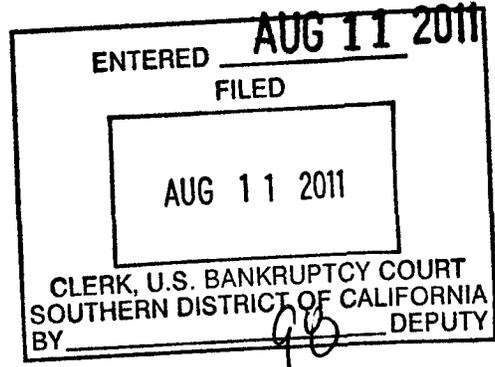


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WRITTEN DECISION – FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

In re: ) BANKRUPTCY NO: 11-01133-MM13  
)  
CIRILO E. CRUZ ) CHAPTER: 13  
JUANA CRUZ )  
) AP: 11-90116-MM  
)  
Debtors, ) MEMORANDUM DECISION ON MOTIONS  
\_\_\_\_\_ ) TO DISMISS SECOND AMENDED  
) COMPLAINT  
CIRILO E. CRUZ, )  
)  
Plaintiff, ) DATE: August 11, 2011  
) TIME: 2:00 p.m.  
) CRTRM: 1  
v. )  
) JUDGE: Margaret M. Mann  
)  
AURORA LOAN SERVICES LLC; SCME )  
MORTGAGE BANKERS, INC.; ING BANK, )  
F.S.B.; MORTGAGE ELECTRONIC )  
REGISTRATION SYSTEMS, INC.; and )  
DOES 1 to 100, )  
)  
Defendants, )  
\_\_\_\_\_ )

1           **I. INTRODUCTION**

2           The Court has considered the Motions ("Motions") to Dismiss the Second Amended Complaint  
3 ("SAC") of debtor and plaintiff Cirilo E. Cruz<sup>1</sup> ("Cruz") brought pursuant to Fed. R. Bankr. P. 7012,  
4 incorporating by reference Fed. R. Civ. P. 12(b)(6), by Defendants Aurora Loan Services ("Aurora"),  
5 Mortgage Electronic Registration Systems, Inc. ("MERS"), and ING Bank, F.S.B. ("ING").<sup>2</sup> The  
6 Court grants the Motions in part and denies them in part for the reasons set forth in this Memorandum  
7 Decision.

8           All Truth-In-Lending-Act ("TILA") related causes of action are dismissed with prejudice. The  
9 Court concludes that Cruz cannot state a cause of action under any theory challenging the TILA  
10 disclosure because his claims are either unripe or barred by the statute of limitations. The TILA  
11 allegations cannot be stated as state law claims because of federal preemption as an alternative ground  
12 for dismissal. The Motions are granted to the additional extent they assert the foreclosure of the  
13 Property was wrongful due to MERS' unauthorized substitution of trustee.

14           The Court denies the Motions to the extent that they assert ING was not required to record its  
15 assignment of beneficial interest before it foreclosed. The Motions request the Court reconsider its  
16 holding in *U.S. Bank N.A. v. Skelton (In re Salazar)*, 448 B.R. 814, 822-24 (Bankr. S.D. Cal. 2011),  
17 that California Civil Code § 2932.5<sup>3</sup> pertains to both mortgages and deeds of trust. For the additional

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18  
19 <sup>1</sup> The Court rules on the Motions despite the recent death of plaintiff Cruz. His demise does not abate this  
20 adversary proceeding, which pursues claims which now either belong to his estate or successor. Fed. R. Civ. P.  
21 25 applies to allow the substitution of the successor of the deceased party in this case. *Hawkins v. Eads*, 135  
22 B.R. 380, 384 (Bankr. E.D. Cal. 1991); *see* Fed. R. Bankr. P. 7025. The Court will decide any motion of  
substitution by any party or by the successors of Cruz at a later time. *Hawkins*, 135 B.R. at 384. The Chapter  
13 case remains pending as Cruz's wife is a co-debtor, and its status will be addressed in the bankruptcy case in  
chief pursuant to Fed. R. Bankr. P. 1016.

23 <sup>2</sup> Defendant SCME Mortgage Bankers, Inc. ("SCME") has been defunct since 2007 and has not responded in  
24 any way to the complaints filed by Cruz. Quality Loan Service Corporation ("Quality") has been deleted as a  
25 Defendant in the SAC, likely due to its filing of a Declaration of Nonmonetary Status pursuant to Cal. Civ. Code  
26 § 29241 ("Status Declaration") to which Cruz did not timely object. In the Status Declaration, Quality stated it  
did not hold title to the Property and only served as the parties' agent. Quality also agreed to be bound by any  
nonmonetary order or judgment of this Court. The Court will thus address the SAC only as it pertains to the  
moving parties Aurora, ING and MERS (collectively "Defendants").

27 <sup>3</sup> All references to a statutory section are references to the California Civil Code unless otherwise specified.  
28

1 reasons set forth in this Memorandum Decision, the Court reaffirms its analysis in *Salazar* and  
2 concludes that ING's failure to record its beneficial interest rendered its foreclosure sale void.

