 case, and it will be dismissed with prejudice.

13 **5. Loan Modification Claims (5th Cause of Action)**

14 In the fifth cause of action, Doble alleges an array of theories complaining of Defendants'  
15 conduct in the loan modification process, including that they engaged in unlawful business practices,  
16 violated California's Consumer Legal Remedies Act, California Civil Code Section §§ 1750-1759, and  
17 breached the covenant of good faith and fair dealing. In response, Defendants only challenge whether  
18 HAMP establishes a private cause of action, based on Doble's allegation he is an intended third party  
19 beneficiary under the HAMP contract.

20 The facts alleged in the Complaint, as well as the additional evidence proffered by the parties in  
21 response to the Court's inquiries, reflect ongoing efforts by Doble to modify the Loan over a period of  
22 eighteen months. Doble claims the efforts were successful, and Defendants should be bound by the  
23 permanent loan modification they offered him in May 2010. Defendants claim the Loan modification  
24 effort failed because Doble failed to make all of the payments due during the trial period. To resolve  
25 this basic controversy requires further evidentiary proceedings, since the communications by  
26 Defendants were confusing and contradictory, but Doble did fail to make all of the required payments  
27  
28

1 even if there was a binding loan modification with Defendants. To facilitate the evidentiary hearing,  
2 the Court will preliminarily address Doble's theories of recovery.

3 Courts have differed on whether HAMP permits a private right of action. *Compare Benito v.*  
4 *Indymac Mortg. Servs.*, No. 2:09-CV-001218-PMP-PAL, 2010 U.S. Dist. LEXIS 51259, at \*20-\*21  
5 (D. Nev. May 21, 2010) (holding a borrower is not a third party beneficiary), *and Escobedo v.*  
6 *Countrywide*, No. 09-cv-1557 BTM (BLM), 2009 U.S. Dist. LEXIS 117017, at \*4-\*7 (S.D. Cal. Dec.  
7 15, 2009) (same), *with Marques v. Wells Fargo Home Mortgage Inc.*, No. 09-cv-1985-L (RBB), 2010  
8 U.S. Dist. LEXIS 81879, at \*19-\*20(S.D. Cal. Aug. 12, 2010) (finding a borrower is a third party  
9 beneficiary with regard to certain contract terms that are not discretionary, and HAMP otherwise has  
10 no enforcement remedies). In determining whether a party is an intended beneficiary of a government  
11 contract, a court must examine "the precise language of the contract for a clear intent to rebut the  
12 presumption that the third parties are merely incidental beneficiaries." *County of Santa Clara v. Astra*  
13 *USA, Inc.*, 588 F.3d 1237, 1244 (9th Cir. 2009), *cert. granted sub. nom, Astra USA, Inc. v. Santa Clara*  
14 *County*, 131 S.Ct. 61 (2010) (failure to include express language identifying parties as intended  
15 beneficiaries is not dispositive). To the extent Doble can prove a specific provision of HAMP was  
16 violated, and compliance with the provision was mandatory for Defendants, he may be able to prove a  
17 valid cause of action as a third party beneficiary of HAMP.

18 Doble's other claims are not invalid as a matter of law even if he cannot establish a direct cause  
19 of action under HAMP. Failure to establish a HAMP third party beneficiary contract cause of action  
20 does not preclude state law claims relating to the Lender's alleged misconduct. *Escobedo*, 2009 U.S.  
21 Dis. LEXIS 117017, at \*10 (allowing claims for violation of unfair business practices under Cal. Bus.  
22 & Prof. Code § 17200); *Villa v. Wells Fargo Bank, N.A.*, No. 10CV81 DMS (WVG), 2010 U.S. Dist.  
23 LEXIS 23741, at \*9 (S.D. Ca. 2010) (allowing an amendment to allege misrepresentation claims);  
24 *Aceves v. U.S. Bank, N.A.*, 192 Cal. App. 4th 218, 233 (2d Dist. 2011) (allowing promissory estoppel  
25 and fraud claims). Doble's claims under the California Legal Remedies Act, Cal. Civ. Code §§ 1750-  
26 1759, and his claims for breach of the covenant of good faith and fair dealing, therefore, cannot be  
27 dismissed as a matter of law at this time.

1           **C.     Order To Show Cause**

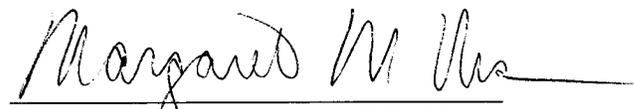
2           Based on the facts and circumstances described in this Memorandum Decision, the Court  
3 orders that Defendants appear and show cause why they should not pay Doble's attorney's fees for their  
4 conduct in this action. This order to show cause is issued pursuant to this Court's authority under 28  
5 U.S.C. § 157, 11 U.S. C. § 105, Bankruptcy Rule 9011(c)(1)(b) and the Court's inherent power to  
6 monitor the proceedings before it for the benefit of the Court, the profession and the public. *Chambers*  
7 *v. NASCO, Inc.*, 501 U.S. 32, 43, 47 (1991); *In re Sunshine Jr. Stores, Inc.*, 456 F.3d 1291, 1305 (11th  
8 Cir. 2006) ("it is within a court's discretion to assess attorney's fees on a party ... for actions taken in  
9 bad faith").

10          **III.    CONCLUSION**

11           The Court denies Defendants' request to set aside the clerk's entry of a default, but grants their  
12 Motion to Dismiss the portions of the first and second causes of action relating to Doble's New York  
13 Trust claims and avoiding power claims. Defendants' Motion to Dismiss Doble's third and fourth  
14 causes of action is also granted. As to the remainder of the first and second causes of action, the Court  
15 finds MERS' limited role as beneficiary of the DOT did not provide talismanic protection against the  
16 myriad foreclosure deficiencies committed by Defendants regarding this Loan. MERS' role did not  
17 provide Defendants the authority to enforce the DOT, the ability to assign the Note without an  
18 endorsement from Plaza, or an exception to their obligation to record the assignment to Deutsche  
19 Bank. The Court will allow Doble to produce additional evidence in support of his claims, but not his  
20 wife's claims. The Court will disallow Defendants' secured and unsecured claims without prejudice.  
21 Defendants may file an amended proof of claim in this case if they fully address the defects identified  
22 in this Memorandum Decision.

23           The Court orders Defendants to appear and show cause why they should not pay Doble's  
24 attorneys fees for their conduct in this action, and schedules a status conference for April 28, 2011 at  
25 3:00 in Department 1 of this Court.

26  
27 Dated: April 14, 2011

  
MARGARET M. MANN, JUDGE