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CLERK, U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY *[Signature]* DEPUTY

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:)	BANKRUPTCY NO: 11-01133-MM
)	
CIRILO E. CRUZ AND JUANA CRUZ,)	CHAPTER: 13
)	
Debtors.)	ADV. PROC. 11-90116-MM
)	
_____)	MEMORANDUM DECISION
)	
CIRILO CRUZ,)	DATE: April 25, 2013
)	TIME: 3:00 P.M.
Plaintiff,)	CRTRM: 1
)	
v.)	JUDGE: Margaret M. Mann
)	
AURORA LOAN SERVICES, LLC, et al.,)	
)	
Defendants.)	
_____)	

1 **I. INTRODUCTION**

2 Defendants Aurora Loan Services ("Aurora"), Mortgage Electronic Registration Systems,
3 Inc. ("MERS"), and ING Bank, F.S.B. ("ING") (collectively "Defendants") brought separate
4 motions to dismiss and for summary judgment (collectively "Motion") requesting the Court
5 reconsider its earlier decision in this case, *Cruz v. Aurora Loan Servs. LLC (In re Cruz)*, 457
6 B.R. 806 (Bankr. S.D. Cal. 2011) ("*Cruz I*"). *Cruz I* granted in part and denied in part
7 Defendants' motions to dismiss an earlier version of the complaint in this action, finding that
8 ING's failure, as the foreclosing beneficiary, to record its beneficial interest in the deed of trust¹
9 invalidated its trustee's sale of the home of debtor Cirilo Cruz² ("Debtor") under Cal. Civ. Code
10 § 2932.5.³ MERS, though the initial beneficiary, no longer had an interest as beneficiary at the
11 time of the foreclosure.

12 This Motion requires this Court to consider, for the third time, the scope of this statute
13 and whether it applies to deeds of trust as well as mortgages. Twice previously, this Court held
14 that § 2932.5 applies to deeds of trust, and a few other authorities concur.⁴ Most cases
15 nevertheless find § 2932.5 only applies to mortgages.⁵ Despite this, the law on the scope of

16 _____
17 ¹ ING was the only foreclosing beneficiary. The Trustee's Deed identified ING as the foreclosing
18 beneficiary, and that recital is a binding statement of fact. *Bank of America v. La Jolla Group II*, 129
19 Cal.App.4th 706, 716 (Cal. App. 5th Dist. 2005).

20 ² Cirilo Cruz is now deceased and his wife, Juana Cruz, has been substituted in his place as plaintiff.

21 ³ All further references to § 2932.5 are to the California Civil Code.

22 ⁴ See, e.g., *Strike v. Trans-West Discount Corp.*, 92 Cal.App.3d 735, 742 (Cal. App. 4th Dist. 1979)
23 (citing the predecessor to § 2932.5; i.e., Cal. Civ. Code § 858, to validate the exercise of the power of sale
24 by a trust deed beneficiary of record); *Tamburri v. Suntrust Mortg., Inc.*, 2011 U.S. Dist. LEXIS 72202,
25 at *11-13 (N.D. Cal. July 6, 2011) (granting a preliminary injunction based in part on the ambiguity in the
law regarding the application of § 2932.5 to deeds of trust); *Tamburri v. Suntrust Mortg., Inc.*, 875 F.
Supp. 2d 1009, 1024 (N.D. Cal. 2012) (denying defendants' motion to dismiss on the same grounds); 1
Roger Bernhardt, California Mortgage and Deed of Trusts, and Foreclosure Litigation § 1.25B (4th ed.
2009) (hereinafter "Bernhardt") (describing the recent state decisions contrary to *Cruz I* as "problematic").
Bernhardt § 1.35 also noted these decisions reversed the 50-year trend to treat mortgages and deeds of
trust as legally identical.

26 ⁵ See *Haynes v. EMC Mortg. Corp.*, 205 Cal.App.4th 329, 336 (Cal. App. 1st Dist. 2012), *cert.*
27 *denied*, 2012 Cal. LEXIS 7371 (Cal. Aug. 8, 2012); *Herrera v. Federal Nat. Mort. Assn.*, 205
28 Cal.App.4th 1495 (Cal. App. 4th Dist. 2012), *cert. denied*, 2012 Cal. LEXIS 7643 (Cal. Aug. 8, 2012);
Calvo v. HSBC Bank USA, N.A., 199 Cal.App.4th 118 (Cal. App. 2nd Dist. 2011), *cert. denied*, 2012
Cal. LEXIS 42 (Cal. Jan. 4, 2012). Although permitted, the California Supreme Court also did not order
that any of these opinions depublished. See California Constitution Article VI, § 14; California Rules of

1 § 2932.5 remains unsettled at least in the federal courts, as was recognized in the most recent and
2 thorough state court case on the issue, *Haynes*, 205 Cal.App. 4th at 337 n. 7.⁶

