In re JAMES L. MACKLIN, Debtor.
JAMES L. MACKLIN, Plaintiff,
v.
DEUTSCHE BANK NATIONAL TRUST CO., Defendant.

Case No. 10-44610-5-7, Adv. Proc. No. 11-2024, Docket Control No. JLM-1.

United States Bankruptcy Court, E.D. California.

April 8, 2015.

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

MEMORANDUM OPINION AND DECISION

RONALD H. SARGIS, Bankruptcy Judge.

James Mackim ("Mackim") is the Plaintiff in this adversary proceeding, naming Deutsche Bank National Trust Co., as Indenture Trustee for the Accredited Mortgage Loan Trust 2006-2 Certificate Holders ("DBNTC") as the only defendant. The Adversary Proceeding was commenced on January 13, 2011, and judgment was entered for DBNTC on July 2, 2013. Dckt. 349. On January 22, 2015, Macklin filed the present Motion for Relief Under Federal Rule of Civil Procedure 60(b),[1]seeking to vacate orders and the judgment entered in this Adversary Proceeding. Dckt. 380.

HISTORY OF ADVERSARY PROCEEDING AND MCKLIN'S MULTI-COURT PARALLEL LITIGATION

The court begins with a review of what has transpired in this Adversary Proceeding (for which there are now 472 docket entries) **Macklin has chosen to be represented by four different attorneys in this Adversary Proceeding (including having terminated an attorney and then rehiring her when Macklin terminated her replacement).** A review of the representation of Macklin is summarized in the following chart:

Holly S. Burgess, Esq.[2]	January 13, 2011 — October 3, 2011

Filed Original Complaint	January 13, 2011
Filed Motion for TRO (TRO Issued)	February 7, 2011
Filed Motion for Preliminary Injunction (Preliminary Injunction Granted)	February 24, 2011
Opposed Motion to Dismiss Original Complaint	March 17, 2011
Filed Motion to Compel Chapter7 Trustee to Abandon Claims against DBNTC	May 10, 2011
Filed First Amended Complaint	June 17, 2011
Opposed Motion to Dismiss First Amended Complaint	September 2, 2011
Opposed Motion to Vacate Preliminary Injunction (Preliminary Injunction dissolved due to Macklin's failure to comply with conditions of injunction)	September 1, 2011
Allan R. Frumkin, Esq.	October 3, 2011 — April 23, 2012
Filed Motion For Re-Argument of Motion to Dismiss First Amended Complaint	October 17, 2011
Prepared Draft Second Amended (Dckt. 201)	October 17, 2011

Complaint	
Filed Status Conference Statement	October 24, 2011
Filed Notice of Macklin Discharging Allan R. Frumkin as Attorney	February 21, 2012
Filed *Ex Parte* Motion to Withdraw as Counsel to Leave Macklin In Propia Persona (Motion denied without prejudice)	March 2, 2012
Filed Noticed Motion For Substitution of Attorney (With Holly S. Burgess, Esq. to be substituted to replace Mr. Frumkin)	March 29, 2012
Holly S. Burgess, Esq.	April 23, 2012 — October 2, 2012
Filed Status Conference Statement	May 16, 2012
Represented Macklin For Court Setting Discovery Scheduling Order, Dispositive Motion Deadline, and Pre-Trial Conference.	June 4, 2012
Opposed DBNTC Motion to Have Reference Withdrawn (Motion denied by District Court)	June 2012
Filed Pleadings Regarding	July 30, 2012

Discovery Disputes

Filed Ex Parte Substitution of Attorney (Daniel Hanecak, Esq. to be counsel for Macklin)	August 23, 2012
Filed Noticed Motion to Withdraw as Counsel for Macklin	September 13, 2012
Daniel J. Hanecak, Esq.	October 2, 2012 — February 23, 2015
Filed Motion to Amend Complaint (Motion Denied After Noticed Hearing)	October 4, 2012
Filed Motion For Summary Judgment	February 21, 2013
Opposed DBNTC Request for Summary Judgment	March 14, 2013
Filed Motion to Withdraw as Attorney (Motion Denied)	June 6, 2013
Charles T. Marshall, Esq.	January 22, 2015 — Current
Motion to Reopen Adversary Proceeding	January 22, 2015
Motion For Relief Pursuant to Rule 60(b)	January 22, 2015