3 **II. FACTUAL ANALYSIS**

4 **A. Standard of Review**

5 The Court assumes the allegations of the SAC are true for purposes of the Motions and  
6 construes them liberally in favor of Cruz. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007);  
7 *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). However, the Court must  
8 also find that the SAC pleads sufficient facts to state a claim of relief that is "plausible on its face."  
9 *Twombly*, 550 U.S. at 570; *Ashcroft v. Iqbal*, \_U.S. \_, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*).  
10 The SAC allegations must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at  
11 555; *see also Iqbal*, 129 S. Ct. at 1950 (citing Fed. R. Civ. P. 8(a)(2)).

12 **B. Factual Summary**

13 The SAC allegations relate to the 2004 financing of Cruz's residence located at 3148 Toopal  
14 Drive, Oceanside, CA 92054 ("Property"), by a loan provided by SCME ("Loan") documented by a  
15 variable interest rate note ("Note") and deed of trust ("DOT"). Aurora was the servicer of the Loan and  
16 MERS was the initial nominal beneficiary of the Loan. Cruz claims the TILA disclosure provided to  
17 him when the Loan was made was misleading by understating its total cost through maturity, which  
18 caused him to forego less expensive financing alternatives.

19 After Cruz defaulted on the Loan, Defendants commenced the foreclosure process. ING had  
20 become the successor beneficiary under the DOT at some time before, but never recorded an  
21 assignment of beneficial interest. Cruz then entered into a forbearance agreement with Aurora. ING  
22 foreclosed on the Property on June 2, 2010 during the extended forbearance period agreed to by  
23 Aurora, even though Cruz was current on his payments at the time. ING's interest, as assignee  
24 beneficiary, first appeared of record in the Trustee's Deed Upon Sale ("Trustee's Deed"), recorded a  
25 few weeks after the foreclosure. The Trustee's Deed identified ING as the foreclosing beneficiary.

1                   **C. Procedural History**

2                   Cruz and his wife filed their joint Chapter 13 bankruptcy petition on January 25, 2011, and  
3 Cruz filed his First Amended Complaint ("FAC") about a month thereafter. Defendants responded to  
4 the FAC with motions to dismiss brought pursuant to Fed. R. Bankr. P. 7012, incorporating by  
5 reference Fed. R. Civ. P. 12(b)(6) ("First Motions"). These were denied in part and granted in part in  
6 this Court's order entered May 24, 2011 ("FAC Order"). The First Motions were denied to the extent  
7 they related to Aurora's forbearance agreement. The Court also denied the First Motions pertaining to  
8 whether causes of action were stated under TILA and under California Business and Professions Code  
9 § 17200 ("Section 17200"). The Court granted the First Motions with leave to amend as to whether the  
10 TILA causes of action were barred by the statute of limitations; whether MERS had authority to  
11 substitute the trustee under the DOT; whether ING's interest was required to be of record; and whether  
12 Cruz could allege facts to tender the Loan amount to set aside the foreclosure under TILA or to claim  
13 damages. The Court also granted leave to amend for Cruz to clarify which Defendants were named in  
14 the different causes of action.

15                   In response to the FAC Order, Cruz filed his SAC,<sup>4</sup> to which Defendants responded with these  
16 Motions.

17                   **III. LEGAL ANALYSIS**

18                   **A. The First, Third and Tenth Causes of Action of the SAC are Preempted.**

19                   Cruz attempts in the first, third and tenth causes of action to allege his TILA claims indirectly  
20 under Section 17200, and as state law fraud and negligent misrepresentation claims. Since these  
21 causes of action rely upon the TILA disclosures made to Cruz when the Loan was made, they must be  
22 dismissed with prejudice due to federal preemption. In *Silvas v. E\*Trade Mortg. Corp.*, 514 F.3d  
23 1001, 1003 (9th Cir. 2008), the Section 17200 claims were alleged based upon TILA disclosures. The

24 \_\_\_\_\_  
25 <sup>4</sup> The SAC alleges ten causes of action: 1) intentional misrepresentation as to SCME and ING; 2) intentional  
26 misrepresentation as to Aurora and ING; 3) negligent misrepresentation as to SCME and ING; 4) negligent  
27 misrepresentation as to Aurora and ING; 5) breach of contract as to Aurora and ING; 6) breach of implied  
28 covenant of good faith and fair dealing as to ING and Aurora; 7) promissory estoppel as to ING and Aurora; 8)  
wrongful foreclosure as to ING, Aurora and MERS; 9) quiet title as to ING; and 10) violation of Section 17200  
as to all Defendants.

1 Ninth Circuit dismissed these claims, finding Congress intended for TILA to preempt the field. *Id.* at  
2 1004-06. Here as well, although the deceit and Section 17200 claims do not reference TILA, they are  
3 based solely upon the representations mandated by TILA. As in *E\*Trade Mortg. Corp., id.*, attempts  
4 to camouflage these claims from TILA scrutiny cannot save them from dismissal.