3 As a federal court, this Court must follow the intermediate state court decisions unless it
4 determines that there is convincing evidence that the California Supreme Court would decide
5 differently. *Lewis v. Tel. Employees Credit Union*, 87 F.3d 1537, 1545 (9th Cir. 1996). That the
6 California Supreme Court has denied review of, and also declined to depublish, three recent state
7 court decisions interpreting § 2932.5 as applicable only to mortgages, weighs against the Court
8 finding convincing evidence that the statute also applies to deeds of trust. Defendants
9 acknowledge, however, the absence of controlling authority, and also that the California
10 Supreme Court's denial of review does not obviate the Court's obligation to assess all of the
11 authorities on the issue. Motion to Dismiss Hr'g Tr., Docket #89, at 4-5, February 21, 2013 (John
12 Campbell); see also *United Bhd. of Carpenters v. NLRB*, 540 F.3d 957, 970 n.12 (9th Cir. 2008)
13 (state court decisions subject to convincing evidence standard even where state high court review
14 is denied unless the denial of review occurred in the case at hand).

15 The Motion asks this Court to hold that § 2932.5 does not apply to deeds of trust for two
16 primary reasons: 1) deeds of trust cannot fit within the plain statutory language because the
17 power of sale under a deed of trust is held by the trustee, not the beneficiary and 2) no gap in title
18 results when an assignment of the beneficial interest in a deed of trust is not of record, because
19 the trustee's interest is of record and suffices for this purpose. To assess these issues under the
20 convincing evidence standard, this Court has therefore reviewed not only the state court
21

22 Court 8.1105(e)(2). The Ninth Circuit and the Bankruptcy Appellate Panel of this circuit have not
23 published on this issue, although they also come to a different conclusion than this Court. *Caballero v.*
24 *Bank of Am.*, 468 Fed. Appx. 709, 710 (9th Cir. 2012); *Marks v. Dockery (In re Marks)*, 2012 Bankr.
25 LEXIS 5788, at *27 n.9 (B.A.P. 9th Cir. 2012). All of the contrary authority either directly or indirectly
rely upon *Stockwell v. Barnum*, 7 Cal. App. 413, 416-17 (Cal. App. 2nd Dist. 1908), without evaluating
whether its analysis was sound at the outset or changed over time as the law developed. *Cruz I*, 457 B.R.
at 816, analyzed *Stockwell* and concluded it was no longer viable.

26 ⁶ *Haynes*, 205 Cal.App.4th at 336, is the only state court case to mention the applicable California
27 Supreme Court authority of *Monterey S. P. P'ship v. W. L. Bangham*, 49 Cal. 3d 454, 461 (1989)
28 (beneficiary was the real party in interest under a deed of trust so service of process of a mechanics lien
suit on the trustee under a deed of trust was inadequate). *Haynes* interpreted *Monterey* to be limited to its
facts. *Haynes*, 205 Cal.App.4th at 336-337.

1 intermediate decisions, but also all applicable California Supreme Court and statutory authority
2 germane to whether § 2932.5 applies to deeds of trust. This review disclosed two relevant
3 California foreclosure statutes, Cal. Civ. Code § 2924(a)(6) and Cal. Civ. Code § 2934a(d), and
4 two California recording statutes, Cal. Gov. Code § 27257(b) and Cal. Gov. Code § 27263, that
5 have not been addressed. The review also further explored the impact of *Monterey*, 49 Cal. 4th at
6 461, as well as *Burns v. Peters*, 5 Cal. 2d 619, 625 (Cal. 1936). Finally, this Court also reviewed
7 the authoritative treatises bearing on the issue. With the exception of the reference to *Monterey*,
8 49 Cal.4th at 461, in *Haynes*, 205 Cal.App.4th at 336, this authority has not been explored by
9 any other court⁷ or, unfortunately, by this Court's earlier decisions.⁸ The presence of controlling
10 statutes or precedent from a state's highest court can be convincing evidence that requires a
11 federal court to disregard intermediate state court decisions. *See Dimidowich v. Bell & Howell*,
12 803 F.2d 1473, 1482-83 (9th Cir. 1986) (finding contrary California Supreme Court authority
13 and misconstruction of legal term sufficient convincing evidence to disregard intermediate
14 appellate precedent).

15 The Court is compelled to conduct a thorough analysis of the new authorities in the
16 context of the issues raised by the Motion to see whether they constitute convincing evidence.

17 ⁷ See footnote 6.

18 ⁸ This Court will not rehash its previous decisions. In summary, its first review of § 2932.5 was in *U.S.*
19 *Bank N.A. v. Skelton (In re Salazar)*, 448 B.R. 814, 824 (Bankr. S.D. Cal. 2011), where this Court
20 concluded *Bank of Italy Nat. Trust & Sav. Assn. v. Bentley*, 217 Cal. 644, 658 (Cal. 1933) (holding that
21 deeds of trust were functionally the same as mortgages), effectively overruled *Stockwell*, 7 Cal. App. at
22 416-17 (holding the statutory predecessor to § 2932.5 did not apply to deeds of trust because they were
23 fundamentally different from mortgages). This Court also held *Stockwell, id.*, was inconsistent with both
24 California Supreme Court authority and statute relating to the relative importance of the assignments of
25 the note and deed of trust. *See Polhemus v. Trainer*, 30 Cal. 686, 688 (Cal. 1866) ("An assignment of the
26 mortgage without the debt is a nullity."). Finally, this Court rejected the argument that MERS was a
27 statutory alternative to following the public recording systems, an argument that is not being pursued
28 here. MERS' role in any event had ended by the time of the Cruz foreclosure. *Salazar* was reversed and
remanded in *U.S. Bank N.A. v. Skelton (In re Salazar)*, 470 B.R. 557, 560-562 (S.D. Cal. 2012), because it
was at odds with the majority of the state court intermediate cases, but the district court decision did not
discuss *Monterey*.