When Macklin commenced this Adversary Proceeding, he also filed a Motion for a Temporary Restraining Order and a Motion for Preliminary Injunction. Dckts. 6 and 26. The court granted both the Motion for Temporary Restraining Order and Motion for Preliminary Injunction. Orders, Dckts. 66 and 100. The preliminary injunction was subsequently dissolved when Macklin's failed to provide a self-funded Rule 65(c), Bankruptcy Rule 7065, bond. Order, Dckt. 187. No payment was being made by Macklin on the disputed secured claim of DBNTC. The court, in lieu of requiring a third-party bond, allowed Macklin to self-fund a bond, making $1,500.00 a month (which approximated the monthly payment asserted to be due on the claim by DBNTC) into a segregated account. Macklin failed to make the $1,500.00 a month payments into the segregated account. Civil Minutes, Dckt. 186.

On April 4, 2011, the court granted DBNTC's motion to dismiss the original Complaint. Dckt. 64. Macklin filed his First Amended Complaint on June 17, 2011. Dckt. 120. On February 16, 2012, the court entered its order granting the Motion to Dismiss the First Amended Complaint, dismissing the causes of action 1 through 8. Order, Dckt. 222. The court's Memorandum Opinion and Decision for the Motion contains a detailed review of the history of the Adversary Proceeding to that time. Dckt. 221.

While the Motion to Dismiss the First Amended Complaint was under submission, Macklin replaced his first counsel, Holly S. Burgess, with Allan Frumkin. Macklin, represented by Mr. Frumkin, filed a Motion to Allow Re-Argument of the Motion to Dismiss. Dckt. 198. In the Motion and Mr. Frumkin's declaration (Dckt. 199), the court was advised that Macklin and his new attorney recognized that the First Amended Complaint should be amended, asserted prior counsel had failed to adequately represent Macklin, and represented that Mr. Frumkin was ready, willing, and able to prosecute this Adversary Proceeding.

The court denied Macklin's request for re-argument of the Motion to Dismiss the First Amended Complaint. Order, Dckt. 220. In its ruling, the court noted that, if the court's ruling on the Motion to Dismiss the First Amended Complaint was adverse to Macklin, then Macklin could seek leave to file a further amended complaint at that time. Civil Minutes, Dckt. 219.

Though Macklin and Mr. Frumkin stated that they knew what amendments they wanted to make to the First Amended Complaint, no motion for leave to file a second amended complaint was filed by Macklin and Mr. Frumkin.

On April 23, 2012, the court filed its order authorizing Allan R. Frumkin to withdraw as counsel for Macklin in this Adversary Proceeding. Dckt. 243. Macklin requested, and the court so substituted in, Holly S. Burgess as Macklin's attorney in this Adversary Proceeding. Dckt. 244.

On June 4, 2012, the court issued its Scheduling Order in this Adversary Proceeding. Dckt. 250. Macklin was represented by Holly S. Burgess and the Scheduling Order was set with input from, and the participation of, Macklin's attorney. Non-Expert Witness discovery closed on October 15, 2012, and Expert Witness Discovery closed on January 31, 2013. Dispositive Motions were to be heard by March 22, 2013, and the Pre-Trial Conference was to be conducted in April 2013. *Id.*

In June 2012, DBNTC sought to have the District Court withdraw the reference to this bankruptcy court for the Adversary Proceeding. Dckt. 215. This request was opposed by Macklin. Dckt. 259. The Motion to Withdraw the Reference was denied by the District Court. Dckt. 262.

The parties proceeded with discovery. On July 30, 2012, Macklin filed a Joint Statement re: Discovery Agreement. Dckt. 263. The court denied the Motion to Compel Production. Order, Dckt. 268; Civil Minutes, Dckt. 267.