5  
6 **B. The First, Third and Tenth Causes of Action Relating to TILA Disclosures are Not Timely.**

7 Even if the preemption bar did not apply, the Court concludes the first, third and tenth causes of  
8 action should still be dismissed. The FAC Order at ¶¶ 12-14 granted leave to amend the TILA causes  
9 of action to specify when Cruz discovered, or should have discovered, the harm of the alleged TILA  
10 inaccuracy. *Gutierrez v. Mofid*, 39 Cal. 3d 892, 897-98 (1985) (relevant discovery time is of the nature  
11 of the harm, not the existence of legal remedies). This is the date of discovery under state law for  
12 statute of limitations tolling purposes. *See Grisham v. Philip Morris USA, Inc.*, 40 Cal. 4th 623, 646  
13 (2007) (personal injury claim for a tobacco company's misrepresentation accrued at the time that "the  
14 physical ailments themselves were, or reasonably should have been, discovered").

15 Rather than providing more detail on when the harm was discovered, as required by the FAC  
16 Order, the SAC hedges the issue. It alleges that Cruz could not have discovered the understatement of  
17 the cost of the 2004 Loan until the TILA disclosure was reviewed by an expert in 2010. Alternatively,  
18 the SAC alleges that the harm could not be discovered until 2015, when the interest rate will become  
19 variable. SAC ¶ 23. But under either discovery date, Cruz cannot state a cause of action.

20 If the alleged harm occurred when the Loan was made in 2004 by misleading Cruz into a bad  
21 financing choice, then the cause of action is barred by the three year statute of limitations for state law  
22 deceit claims. Cal. Code Civ. Pro. § 338(d). Even though a complicated analysis is required, it is  
23 possible to discern from the Loan documents attached to the SAC that the total cost of financing on the  
24 TILA disclosure differed from the stated interest rate. Although Cruz only alleges state law deceit  
25 claims, the Court finds persuasive Ninth Circuit authority that addressed when the harm of TILA  
26 misrepresentations should be discovered. Although these claims are alleged under state law, both  
27 federal and state courts have applied TILA to assess related state law claims. *See e.g. Pacific Shore*  
28

1 *Funding v. Lozo*, 138 Cal. App. 4th 1342, 1347 (2006); *Rubio v. Capital One Bank*, 613 F.3d 1195,  
2 1203 (9th Cir. 2010). Under *Meyer v. Ameriquest Mortgage Co.*, 342 F.3d 899, 902 (9th Cir. 2003),  
3 because the plaintiffs "were in full possession of all information relevant to the discovery of a TILA  
4 violation and a § 1640(a) damages claim on the day the loan papers were signed," they could not toll  
5 the statute of limitations.

6 Cruz was in full possession of the Loan documentation in 2004. Because there are no  
7 allegations of fraudulent concealment, or any other action on the part of any Defendant to cover up the  
8 misrepresentations, the deceit causes of action accrued when the Loan was made. *Id.* This was the  
9 date the harm to Cruz could have been determined from the face of the Loan documents.

10 The alternative explanation of the discovery of the harm is that it has not yet occurred and will  
11 not occur, if at all, until the interest rate on the Loan becomes variable in 2015. SAC ¶¶ 23-33.  
12 Whether the Loan will be more or less expensive than either the stated 5.85% initial contract rate, or  
13 the projected variable index rate of 4.85% starting in 2015, cannot be known until 2015. It is beyond  
14 the capabilities of this Court, or any expert or jury, to speculate about future interest rates. If interest  
15 rates drop below the index assumption used when the Loan was made, Cruz will receive a windfall. If  
16 they rise, Cruz will suffer loss assuming he is still paying on the Loan. This lack of a concrete impact  
17 on the parties renders these claims unripe for resolution. *See Thomas v. Union Carbide Agricultural*  
18 *Prod. Co.*, 473 U.S. 568, 580 (1985) (ripeness doctrine prevents premature adjudication where the  
19 impact of a claim against the parties cannot be known); *see also Exxon Corp. v. Heinze*, 32 F.3d 1399,  
20 1404 (9th Cir. 1994).

21 The first, third and tenth causes of action, to the extent they are related to the TILA  
22 disclosures,<sup>5</sup> are accordingly dismissed with prejudice because they are either barred by the statute of  
23 limitations or are unripe.

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25 <sup>5</sup> Cruz argued that since the Court denied the First Motions to dismiss the Section 17200 cause of action, MERS  
26 is precluded from challenging it again. But the Court's analysis of the ripeness of this dispute is based upon new  
27 allegations of the SAC found in paragraph 23—that Cruz "would have discovered the interest rate discrepancy in  
28 the year 2015 when his payments would have deviated significantly from what the TILA disclosure statement  
reflected."

1  
2 **C. The Eighth and Ninth Causes of Action for Wrongful Foreclosure and Quiet**  
3 **Title Cannot Be Based upon a Wrongful Substitution of Trustee, But Only**  
4 **upon Section 2932.5.**

5 There are two separate factual scenarios alleged in the wrongful foreclosure causes of action: 1)  
6 that MERS lacked authority to substitute Quality as trustee of the DOT; and 2) that ING had no  
7 recorded beneficial interest at the time it foreclosed. The second scenario, but not the first, alleges a  
8 viable cause of action.