In its second review of the issue, *Cruz I* determined the beneficiary to be the true party in interest in
regard to the deed of trust (457 B.R. at 817), and held that a gap in title would result if the interest of the
foreclosing beneficiary was not of record before it foreclosed (*id.* at 818). However, *Cruz I* did not
address the statutes analyzed here.

1 This Court would not hesitate to follow the majority view if it contained an analysis of the new
2 authority, and this Court simply disagreed with that analysis. This Court faces a conundrum
3 however, when on one hand it is directed to respect the intermediate decisions of state courts,
4 *Lewis*, 87 F.3d at 1545, but on the other hand, it is also directed to follow controlling authority
5 that is contrary to the intermediate state court decisions. *Dimidowich*, 803 F.2d at 1482-83.

6 To rule on the Motion then, this Court must first analyze this new authority, and then
7 apply that analysis to resolve this conflict.

8 **II. ANALYSIS**

9 **A. Whether the Beneficiary or the Trustee Holds the Power of Sale Under a** 10 **Deed of Trust**

11 The first issue raised by Defendants is whether the plain language of § 2932.5 can
12 accommodate deeds of trust as easily as it does mortgages.⁹ The power of sale is the right that
13 allows a beneficiary to foreclose on the deed of trust without resorting to the judicial process.

14 Cal. Civ. Code § 2924(a). With emphasis on the relevant terms, § 2932.5 provides:

15 § 2932.5 *Power of sale*; vesting in assignee:

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

23 By its plain language, § 2932.5 only applies to a mortgagee or other encumbrancer
24 holding the power of sale. See *Cal. Fed. Savings & Loan Assn. v. City of Los Angeles*, 11 Cal.4th
25 342, 349 (1995) (plain language of a statute, giving the words their "plain and direct import,"
26 determines its statutory meaning). Both the mortgagee under a mortgage, and the beneficiary

27 ⁹ The key difference between mortgages and deeds of trust is that a mortgage is a two-party security
28 instrument and a trust deed is a three-party security instrument. The deed of trust involves the trustor in
the place of the borrower/mortgagor and the beneficiary in the place of the lender/mortgagee, and also has
a trustee. *Aviel v. Ng*, 161 Cal. App. 4th 809, 816 (Cal. App. 1st Dist. 2008); 4 B.E. Witkin, Summary of
California Law, Ch. VIII, § 5, at 795 (10th ed. 2012) (hereinafter "Witkin"); Harry D. Miller & Marvin B.
Starr, California Real Estate § 10.3 (3rd ed. 2010) (hereinafter "Miller & Starr").

1 under a deed of trust, can be considered encumbrancers under the statute. The trustee, however,
2 cannot.

3 As recognized in *Haynes*, whether the beneficiary or the trustee holds the power of sale
4 will determine whether the statute applies to deeds of trust. 205 Cal.App.4th at 336 (concluding
5 that since the trustee holds the power of sale, the statute, "by its plain terms, does not apply to
6 deeds of trust"). Although *Haynes, id.*, concluded that the trustee holds the power of sale, other
7 authorities, including this Court, have found that the beneficiary holds the power of sale and
8 hence, the plain language of § 2932.5 applies to deeds of trust. *See Cruz I*, 457 B.R. at 817 (the
9 beneficiary holds the power of sale, relying upon *Monterey*, 49 Cal. 3d at 461); *see also* Miller &
10 Starr § 10:38 (statutory language of § 2932.5 appears to accommodate deeds of trust although
11 acknowledging that recent state decisions have decided otherwise). The role of each of the
12 trustee and the beneficiary in the process of foreclosing on a deed of trust must be evaluated to
13 determine which view is correct.

14 Under the conveyance language of the deed of trust, the trustee is conveyed legal title
15 with power of sale. This conveyance language is what Defendants rely upon to conclude the
16 trustee holds the power of sale. The trustee only holds legal title, however, not actual title. *See*
17 *Olympic Fed. Sav. & Loan Assoc. v. Regan*, 648 F.2d 1218, 1221 (9th Cir. 1981) (relying upon
18 *Bank of Italy*, 217 Cal. 644, to hold mortgages and deeds of trust are "legally identical," so that
19 the borrower retains actual title to the property). And the title held by the trustee is mere
20 technical title, which is transferred "only so far as may be necessary to the execution of the
21 trust." *Monterey*, 49 Cal.3d at 460 (quoting *Lupertino v. Carbahal*, 35 Cal.App.3d 742, 748 (Cal.
22 App. 3d Dist. 1973)). In fact, the trustee's role as a "trustee" has been described in *Monterey, id.*
23 at 464, as being one of terminology rather than substance in regards to the differences between
24 deeds of trust and mortgages. While *Monterey* dealt with a different context of whether the
25 beneficiary was the real party in interest in a mechanic lien foreclosure suit, it reversed the lower
26 court's finding that service of process on the trustee was sufficient to protect the beneficiary's
27 interest.