On August 23, 2012, Macklin filed another Notice of Substitution of Counsel. Macklin sought to terminate Holly S. Burgess as his attorney (who replaced Allan Frumkin, who replaced Holly S. Burgess the first time). The Motion to Substitute was filed on September 13, 2012. Dckt. 275. At the September 27, 2012 hearing on the Motion to Substitute, the court confirmed with the proposed new counsel that he understood discovery was closing shortly in the Adversary Proceeding and that Macklin's desire to engage a fifth attorney to represent him (counting the termination and re-hiring of Ms. Burgess as two attorneys) was not, in and of itself, a basis for reopening discovery and further delaying the prosecution of this Adversary Proceeding. When the proposed fifth counsel for Macklin confirmed that he clearly understood and was able to represent Macklin in the case as it then stood (with discovery closing), the court allowed Daniel J. Hanecak to be substituted in as the fifth attorney for Macklin in this Adversary Proceeding. Order Dckt. 287; Civil Minutes, Dckt. 285.[3]

On October 4, 2012, two days later, Macklin, represented by Mr. Hanecak, filed his Motion to File a Second Amended Complaint. Dckt. 288. The court denied that Motion. Dckt. 306. The court discusses in greater detail below this Motion and the grounds for denial of that motion.

On February 21, 2013, Macklin filed his Motion for Summary Judgment. Dckt. 307. DBNTC opposed and requested that summary judgment be granted in its favor pursuant to Rule 56(f). Dckt. 314. The court denied summary judgment for Macklin and granted summary judgment for DBNTC for the remaining two causes of action. Order, Dckt. 327; Memorandum Opinion and Decision, Dckt. 325. Judgment was entered for DBNTC and against Macklin on July 2, 2013. Dckt. 349. (The court having to address another motion to withdraw filed by Mr. Hanecak, the attorney for Macklin. Order denying, Dckt. 344.)

On June 20, 2013, Macklin filed a motion to vacate the order granting DBNTC summary judgment and denying Macklin summary judgment. Dckt. 338. Macklin filed the motion in *pro se,* with the consent of his attorney of record.[4] The Motion to Vacate was denied on July 29, 2013. Dckt. 357.

Appeal of Judgment Entered In This Adversary Proceeding

The final judgment was issued in this Adversary Proceeding on July 2, 2013. Dckt. 349. On August 26, 2013, Macklin filed a Notice of Appeal of the order granting DBNTC summary judgment, order denying Macklin's motion to vacate, and "all interlocutory Orders as evidenced in the Record, including the Order on Debtor's First Amended Complaint." Dckt. 361.

On October 25, 2013, the Bankruptcy Appellate Panel issued a "Notice of Deficient Appeal and Impending Dismissal." Dckt. 372. The Notice states that the Notice of Appeal was filed beyond the fourteen day period required pursuant to Bankruptcy Rule 8002 and 8019. Macklin was instructed to file a "legally-sufficient explanation" as to why the appeal should not be dismissed as untimely. Macklin did not respond to the Notice or attempt to prosecute the appeal. On December 16, 2013, the Bankruptcy Appellate Panel issued an order dismissing the appeal of the judgment and interlocutory orders issued in this Adversary Proceeding. Dckt. 373.[5]

No other appeals have been identified by Macklin as having been taken from the judgment or any orders issued in this Adversary Proceeding. No action, other than as stated above, had been taken (as reflected on the court's docket for this Adversary Proceeding) by Macklin to attempt prosecute any appeal from the orders and judgment of this court in this Adversary Proceeding.

Parallel District Court Lawsuit

When this Adversary Proceeding was commenced, Macklin was already litigating the same issues in the United States District Court for the Eastern District of California. Dist. Ct. 2:10-cv-01097 ("District Court Action"). When DBNTC's motion for summary judgment in the District Court Action was pending, Macklin commenced his Chapter 13 bankruptcy case in this court. Over the opposition of DBNTC, the District Court stayed the District Court Action, erroneously believing that the automatic stay prevented that action from proceeding.[6]

On April 15, 2014, Macklin filed a motion for leave to file a second amended complaint in the District Court Action. 10-01097, Dckt 40. This was ten months after this court entered the final judgment in this Adversary Proceeding. The motion was granted by the District Court and on July 1, 2014, the second amended complaint was deemed filed by Macklin in the District Court Action. DBNTC filed a motion to dismiss the second amended complaint, asserting that Macklin was barred from attempting to re-litigate those issues, the final judgment having been entered in this Adversary Proceeding.

On September 29, 2014, Charles T. Marshall, Esq. substituted into the District Court Action as Macklin's attorney. 10-01097, Dckt. 73. Macklin's opposition (totaling 116 pages) to the motion to dismiss the second amended complaint in the District Court Action was filed on October 10, 2014. 10-01098, Dckt. 79. The motion to dismiss the second amended complaint in the District Court Action was granted on January 14, 2015, and it was dismissed with prejudice. 10-01098, Dckts. 87 and 88.