9 **1. The Substitution of Trustee by MERS was Valid.**

10 In the FAC Order, Cruz was directed to specifically allege why MERS, as the nominee of the  
11 Lender under the DOT and the beneficiary of record, lacked authority under § 2934a(a)(1)(A) to  
12 substitute the trustee. The Court earlier ruled in the FAC Order that if MERS was authorized by the  
13 Lender under the DOT to substitute the trustee, this substitution would be valid.

14 Instead of alleging specific facts that MERS was not authorized by the Lender to substitute the  
15 trustee, Cruz relies upon general allegations that two parties cannot both be the beneficiary. SAC ¶  
16 101. These allegations seem to leave the resolution of whether MERS was authorized to substitute the  
17 trustee to the outcome of the litigation. But California law does not provide a cause of action to  
18 determine whether or not a party has authority to institute foreclosure proceedings. *Gomes v.*  
19 *Countrywide Home Loans*, 192 Cal. App. 4th 1149, 1154-56 (2011).

20 Cruz separately alleges that ING was the beneficiary throughout the foreclosure process.<sup>6</sup> He  
21 argues in his opposition that the DOT follows the Note, and MERS could not have been the beneficiary  
22 once ING was assigned the Note. This argument ignores that once ING was entitled to enforce the  
23 Note, it became the Lender under the DOT, even if its interest was not yet of record. As such, ING  
24 could direct MERS, as the beneficiary of record and as the Lender's nominee, to substitute Quality as  
25 the trustee of the DOT. *Ferguson v. Avelo Mortgage LLC*, 195 Cal. App. 4th 1618, 1628 (2011)

26 <sup>6</sup> In SAC ¶ 100, Cruz alleges that "ING claims that they are and were the beneficiary of the Deed of Trust  
27 throughout the foreclosure process." Cruz also alleges in SAC ¶ 61 that "Aurora was acting as agent for ING,"  
28 including when Aurora entered into the "Forbearance Contract" in October 2009. SAC ¶ 83.

1 (authorized beneficiary may substitute the trustee). *Avelo* relied upon § 2934a which specifically  
2 authorizes substitutions of trustees to be recorded after the substituted trustee takes action. *Id.*

3 Leave to amend the substitution of trustee claim will not be granted because Cruz' allegations  
4 that ING was the beneficiary throughout the foreclosure process disprove this claim. *Abagninin v.*  
5 *AMVAC Chem. Corp.*, 545 F.3d 733, 742 (9<sup>th</sup> Cir. 2008) (leave to amend may be denied if the  
6 allegation of other facts, consistent with those plead, cannot cure the deficiency).

## 7 2. Section 2932.5 Applies to Deeds of Trust.

8 Although Cruz's other causes of action are fatally defective, Cruz has properly stated claims for  
9 wrongful foreclosure and quiet title based upon ING's non-judicial foreclosure of the DOT.<sup>7</sup> Section  
10 2932.5 required that ING's interest be of record at the time of the foreclosure sale, and it was not.  
11 MERS was the beneficiary of record when ING foreclosed, but ING was the actual foreclosing  
12 beneficiary.<sup>8</sup> The Trustee's Deed identified ING as the foreclosing beneficiary, and that recital is a  
13 binding statement of fact. *Bank of America v. La Jolla Group II*, 129 Cal. App. 4th 706, 731-32  
14 (2005). Because ING lacked an interest of record, it was not authorized to proceed with the  
15 foreclosure sale under § 2932.5, rendering the sale void. *Dimock v. Emerald Properties*, 81 Cal. App.  
16 4th 868, 874 (2000) (sale under deed of trust by former trustee *void*, and tender of the amount due is  
17 unnecessary); *Bank of America*, 129 Cal. App. 4th at 712.<sup>9</sup>

18 To reevaluate whether § 2932.5 concerns both mortgages and deeds of trust, the Court has  
19 carefully considered the "intermediate appellate court decisions, decisions from other jurisdictions,  
20 statutes, treatises, and restatements as guidance . . ." to attempt to determine how the California

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21 <sup>7</sup> Although not the focus of his SAC, which is instead on the substitution of trustee under the DOT, Cruz alleges  
22 sufficient facts to assert this claim in SAC ¶ 106.

23 <sup>8</sup> Defendants do not contest that § 2932.5, if applicable, was not complied with by ING's foreclosure without its  
24 interest being of record. They merely contest whether the statute applies to deeds of trust, or only to mortgages.

25 <sup>9</sup> *Avelo*, 195 Cal. App. 4<sup>th</sup> at 1628, on which Aurora relies for the broad statement that tender is required in any  
26 case seeking to set aside a completed sale, is not to the contrary. *Avelo* recognized that an unauthorized  
27 foreclosure sale was void, but did not find the sale at issue was unauthorized. There, the substitution of trustee  
28 was signed by a lender before it was assigned any interest in the deed of trust. Because § 2934a retroactively  
validates a substitution of trustee by an unauthorized beneficiary, the substitution of trustee was deemed valid as  
of the time the deed of trust was assigned. *Id.*, citing *Dimock*, 81 Cal. App. 4th at 876-78.