1 The trustee's role in holding title and conducting the foreclosure sale does not dictate that
2 it holds the power of sale under a deed of trust in § 2932.5. By its plain language, that statute
3 deals with the authority to foreclose under an assigned security interest, rather than title issues or
4 the conduct of the sale: "The **power of sale** may be exercised by the assignee if the assignment is
5 duly acknowledged and recorded." § 2932.5 (emphasis added). The word "power" is
6 synonymous with the words "authority," "control," and "ability." WEBSTER'S NEW ROGET'S
7 A-Z THESAURUS 322 (3rd ed. 2003). These synonyms help interpret the statute. *See Schmidt v.*
8 *Contra Costa Cnty.*, 693 F.3d 1122, 1135 (9th Cir. 2012) (using the plain meaning of words from
9 the dictionary to define an undefined term in a California statute); *accord Greenwood v.*
10 *CompuCredit Corp.*, 615 F.3d 1204, 1207 (9th Cir. 2010).

11 To illustrate why the statute prescribes the authority to foreclose, simply replacing the
12 word "power" with its synonym "authority." This illustration demonstrates how the beneficiary
13 must be interpreted as holding the power of sale because its role is no different from a
14 mortgagee:

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

20 Putting the statute in the proper context, there can be no real dispute that the beneficiary,
21 not the trustee, holds the power of sale because it holds the authority to foreclose. The California
22 Supreme Court has so held. *See Monterey*, 49 Cal. 3d at 460 (only "on proper request from the
23 beneficiaries," can the trustee "exercise the power of sale contained in the deed of trust"); *Burns*
24 *v. Peters*, 5 Cal. 2d 619, 625 (Cal. 1936) (a foreclosure sale by a different trustee than the one
25 specifically named in the deed of trust was nevertheless valid because the beneficiary, as a
26 "principal" party, supported the sale); *Jones v. First Am. Title Ins. Co.*, 107 Cal.App.4th 381, 389
27 (Cal. App. 2d Dist. 2003) (principles of reformation may validate a foreclosure sale under
28 section 2934a by the incorrect trustee because the beneficiary is the principal party). *But see*

1 *Dimock v. Emerald Props.*, 81 Cal.App.4th 868, 877 (Cal. App. 4th Dist. 2000) (distinguished by
2 *Jones*, 107 Cal.App.4th at 383, for failing to consider reformation).

3 The beneficiary also is given plenary authority over the foreclosure sale by statute. Cal.
4 Civ. Code § 2924(a)(6) provides in pertinent part:

5
6 No agent of the holder of the beneficial interest under the mortgage
7 or deed of trust, original trustee or substituted trustee under the deed
8 of trust may record a notice of default or otherwise commence the
9 foreclosure process except when acting within the scope of
10 authority designated by the holder of the beneficial interest. The
11 trustee has no ability to exercise the power of sale *unless* it is
12 authorized by the beneficiary.

13 (emphasis added.) The trustee cannot be determined to have the power of sale under § 2932.5,
14 when the critical foreclosure statute gives it no authority over the foreclosure process. Cal. Civ.
15 Code § 2924(a)(6) is part of the "comprehensive statutory scheme regulating nonjudicial
16 foreclosures." *Herrera*, 205 Cal.App.4th at 1505 (citing *Moeller v. Lien*, 25 Cal.App.4th 822,
17 830-32 (Cal. App. 2d Dist. 1994)). Other California foreclosure statutes similarly recognize the
18 preeminence of the beneficiary's authority over the nonjudicial foreclosure process. For example,
19 the beneficiary holds the power to substitute the trustee, even without the trustee's consent. Cal.
20 Civ. Code § 2934a(d).¹⁰ The parties' agreement also reflects this allocation of authority. Under
21 the deed of trust, the right to "invoke" the power of sale is expressly reserved to the beneficiary.¹¹

22 Defendants' interpretation of the statute in contrast is difficult to harmonize with the
23 statutory language. The recognized legal meaning of the word "power" is the ability to act or not
24 act. BLACK'S LAW DICTIONARY 1288 (9th ed. 2009). The trustee has no ability or power to
25 do anything in the context of the foreclosure, other than the subservient one to follow the

26 ¹⁰ See *Grant v. Heverin*, 77 Cal. 263, 266 (1888) ("I know of no rule of law which empowers an agent,
27 without authority of his principal, to substitute another agent in his place, or a trustee by his conveyance
or assignment to put another person in his place as trustee, without the consent of the beneficiaries."); see
also *Walton v. Mortg. Elec. Registration Sys.*, 2013 U.S. App. LEXIS 2846, at *2 (9th Cir. Feb. 11, 2013)
(unpublished) (citing § 2934a(d) upon stating that "there is no requirement that a trustee consent to a
substitution of trustee").