Macklin has filed a motion to vacate the order dismissing the second amended complaint in the District Court Action pursuant to Rule 60(b). That motion is now under submission in the District Court.

REVIEW OF MOTION FOR RELIEF UNDER RULE 60

The court begins its review of the Motion with consideration of Rule 7(b), as incorporated into this Adversary Proceeding by Bankruptcy Rule 7007. This requires that the motion must state with particularity the grounds upon which the relief is based. In addition to the pleading requirement for the motion, the Local Bankruptcy Rule and *Revised Guidelines for Preparation of Documents in this District* require that "[m]otions, notices, objections, responses, relies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Local Bankruptcy Rule 9014-1(d) (1) and *Revised*

Guidelines for the Preparation of Documents, ¶(3)(a). Here, Macklin has failed to comply with the rule and instead filed a "Mothorities," which is a pleading in which the Rule 7(b) grounds are placed between extensive citations, quotations, arguments, speculation, facts, and conjecture. Macklin has left it to the court to decipher what are the actual grounds (subject to the warranties of Bankruptcy Rule 9011) and the mere "argument" or "speculation." The court has done the best it can to extract from the Mothorities the grounds asserted by Macklin.

From the 11-page Motion, the court identifies the following grounds:

I. Macklin seeks to vacate all, unspecified, orders which are in conflict with the U.S. Supreme Court's 2015 decision in *Jesinoski v. Countrywide Home Loans,* U.S. , 135 S. Ct. 790, 190 L. Ed. 2d 650 (2015), and the Ninth Circuit 2014 decisions in *Merritt v. Countrywide Financial Corporation,* 759 F.3d 1023 (9th Cir. 2014).

II. The grounds are stated to be:

A. There was no mortgage or deed of trust encumbering the Property at the time the bankruptcy case was filed by Macklin.
B. **Under the terms of the Truth in Lending Act ("TILA"), an unidentified "lender" failed to return Macklin's money or file a declaratory action defending the rescission of the loan transaction.**
C. **The loan transaction was nullified and the debt became void as of the March 3, 2009 rescission.**
D. Macklin is entitled to recovery of all payment made to the (unidentified) "original lender."
E. **Because Macklin assets that the loan transaction was rescinded, DBNTC does not have standing to assert any rights with respect to the note or the asserted rescission of the loan transaction.**
F. **All orders, judgments and decisions issued by the court are void by operation of law based upon the 2015 Supreme Court decision in *Jesinoski.***
G. Macklin asserts he is entitled to relief pursuant to Rule 60(b)(1), (4), (5) and (6), and (d).
H. **Since DBNTC could not have had any interest in note because Macklin asserts that it was rescinded, DBNTC is not prejudiced by vacating all orders, judgments, and decisions of the court in this Adversary Proceeding.**
I. Macklin is prejudiced, as he lost possession of his home.
J. Macklin executed a note and two deeds of trust with Accredited Home Loans, Inc. ("AHL") totaling $632,000.00.

K. Macklin was not provided with the required disclosures at the time of the transaction with AHL and unidentified persons used false information to qualify Macklin for the $632,000.00 loan.

L. **On May 3, 2009, Macklin perfected a rescission of the AHL loan transaction under TILA 1635(a). An unidentified "lender" received a rescission notice from Macklin and failed to respond with the 21-day period.**

M. **On March 3, 2009, counsel for the unidentified lender provided an untimely response disputing the notice of rescission**.

N. On November 30, 2009, AHL executed what Macklin asserts was a false or forged assignment of the deed of trust to a trust, for which DBNTC is the trustee.

O. **As of the November 30, 2009, assignment AHL had no rights or interest to assign in the note and deed of trust because of the rescission by Macklin.**

P. On February 16, 2012, the court dismissed all causes of action in Macklin's First Amended Complaint except that the Ninth Cause of Action for Wrongful Foreclosure, and the Tenth Cause of Action for Quiet Title. The dismissal included the cause of action under TILA.

Q. On October 4, 2012, Macklin sought to amend his complaint to assert TILA claim for rescission. The court denied the amendment based on Ninth Circuit controlling law that Macklin failed to file an action within one-year of the rejection of the notice of rescission.