1 Supreme Court would rule. *Lewis v. Tel. Employees Credit Union*, 87 F.3d 1537, 1545 (9<sup>th</sup> Cir. 1996).

2 The Court remains convinced that the highest court in this state would hold that § 2932.5 requires an  
3 assignee trust deed beneficiary to record its interest before it non-judicially forecloses.

4 a. The Plain Language of § 2932.5 Can Be Applied to Deeds of Trust.

5 Defendants first contend the plain language of § 2932.5<sup>10</sup> cannot accommodate deeds of trust  
6 within its ambit. Starting with a review of the statutory language, and considering its legislative  
7 history, *see Conservatorship of Whitley*, 50 Cal. 4th 1206, 1214 (2010), the Court finds the plain  
8 language of § 2932.5 easily pertains to deeds of trust:

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

14 (Emphasis added). The statute does not only apply to mortgagees but also to other encumbrancers.  
15 That a beneficiary under a deed of trust is an encumbrancer is confirmed by the California Supreme  
16 Court. "(M)ortgagees and trust deed beneficiaries alike hold security interests in property encumbered  
17 by mortgages and deeds of trust." *Monterey S. P. P'ship v. W. L. Bangham*, 49 Cal. 3d 454, 461 (1989)  
18 (rejecting that a deed of trust conveyed true title to the trustee). Section 2932.5 further provides that  
19 the "power [of sale] is part of the security and vests in any person who by assignment becomes entitled  
20 to payment of the money secured by the instrument." As the assignee of the Note, ING was the party  
entitled to the payment of money. It took title to the Property in satisfaction of the secured debt at the  
time of the foreclosure sale. Each of the clauses of § 2932.5 applies comfortably to deeds of trust.

21 The legislative history of § 2932.5 also supports its application to deeds of trust as well as  
22 mortgages. Section 2932.5 succeeded to § 858 verbatim as part of the 1986 technical revisions to  
23 California trust law. *See Recommendation Proposing the Trust Law* (Dec. 1985) 18 Cal. Law Revision  
24 Rep. (1985) p. 764; *Selected 1986 Trust and Probate Legislation*, (Sept. 1986) 18 Cal. Law Revision

25 \_\_\_\_\_  
26 <sup>10</sup> Aurora and ING also direct the Court to a portion of § 2920(b) asserting that mortgages and deeds of trust are  
27 mutually exclusive under the foreclosure statute. This assertion ignores that § 2920(b) by its express terms only  
28 applies "(f)or purposes of Sections 2924 to 2924h, inclusive..." This limited exclusion of a deed of trust from  
the definition of a mortgage is patently inapplicable to § 2932.5.

1 Com. Rep. (1986) p. 1483, available at <http://www.clrc.ca.gov/Mreports-publications.html#V18>.

2 These technical revisions included two changes to California foreclosure law pertaining to deeds of  
3 trust—to renumber § 2932.5 as part of the non-judicial foreclosure statute, and to add § 2934b to apply  
4 Probate Code §§ 15643 (vacancy in the office of trustee) and 18102 (protections for third persons  
5 dealing with former trustee.) Had § 2932.5 been limited to mortgages, there would have been no need  
6 to revise it at the time of the other revisions to California trust law.

7 *Strike v. Trans-West Discount Corp.*, 92 Cal. App. 3d 735, 742 (1979) cited the predecessor to  
8 § 2932.5; *i.e.*, § 858 to validate the exercise of the power of sale by a trust deed beneficiary of record.  
9 *Tamburri v. Suntrust Mortg., Inc.*, 2011 U.S. Dist. LEXIS 72202 \*12-13 (N.D. Cal. July 6, 2011)  
10 recognized that whether § 2932.5 applies to deeds of trust raises a serious question sufficient to grant a  
11 preliminary injunction against the sale of foreclosed property. The two authoritative treatises that  
12 discuss § 2932.5 also agree that deeds of trust fall within its purview. 4 Harry D. Miller & Marvin B.  
13 Starr, California Real Estate, §§ 10.2, 10:38, 10:39<sup>11</sup> (3d ed. 2010); and Cal Jur 3d (Rev) Deeds of  
14 Trust §112.<sup>12</sup>

15 Defendants do not discuss the interpretation of § 2932.5 by these persuasive treatises and other  
16 authorities. They point instead to the conveyance language of the DOT, which conveys title to the  
17 Property, "with power of sale," to the trustee, to claim the beneficiary cannot be the "encumbrancer" in  
18 whom a power of sale is vested. Not only does this contention ignore that the power of sale in the

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19 <sup>11</sup> MERS incorrectly cites 4 Harry D. Miller & Marvin B. Starr, California Real Estate, §§ 10:2, 10:38, 10:39  
20 (3d ed. 2010) ("Miller & Starr") despite it being cited by MERS as an authoritative source on real estate. MERS  
21 quotes Miller & Starr to state that ("An assignment of the note and deed of trust need not be recorded to be  
22 effective...."). The text quoted by MERS pertains only to the effectiveness of assignments between the assignee  
23 and assignor, but not to § 2932.5. Miller & Starr in the same section, § 10:39, proceed to specifically apply §  
24 2932.5 to deeds of trust as well as mortgages: "In the case of a deed of trust or mortgage with a power of sale,  
25 an assignee can only enforce the power of sale if the assignment is recorded, because the assignee's authority to  
26 conduct the sale must appear in the public records."