28 ¹¹ See Defendants' Motion to Dismiss, Exhibit 1, Deed of Trust ¶ 22, Docket #79-3.

1 direction of the beneficiary. Cal. Civ. Code § 2924(a)(6); *see also Pro Value Props., Inc. v.*
2 *Quality Loan Serv. Corp.*, 170 Cal.App.4th 579, 583 (Cal. App. 2d Dist. 2009) (the trustee under
3 the deed of trust can only be considered a mere "ministerial actor"). To interpret the statute
4 deeming the trustee to have the power of sale as Defendants claim would create an unviable
5 conflict between Cal. Civ. Code § 2924(a)(6) and § 2932.5. *See DuBois v. Workers' Comp.*
6 *Appeals Bd.*, 5 Cal.4th 382, 388 (1993) ("[T]he various parts of a statutory enactment must be
7 harmonized by considering the particular clause or section in the context of the statutory
8 framework as a whole.").

9 Although neither of these statutes, Cal. Civ. Code § 2924(a)(6) nor § 2934a(d), has been
10 analyzed by any other cases involving § 2932.5, this Court finds them dispositive. In giving the
11 beneficiary complete authority over the foreclosure sale, these statutes and germane California
12 Supreme Court decisions require the beneficiary be deemed the holder of the power of sale. The
13 technical title of the trustee, which holds no power regarding the foreclosure sale at all, should
14 not affect this allocation of authority under § 2932.5.

15
16 **B. A Gap in Title Resulted Due to ING, as Foreclosing Beneficiary, Lacking
an Interest of Record**

17 Defendants' second argument to except deeds of trust from the scope of § 2932.5 is that
18 the recorded interest of the trustee avoids a gap in title even if the beneficiary's interest is not
19 recorded. Defendants admit that a gap in title would result if an assignment of a mortgage were
20 not recorded, but contend that deeds of trust are different. They rely upon *Stockwell*, 7 Cal.App.
21 at 416-17 (the purpose of § 2932.5 is to avoid gaps in title and assure marketable title upon a
22 foreclosure under the power of sale, but it does not apply to deeds of trust because the trustee
23 holds true title), and *Haynes*, 205 Cal.App.4th at 336-37 (same). As noted above, the California
24 Supreme Court has clearly held that trustee does not hold actual title, but only technical title. The
25 basis of the conclusion of *Stockwell*, 7 Cal.App. at 416-17, that no gap in title would result from
26 the failure to record a beneficial interest, was later discredited in *Monterey*, 49 Cal. 3d at 460.

27 That the trustee holds technical title, and its interest by law must be recorded before the
28 foreclosure sale under Cal. Civ. Code § 2934a(d), is in any event not the important factor for

1 interpreting § 2932.5. The proper inquiry is whether the trustee's interest, even if of record,
2 prevents a gap in title at the time of the foreclosure sale where the beneficiary's interest is not
3 separately of record. How a gap in title occurs is defined by the California recording statutes,
4 which no case to date has explored. This analysis is necessary to assess the gap in title
5 justification for excepting deeds of trust from § 2932.5.

6 California has strict requirements for the proper recording of documents in the real
7 property records. A gap in title results when a document affecting title is not properly indexed in
8 the grantor/grantee index mandated by California recording statutes. *See Hochstein v. Romero*,
9 219 Cal.App.3d 447, 452 (Cal. App. 4th Dist. 1990) ("[W]here the document is improperly
10 indexed and hence not locatable by a proper search, mere recordation is insufficient to charge the
11 subsequent purchaser with notice."); Miller & Starr § 11:22; 12 Witkin, Ch. XVII, § 321, at 379.
12 "If an instrument cannot be located by searching the 'grantor' and 'grantee' indices of the public
13 records, it is a wild deed. The instrument then does not constitute constructive notice and later
14 bona fide purchasers or encumbrances are not charged with knowledge of its existence." *Far*
15 *West Sav. & Loan Ass'n v. McLaughlin*, 201 Cal.App.3d 67, 73 (Cal. App. 2d Dist. 1988) (deed
16 of trust not properly indexed under name of trustor who held record title when the deed of trust
17 was recorded left a gap in title);¹² *see also Chase Manhattan Bank USA, N.A. v. Taxel (In re*
18 *Deuel)*, 594 F.3d 1073 (9th Cir. 2010) (despite listing on debtor's bankruptcy petition, trustee did
19 not have constructive notice of secured creditor's unrecorded lien since it was not recorded as
20 prescribed by law). This is because the interest of a party must be traced back to its source within
21 the chain of title from one transferee to the next transferor. *Far West*, 201 Cal. App. 3d at 73,
22 explains that if a party conveys an interest in title before the party acquires an interest of record,
23 the interest is outside the chain of title.

24 In California, county recorders have a choice of two indexing systems for grantor/grantee
25 recording purposes. Cal. Gov. Code § 27257. The more common system, and the one employed

26
27 ¹² The Debtor distinguishes *Far West*, 201 Cal.App.3d at 73, on the ground that since the deed of trust
28 was recorded after the deed to the Debtor, no gap in title resulted. While this distinction is true of the
recording of the original deed of trust, it is not pertinent to the issues before the Court involving the
assignment of ING's beneficial interest in the deed of trust.