R. The court granted DBNTC summary judgment on July 2, 2013, on the causes of action for wrongful foreclosure and to quiet title.

S. **In *Merritt v. Countrywide*, the Ninth Circuit determined that pleading a claim for rescission pursuant to TILA does not require that Macklin plead that tender has been made or is possible by the party seeking to rescind.**

T. **In *Jesinoski,* the Supreme Court held that rescission under TILA requires only that the notice be given, altering the common law requirements for rescission.**

U. **The decisions of the trial court, while consistent with controlling Ninth Circuit law in 2011 and 2012, are not consistent with the subsequent ruling of the Supreme Court in *Jesinoski* in 2015 and the Ninth Circuit in *Merritt* in 2014**.

V. **The 2015 and 2014 decisions render DBNTC to not have had standing in the 2011 and 2012 litigation by which it asserted to have an interest in the note and deed of trust or to challenge Macklin's assertion that the loan transaction had been rescinded.**

Motion to Vacate, Dckt. 380.

Most of Macklin's extensive arguments relate to why Macklin should have won, why DBNTC should not have been allowed to defend itself against the claims asserted by Macklin, and

that it is "unfair" for Macklin to be bound by the orders and judgment in this litigation he commenced, prosecuted, and sought summary judgment against DBNTC, and from which he failed to prosecute an appeal.

Macklin Asserts Lack of Subject Matter Jurisdiction

In this Adversary Proceeding, Macklin sought to obtain a monetary judgment against DBNTC under several stated theories: (1) Violation of the TILA federal law claim which was property of the bankruptcy estate; (2) Violation of RESPA federal law claim which was property of the bankruptcy estate; (3) Violation of the Fair Credit Reporting Act federal law claim which was property of the bankruptcy estate; (4) Fraud state law claim which was property of the bankruptcy estate; (5) Unjust Enrichment state law claim which was property of the bankruptcy estate; (6) Violation of RICO federal law claim which was property of the bankruptcy estate; (7) Violation of state Unfair Competition (Business Practices) law which was property of the bankruptcy estate; (8) Breach of Trust Instrument state law claim which was property of the bankruptcy estate; (9) Wrongful Foreclosure under state law claim which was property of the bankruptcy estate; and (10) Quiet Title state and federal law claims, for which the Property and claim were property of the bankruptcy estate. First Amended Complaint, Dckt. 120. **Discussing the effect of the post-judgment decisions in *Jesinoski,* Macklin contends that DBNTC "never had constitution or prudential standing and this court lacked subject matter jurisdiction over DBNTC, *ab initio."* Motion, p.2:14-16; Dckt. 380.** It appears that Macklin contends since he alleges DBNTC does not have a valid interest or rights, and further that the bankruptcy estate and Macklin have multiple federal and state claims against DBNTC, this bankruptcy court could not have "subject matter jurisdiction" over DBNTC. However, it appears from the Motion that Macklin admits that the federal courts (district and this bankruptcy court) had both *in personam* and subject matter jurisdiction over Macklin, the claims, and the Property, and had ability to adjudicate the rights asserted by Macklin against DBNTC.

After receiving DBNTC's opposition to the Motion, **Macklin expanded his subject matter jurisdiction argument in his Response. Dckt. 400. Macklin states that he objects to the federal court's subject matter jurisdiction "for the reason that Defendant DBNTC has never had standing in this court, or any court, as an operation of law under Truth in Lending Act § 1635 et. seq. [asserting that Macklin had rescinded the loan and therefore DBNTC could not have, and cannot assert, any rights, or defend itself against the various claims asserted by Macklin]."** Response, p. 2:1-12, Dckt. 400. **Though the fallacy of Macklin's logic is evident, the court will specifically address the issue of subject matter jurisdiction *infra*.[7]**

REVIEW OF PRIOR ORDERS

In order to consider whether proper grounds exist to vacate an order or judgment under Rule 60, the court must first review the actual grounds upon which the orders and judgment of this court were based. Below is the court's analysis of the prior orders and judgments, specifically highlighting the grounds upon which the court based the rulings.