27 <sup>12</sup> Cal Jur 3d (Rev) Deeds of Trust §112 cites § 2932.5 and other authority for the following:

28 The assignment of a note and trust deed ordinarily vests in the assignee  
all the rights and interest of the beneficiary. The assignee becomes the  
equitable owner of the security and is entitled, as successor to the  
beneficiary, to all that is equitably due on the trust deed including  
interest on the amount secured to the date of payment or tender. The  
assignee has a right to bring a foreclosure action and may exercise the  
power of sale in a security instrument if the assignment is duly  
acknowledged and recorded.

1 DOT is controlled and must be invoked by the beneficiary, it seeks to revive the outdated title  
2 distinction between mortgages and deeds of trust rejected by the California Supreme Court.

3 b. Defendants' Primary Authority is Out-Dated.

4 Defendants primarily<sup>13</sup> rely on *Stockwell v. Barnum*, 7 Cal. App. 413, 416-17 (1908), and the  
5 District Court cases<sup>14</sup> that follow it, to assert the power of sale in a deed of trust is held by the trustee,  
6 not the beneficiary. *Stockwell* is not a sound basis to determine how the California Supreme Court  
7 would apply § 2932.5 because it relies upon the archaic title theory of deeds of trust rather than the  
8 modern lien theory. 4 Witkin Sum. Cal. Law STRP § 6(2) (10th ed.) ("In most situations, the title  
9 theory has been disregarded, and the deed of trust has been deemed to create a mere lien on the  
10 property.").

11 In *Stockwell, id.* at 415, an assignee of a note and deed of trust failed to record her interest  
12 before the property was sold at a foreclosure sale. Before the foreclosure sale, the borrower had  
13 conveyed the property to someone else. *Stockwell* held that the purchaser at the foreclosure sale had  
14 superior title over the successor owner because the predecessor statute to § 2932.5 only applied to  
15 mortgages. *Id.* Its reason for the distinction was that a deed of trust "instead of creating a lien only, as  
16 in the case of a mortgage, passes the legal title to the trustee, thus enabling him in executing the trust to  
17 transfer to the purchaser a marketable record title." *Id.* at 417.<sup>15</sup>

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18 <sup>13</sup> Defendants also cite two cases, neither of which supports that a deed of trust grants the power of sale to the  
19 trustee, rather than the beneficiary. *Garretson v. Post*, 156 Cal. App. 4th 1508, 1516 (2007) was actually a  
20 SLAPP case against the beneficiary arising from a claim of wrongful foreclosure, which summarily described  
21 the non-judicial foreclosure process. *Py v. Pleitner*, 70 Cal. App. 2d 576, 579 (1945) involved an obsolete  
22 difference between the right of redemption between mortgages and deeds of trust, rather than whether the trustee  
23 or beneficiary held the power of sale. Since Code of Civil Procedure § 729.010 now provides for a right of  
24 redemption following a judicial sale under either a mortgage or a deed of trust, Civ. Proc. § 729.010 (Deering  
25 2011), it is particularly inapposite here.

26 <sup>14</sup> This Court respectfully is not bound by these District Court decisions. *See State Compensation Ins. Fund v.*  
27 *Zamora (In re Silverman)*, 616 F.3d 1001, 1005 (9th Cir. 2010) (reserving whether bankruptcy courts are bound  
28 by district court decisions within the district where the bankruptcy court sits, but recognizing problems with a  
non-uniform body of law might result).

<sup>15</sup> *Stockwell*, 7 Cal. App. at 417, secondarily based its holding on its conclusion that "[i]t is immaterial who  
holds the note," a conclusion recognized by Defendants as erroneous. In fact, they assert who holds the Note is  
dispositive, rather than "immaterial." Defendants claim that because ING was the holder of the Note at the time  
of the foreclosure, it was unnecessary for it to record the assignment, because when the Note was transferred to  
ING, the beneficial interest in the DOT automatically transferred with it. *Polhemus v. Trainer*, 30 Cal. 686, 688  
(1866) (interest in the collateral subject to the mortgage "does not pass unless the debt itself [is] assigned").  
That ING is entitled to enforce the Note does not alone obviate compliance with § 2932.5, which also requires  
the assignment be recorded before the power of sale is exercised by the beneficiary.