1 by the County of San Diego, involves one general series of books or film called "official
2 records," into which all transfers are entered. Cal. Gov. Code § 27323. This record involves a
3 single, alphabetized grantor/grantee index in which the grantors are distinguished from the
4 grantees "by an easily recognizable mark or symbol," with a reference to the "location of each
5 document in the permanent file, book, or film record." Cal. Gov. Code § 27257(b).

6 Applying these indexing statutes to deeds of trust, this Court cannot agree that the
7 trustee's recorded interest would prevent a gap in title if the beneficiary's interest is not of record.
8 As with the plain language analysis above, the beneficiary is the principal party in interest in the
9 context of the recording statutes. The grantor is indexed under the trustor's name, and the grantee
10 is indexed by the beneficiary's name. Miller & Starr § 11:19. In fact, by statute, the trustee's
11 interest under the deed of trust need not be indexed at all. Cal. Gov. Code § 27263. Since the
12 recorded interest of the trustee need not be indexed in the official records, it cannot provide
13 constructive notice when there is a change in beneficiary. *See Hochstein*, 219 Cal. App. 3d at 452
14 (judgment that was not properly indexed in accordance with the recording statutes did not give
15 constructive notice even though it appeared in the public records); *see also Lewis v. Superior*
16 *Court*, 30 Cal.App.4th 1850, 1867 (1994) (lis pendens not properly indexed did not provide
17 constructive notice).

18 In the supplemental papers filed in response to the Court's request for further briefing on
19 the gap in title issue, Defendants asserted a new argument. Rather than relying upon the trustee's
20 recorded interests, they now contend the proper indexing is under the name of the Debtor as
21 trustor. Relying upon the following sentence from Cal. Gov. Code § 27263, they assert that
22 ING's interest as foreclosing beneficiary did not need to be recorded because both the deed of
23 trust and the trustee's deed upon sale can both be located under the Debtor's name as trustor:

24
25 A trustee's deed given upon the exercise of the power of sale
26 under any deed of trust shall be indexed under the names of the
original trustor and the grantee named therein.

27 Defendants cite no authority supporting their claim that indexing exclusively under the
28 trustor's name satisfies the recording statutes. This claim is also directly inconsistent with

1 applicable statutes. Applicable here to the system adopted by the County of San Diego, Cal. Gov.
2 Code § 27257(b) requires both a grantor and a grantee to be indexed for each conveyance, not
3 just the grantor. These two statutes must be interpreted harmoniously. *DuBois*, 5 Cal.4th at 388.

4 To illustrate their argument, Defendants purport to conduct a search of the San Diego
5 Recorder's records and attach a document reflecting the results of their search (the "Search
6 Results").¹³ Although it is unclear how the search was conducted, the Court has nevertheless
7 reviewed the Search Results. Rather than supporting Defendants' claim, the Search Results
8 instead appear to reflect the gap in title caused when ING failed to record its beneficial interest
9 before it foreclosed. Consistent with the statutory analysis above, the Search Results reflect only
10 two of the three transactions germane to this action.¹⁴ The reference to the deed of trust, Doc.
11 No. 2004-1211211, has the name of two parties, Cirilo Cruz and SCME Mortgage Bankers, Inc.
12 ("SCME"); notably, neither the original trustee, Stewart Title Company of San Diego ("Stewart

13
14 ¹³ The Court has reviewed the declaration of Viola Ninchak submitted by Defendants. *See* Declaration of
15 Viola Ninchak, Doc. #94. She avers to be a person employed by First Support Legal Services, but
16 demonstrates no knowledge, training or experience in title matters, and her declaration is not persuasive
17 to the Court. The declaration also attaches a copy of the results of her internet search under the name
18 Cirilo Cruz. It is unclear if Ms. Ninchak conducted a search of the grantor/grantee index, which the
19 County of San Diego is required to maintain by law. Her results include numerous transactions that
20 appear unrelated to the issues before this Court, and there may be other deeds of trust, properties or even
21 other people in this county named Cirilo Cruz. For these reasons, an index of only one party's name not
22 qualified by property address or limited by the other party to the transaction is of little relevance to the
23 Court's question attempting to ascertain the chain of title for the deed of trust involved in this action.

24
25 ¹⁴ There are only three documents relevant to the deed of trust in the record before the Court: 1) the deed
26 of trust between the Debtor as trustor, Stewart Title, as trustee, and MERS, as nominee of SCME (Official
27 Record Doc. No. 2004-1211211), Exhibit 1, Doc. #79-3, at 2; 2) the substitution of trustee under the deed
28 of trust by Stewart Title to Quality Loan (Official Record Doc. No. 2009-0423592), Exhibit 3, Doc. #79-
3, at 33; and 3) the trustee's deed from the foreclosure sale from both Quality Loan, as trustee, and ING,
as foreclosing beneficiary, to ING as the fee title holder (Official Record Doc. No. 2010-0298513),
Exhibit 5, Doc. #79-3, at 40.