1 This reasoning of *Stockwell* is now inapposite. Under *Monterey*, 49 Cal. 3d at 461, a deed of  
2 trust is no longer a conveyance of actual title to the Property, but merely a lien. The borrower now  
3 retains actual title to the property. *Bank of Italy Nat. Trust & Sav. Assn. v. Bentley*, 217 Cal. 644, 656  
4 (1933). That this title theory is discredited by the Supreme Court is recognized by the Ninth Circuit.  
5 *Olympic Federal Sav. & Loan Asso. v. Regan*, 648 F.2d 1218, 1221 (9th Cir. 1981) (mortgages and  
6 deeds of trust are "legally identical," so that the borrower retains actual title to the property that the  
7 Internal Revenue Service can redeem despite the presence of a junior deed of trust). *See also Aviel v.*  
8 *Ng*, 161 Cal. App. 4th 809, 816 (2008) (to interpret a subordination clause in a lease, the terms  
9 mortgages and deeds of trust were treated as synonymous based upon *Bank of Italy*, 217 Cal. at 656).

10 This Court finds the California Supreme Court is likely to overrule *Stockwell's* holding that the  
11 trustee of a deed of trust holds actual legal title, rather than a lien. It has done so before. *Monterey*, 49  
12 Cal. 3d at 463 (overruling *Johnson v. Curley* 83 Cal. App. 627 (1927), which held that beneficiaries  
13 under a deed of trust were not necessary parties to an action to have that deed declared void for fraud).

14 c. The Beneficiary, Not the Trustee, Holds the Power of Sale.

15 A better predictor than *Stockwell*, 7 Cal. App. at 416-17, of whether the California Supreme  
16 Court would apply § 2932.5 to deeds of trust, is that Court's analysis of the respective roles of trust  
17 deed trustees and beneficiaries found in *Monterey*, 49 Cal. 3d at 463. The trustee merely holds bare  
18 legal title to the extent necessary to reconvey the lien if the debt is paid, or to foreclose the security  
19 interest if it is not. *Id.* at 460. The trustee is bound by no fiduciary duties, and has no duty to defend  
20 the rights of the beneficiary, or authority to appear in the suit in its behalf. *Id.* at 462. The trustee of a  
21 deed of trust serves merely as a common agent of both parties. *Vournas v. Fidelity Nat. Tit. Ins. Co.* 73  
22 Cal. App. 4th 668, 677 (1999). Because the beneficiary's economic interests are threatened when the  
23 existence or priority of the deed of trust is challenged, it is the real party in interest under a deed of  
24 trust. *Monterey*, 49 Cal. 3d at 461 (trust deed beneficiary must be named in a mechanics lien  
25 foreclosure suit since trustee does not protect its interests). *See also Diamond Heights Village Assn.,*  
26 *Inc. v. Financial Freedom Senior Funding Corp.*, 196 Cal. App. 4th 290, 304 (2011) (beneficiary is the  
27 real party in interest in a fraudulent conveyance action to void the security).

28 To claim the trustee, rather than the beneficiary, is the party who holds the power of sale under  
the deed of trust, elevates form over substance. The beneficiary is the real party in interest and should  
comply with § 2932.5.

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d. Section 2932.5 Protects Borrowers' Rights.

The California Supreme Court is clear that the distinction between mortgages and deeds of trust is inapplicable where necessary to protect a borrower's rights. *Bank of Italy*, 217 Cal. at 658. Even though other statutes address the notices required to be sent to the borrower,<sup>16</sup> who no longer has a right to redeem the property after any foreclosure,<sup>17</sup> the borrower still has a right to strict construction of all of the non-judicial foreclosure statutes, including § 2932.5, to prevent an improper sale of its property. *See System Inv. Corp. v. Union Bank*, 21 Cal. App. 3d 137, 153 (1971) (harshness of non-judicial foreclosure justifies strict compliance with statutes); *Bank of America*, 129 Cal. App. 4th at 712 ("Statutory provisions regarding the exercise of the power of sale provide substantive rights to the trustor and limit the power of sale for the protection of the trustor," citing *Miller & Starr*, § 10:123 (3d ed. 2003)). Deeds of trust are "far more widely used in this state" than mortgages. 4 *Witkin Sum. Cal. Law STRP* § 4 (10th ed.) (Citations omitted). Application of § 2932.5 to deeds of trust advances California's broader statutory scheme to protect borrowers, consumer and otherwise, from a wrongful foreclosure.

MERS argues that the assignee beneficiary need not record its interest to prevent a gap in title. It again confuses the title to the lien of the deed of trust with title to the Property. That MERS was the beneficiary of record even though ING was the foreclosing beneficiary created a gap in title to the lien. ING was a stranger to the record before the foreclosure giving rise to suspicion that the sale was not authorized. This is the very risk that § 2932.5 was intended to safeguard. *Stockwell*, 7 Cal. App. at 416-17 ("the record should correctly show the authority of a mortgagee or his assigns to sell" to ensure that the title so conveyed be free from suspicion).