24 The Court takes judicial notice of the recording information contained in these documents because the
25 records "can be accurately and readily determined from sources whose accuracy cannot reasonably be
26 questioned." Fed. R. Evid. 201(b)(2) (as applicable here, under Fed. Bankr. R. 9017); *see also* *Aliah K. v.*
27 *Haw. Dep't of Educ.*, 788 F. Supp. 2d 1176, 1187 (D. Haw. 2011) (taking judicial notice *sua sponte* of
28 pleadings in another court case); *Mesa Grande Band of Mission Indians v. Salazar*, 657 F. Supp. 2d 1169,
1172 (S.D. Cal. 2009) (noting ability to take judicial notice *sua sponte*). Moreover, a court "may presume
that public records are authentic and trustworthy." *Gilbrook v. City of Westminster*, 177 F.3d 839, 858
(9th Cir. 1999); *see also* *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001) (judicial notice
of matters of public record).

1 Title"), nor MERS appears as a listed party. The substitution of trustee, Doc. No. 2009-0423592,
2 through which the interest of the foreclosing trustee Quality Loan Service Corp. ("Quality Loan")
3 became of record, does not appear at all in the Search Results. The reference in the Search
4 Results to the third document, the trustee's sale deed, Doc. No. 2010-0298513, only contains the
5 names of Cirilo Cruz and ING.

6 The Search Results undercut Defendants' two arguments that the failure to record ING's
7 beneficial interest left no gap in title for two reasons. First, consistent with Cal. Gov. Code §
8 27263, the index contains no reference to any recorded interest of either of the trustees, since
9 they need not be indexed by statute. Reliance on the trustee's recorded interest to prevent a gap in
10 title is misplaced.

11 Second, the Search Results reflect no relationship whatsoever between the original deed
12 of trust and the grantee's deed upon foreclosure of the deed of trust, other than the name Cirilo
13 Cruz. The Search Results instead reflect separate transfers from Cruz to SCME and then from
14 Cruz to ING. Had SCME recorded its assignment of beneficial interest to ING, there presumably
15 would be a third entry in the Search Results. Collectively, these three transfers would then
16 demonstrate as a matter of public record what occurred here — Cruz conveying a beneficial
17 interest to SCME, SCME conveying its beneficial interest to ING, and then ING foreclosing on
18 that beneficial interest to obtain fee title from Cruz. Because the middle step in this series of
19 transactions is not of record, a gap in title resulted from ING's failure to record its assignment of
20 beneficial interest from SCME in compliance with § 2932.5.

21 To avoid a gap in title, the recording statutes require the critical interests — the
22 mortgagor/trustor on one hand and the lender/mortgagee on the other hand — to be indexed by
23 name in the key grantor/grantee index. The trustee's interest need not be of record at all for either
24 instrument. Since the trustee's interest, even if of record, could not plug the gap in title created
25 here when SCME, as beneficiary and grantee under the deed of trust, assigned its interest to ING
26 in an unrecorded assignment, the Court is not persuaded by the majority view excluding deeds of
27 trust from the scope of § 2932.5.

1 **III. CONCLUSION**

2 This Court is not persuaded to rule that deeds of trust are excluded from the purview of
3 § 2932.5 after reconsideration of Defendants' arguments and review of the intermediate appellate
4 decisions. Under the California recording statutes, Cal. Gov. Code §§ 27263 and 27257, as well
5 as with the statutes affecting the authority to exercise the power of sale, Cal. Civ. Code §§
6 2924(a)(6) and 2934a(d), deeds of trust are treated largely the same as mortgages for the
7 purposes of § 2932.5. Indeed, for all other purposes explored by the California Supreme Court to
8 date, *Monterey*, 49 Cal. 3d 461, *Burns*, 5 Cal. 2d at 625, and *Bank of Italy*, 217 Cal. at 657,
9 deeds of trusts and mortgages have been treated as functional equivalents. This Court cannot
10 reconcile the majority's conclusion that the trustee, rather than the beneficiary, holds the power
11 of sale, and that the trustee's interest of record is alone sufficient to prevent a gap in title, with
12 this controlling authority. For this reason, this Court cannot join the majority view and except
13 deeds of trust from § 2932.5 to grant the Motion. This Court hopes that the higher authorities or
14 the legislature will reconcile all of the applicable law on this topic for the benefit of the parties
15 and the lower courts that must grapple with this issue now or in the future. This Court writes this
16 opinion to add to the discussion so that the unsettled issues raised here can be finally resolved,
17 whatever the outcome.

18 Nevertheless, as noted before, whether this Court is persuaded to change its mind on the
19 scope of § 2932.5, is not truly the issue before this Court. Rather, this Court is tasked with
20 determining whether there is convincing evidence the California Supreme Court would overrule
21 the state court decisions limiting the scope of § 2932.5 to mortgages. *See Easyriders Freedom*
22 *F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1494 n.4 (9th Cir. 1996) ("In the absence of convincing
23 evidence that the state supreme court would decide differently, a federal court is obligated to
24 follow the decisions of the state's intermediate courts."). In effect, this Court must step into the
25 shoes of the California Supreme Court and predict its future actions. This is a task this Court
26 must undertake with great reluctance, because the preferred course of action when the federal
27 courts must resolve an unsettled issue of state law is to certify the unsettled issue to the
28 California Supreme Court under California Rules of Court Rule 8.548. Certification is

1 appropriate in respect of the state court's proper purview over state law. *Hayes v. County of San*
2 *Diego*, 658 F.3d 867, 868 (9th Cir. 2011). Regrettably, this avenue is not available to this Court
3 despite the issue being one of pure state law. While the Ninth Circuit may certify unsettled issues
4 to the California Supreme Court, bankruptcy courts may not. *See Beeman v. Anthem Prescription*
5 *Mgmt., LLC*, 689 F.3d 1002, 1005-06 (9th Cir. 2012) (certifying question of state law to
6 California Supreme Court pursuant to Rule 8.548 of the California Rules of Court).

7 This Court's hesitance to rule on the convincing evidence standard is exacerbated by its
8 inability as an Article I court to issue a final ruling in this action. This adversary proceeding
9 involves claims by the Debtor to augment the estate on issues of state law against third parties
10 who are not creditors of this estate and have not consented, implicitly or explicitly, to this Court's
11 jurisdiction. *See generally Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S.
12 50 (1982); *see also Chabot v. Wash. Mut. Bank (In re Chabot)*, 369 B.R. 1, 24 (Bankr. Mont.
13 2007) (debtor's claims regarding the validity of the loan transaction and premature wrongful
14 foreclosure claim are non-core). If this Court were to rule on the Motion, that ruling would need
15 to be reviewed de novo by the District Court before it could become final. *Exec. Benefits Ins.*
16 *Agency v. Arkison (In re Bellingham Ins. Agency)*, 702 F.3d 553, 566 (9th Cir. 2012). This Court
17 is loathe to multiply the proceedings in federal court on an issue that must ultimately be decided
18 in state court. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 577 (1996) ("[O]nly state courts
19 may authoritatively construe state statutes."). Because the legal issues raised in the pleadings
20 have been limited by earlier rulings by this Court, there are currently no issues of federal
21 jurisdiction remaining in this case.

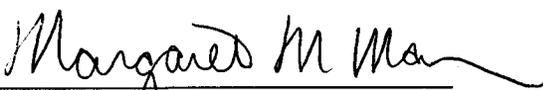
22 Due to both the jurisprudential and jurisdictional limitations of this Court issuing a final
23 ruling, this Court is questioning sua sponte¹⁵ whether it should discretionarily abstain from

24 ¹⁵ Permissive abstention under § 1334(c)(1) may be raised by the court sua sponte. *Gober v. Terra+Corp.*
25 *(In re Gober)*, 100 F.3d 1195, 1207 (5th Cir. 1996); *In re Pac. Gas & Elec. Co.*, 279 B.R. 561, 567
26 (Bankr. N.D. Cal. 2002) (listing cases). The Bankruptcy Court also has authority to enter "final orders for
27 discretionary abstention under 28 U.S.C. § 1334(c)(1), even in non-core proceedings." *See Pineda v. Bank*
28 *of America, N.A. (In re Pineda)*, 2013 WL 1749554, at *28 n.10 (B.A.P. 9th Cir. April 23, 2013)
(unpublished) (citing *Holtzclaw v. State Farm Fire and Cas. Co. (In re Holtzclaw)*, 131 B.R. 162, 164
(E.D. Cal. 1991) (listing cases)).

1 hearing this case in lieu of deciding the convincing evidence issue. Because there is no pending
2 state court proceeding to remand this adversary proceeding, Debtor would be required to bring a
3 separate action in state court. *See Eastport Assocs. v. City of Los Angeles (In re Eastport*
4 *Assocs.)*, 935 F.2d 1071 (9th Cir. 1991) (abstaining where no state court action was pending);
5 *Schulman v. California (In re Lazar)*, 237 F.3d 967, 982 (9th Cir. 2001) (abstention not available
6 where the remand provisions of 28 U.S.C. § 1452(b) are applicable, and distinguishing *Eastport*
7 accordingly). Many, if not all, of the factors for discretionary abstention identified in *Christensen*
8 *v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F. 2d. 1162, 1167 (9th Cir. 1990), are
9 met here due to: 1) the extent that state law issues predominate; 2) the unsettled nature of the
10 applicable state law; 3) the lack of jurisdictional basis; and 4) because of this Court's limited
11 authority to issue a final ruling on non-core matters. However, the Court will consider the views
12 of the parties on the discretionary abstention issue before it decides whether to abstain.

13 This Court thus invites the parties to file supplemental papers whether it should
14 discretionarily abstain from hearing this case to be filed not later than **May 16, 2013**. This Court
15 will then enter an order of abstention, or make its final ruling as to whether there is convincing
16 evidence the California Supreme Court would not adhere to the intermediate state court
17 decisions' view of § 2932.5.

18
19 Dated: April 26, 2013


MARGARET M. MANN, JUDGE
United States Bankruptcy Court