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**D. MERS Remains a Party to the Eighth and Tenth Causes of Action.**

MERS seeks to dismiss the only two causes of action against it in the SAC, the eighth (wrongful foreclosure) and the tenth (Section 17200). MERS remains a party to the wrongful foreclosure cause of action due to this Court's ruling on § 2932.5, even though the substitution of

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<sup>16</sup> MERS correctly points out that notice requirement for borrowers are also addressed by other statutes. *See* §§ 2924b(b)(1) (trustor and mortgagee must receive copy of recorded notice of default via mail), 2924b(b)(2) (trustor and mortgagee must receive copy of recorded notice of sale via mail) and 2937 (trustor and mortgagee of residential property must receive notice of assignment of servicing of mortgage of trust deed via mail). This does not change the Court's view addressed in *Salazar*, 448 B.R. at 821, that § 2932.5 helps ensure borrowers know who actually owns the loan and is the real party in interest during the foreclosure process. *Id.* at 818.

<sup>17</sup> *See* footnote 13, *infra*.

1 trustee claims found in that cause of action are dismissed. Because MERS may be liable for wrongful  
2 foreclosure on that basis, Cruz has also stated a viable 17200 claim as well.

3 Section 17200 establishes a disjunctive three part definition prohibiting any "unlawful, unfair,  
4 or fraudulent business practice." "Each of these three adjectives captures a 'separate and distinct theory  
5 of liability.'" *Rubio*, 613 F.3d at 1203, citing *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir.  
6 2009). As amended by Proposition 64, Section 17200 is applicable to protect consumers who have  
7 suffered an injury in fact as well as business competitors. *Californians for Disability Rights v.*  
8 *Mervyns' LLC*, 39 Cal. 4th 223, 228 (2006).

9 Since MERS is not alleged to have participated in any fraudulent activity, the last prong is not  
10 at issue. Under its "unlawful" prong, Section 17200 borrows violations of other laws and makes them  
11 independently actionable. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20  
12 Cal. 4th 163, 180 (1999). Although not a criminal statute, violation of other civil statutes can satisfy  
13 Section 17200. *State Farm Fire & Casualty Co. v. Superior Court*, 45 Cal. App. 4th 1093, 1103  
14 (1996) (unlawful prong includes "anything that can properly be called a business practice and that at  
15 the same time is forbidden by law," including antidiscrimination laws, antitrust laws, environmental  
16 protection laws, fish and game laws, housing laws, labor laws, vehicle laws, and criminal laws  
17 (citations omitted)); *Rubio*, 613 F.3d at 1204 (TILA violation). The "unfair" prong is measured by the  
18 alternative public policy test adopted by *Rubio*, 613 F.3d at 1205, citing *Gregory v. Albertson's, Inc.*,  
19 104 Cal. App. 4th 845, 854 (2002). This test looks to whether the practice violates public policy as  
20 declared by "specific constitutional, statutory or regulatory provisions." *Rubio*, 613 F.3d at 1205. In  
21 *Rubio*, the Ninth Circuit simply noted that the statutory policy behind TILA would satisfy the "unfair"  
22 prong of the test. It in effect collapsed the two prongs where statutory violations are alleged. *Id.*

23 The allegations of the SAC support MERS' involvement in the violation of § 2932.5. MERS  
24 was the beneficiary of record, even though ING was the foreclosing beneficiary. The "unlawful" prong  
25 is met; as is the "unfair prong" under these allegations, and MERS will not be dismissed from either the  
26 eighth or tenth causes of action.

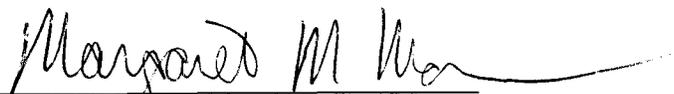
1           **IV. CONCLUSION**

2           The distinction between mortgages and deeds of trust is more one of terminology than  
3 substance as *Monterey*, 49 Cal. 3d at 464 stated: "Regrettably, it appears to be too late in the  
4 development of our vocabulary to rename deeds of trust and the 'trustees' who act under those  
5 instruments." Weighing the dubious continuing viability of the *Stockwell* case against the other  
6 authority cited in this Memorandum Decision, the Court concludes that ING as the foreclosing  
7 beneficiary under the DOT is as subject to the mandates of § 2932.5 as if it held a mortgage. The DOT  
8 gives the authority to exercise the power of sale to ING, who is the real party in interest by law for  
9 foreclosure matters. For the same reasons as a mortgagee must record its interest before it forecloses,  
10 so must a beneficiary of a deed of trust under § 2923.5. The ministerial role of the trustee does not  
11 justify any distinction between the two instruments for purposes of § 2932.5 because the trustee as  
12 agent simply acts at the direction of the beneficiary.

13           This Memorandum Decision will constitute the Court's findings of fact and conclusions of law  
14 pursuant to Fed. R. Bankr. P. 7052. Counsel for Cruz is directed to prepare an order in accordance  
15 with this Memorandum Decision within ten days of the date of entry.

16           IT IS SO ORDERED.

17           Dated: August 11, 2011

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19           MARGARET M. MANN, JUDGE  
20           United States Bankruptcy Court