First Amended Complaint Prosecuted By Macklin

On June 17, 2011, Macklin filed his First Amended Complaint. Dckt. 120. The First Amended Complaint names DBNTC as the only defendant. Macklin alleges that there are other unnamed defendants at the time of filing the First Amended Complaint. The prayer for the First Amended Complaint requests the following relief:

A. An order compelling "Defendants" to transfer or release legal title and any encumbrance to, and possession of, the Property.
B. For a declaration and determination that Macklin is the rightful holder of title to the Property, and "Defendants" have no interest in the Property.
C. For a judgment forever enjoining "Defendants" from claiming any interest in the Property.
D. For a declaration that the foreclosure which was instituted be deemed illegal and void, and further foreclosure proceedings be declared void.

The prayer does not request that the court enter judgment for the rescission of the loan transaction, but only seeks to have a declaration that Macklin has all rights and interests in the Property and "Defendants" have none, without Macklin having any corresponding obligations arising from a rescission.

Dismissal Of Causes Of Action From First Amended Complaint

The court's findings and conclusions in dismissing the causes of action one through eight of the First Amended Complaint, include the following statements by the court in the Memorandum Opinion an Decision, Dckt. 221:

I. First Cause of Action — Truth in Lending Here, however, Macklin admits that DBNTC was not the creditor in the original transaction that allegedly triggered the statutory disclosure requirements. According to Macklin's FAC, the creditor was either Accredited Home Lenders, Inc. or Centennial Bank of Colorado. Therefore, the court finds that Macklin has

not stated a claim against DBNTC, who was not an original party to the original underlying loan transaction.

Id. at 18:6-12.

In Macklin's letter to the loan servicer, however, he demanded to be repaid all of his payments on the loan ($125,713.46), have the promissory note returned by him, and retain the Property free and clear of any liens. This not a rescission, but a demand by Macklin to be paid money, have his note returned to him, and be given property free and clear of the deed of trust.

Id. at 18:21-24, 19:1-3.

Section 1641(g) applies to "a mortgage loan . . . sold or otherwise transferred or assigned to a third party." Section 1641 (g) was added by an Act of Congress dated May 20, 2009, and therefore may not apply to the mortgage loan transaction at issue here — the transfer of the promissory note into the Trust, not the assignment of the deed of trust or the substitution of trustee.

Id., 20:7-12.

Though this Notice of Rescission is undated, it had to predate the March 31, 2009 response and demonstrates that as early as March 2009 Macklin was aware of potential TILA and other claims arising out of the loan. Therefore, the motion to dismiss the TILA claim (First Cause of Action) as untimely due to the Statute of Limitations is also granted, without leave to amend.

Id. at p. 21:12-17.

II. Second Cause of Action — Real Estate Settlement Procedures Act ("RESPA")

An action alleging violation of 12 U. S. C. § 2605 must be brought within three years of such violation, and an action alleging violation of 12 U.S.C. § 2607 must be brought within one year of such a violation. The loan transaction at issue here closed in April 2006. Macklin did not file this action until January 13, 2011, almost five years later. Accordingly, the court finds that the cause of action under RESPA is time-barred.

Id. at 22:3-10.

"Section 2605 of RESPA requires a loan servicer to provide disclosure relating to the assignment, sale, or transfer of loan servicing to a potential or actual borrower: (1) at the time of the loan application, and (2) at the time of transfer." Likewise, "[t]he loan servicer also has a duty to respond to a borrowers's inquiry or `qualified written request.,"67 Defendant DBNTC alleges without dispute that it is not a loan servicer. Macklin does not allege that DBNTC is a "servicer," instead he makes general, nonspecific allegations that "Defendant and/or its agents" were a servicer. The [First Amended Complaint] goes further to allege that Qualified Written Responses and inquiries were made of others, and attempts to bring in the current Defendant, DBNTC, based upon Macklin's interaction with others or predecessor owners of the Note. Accordingly, Macklin fails to state a claim upon which relief can be granted.

Id. at 22:13-20, 23:1-7.

III. Third Cause of Action — Fair Credit Reporting Act ("FCRA")

While not clear from the FAC, the court understands the argument to be that servicer was obligated on a contract, to which Macklin is not a party, that if Macklin (or obligors on other notes) defaulted in his payments, the servicer would advance monies to the then current note holders while the default under the note was enforced . . . Thus Macklin argues that even though he has defaulted on his obligation and there have been defaults, the "servicer" making advances on an unrelated contract constitutes a payment for the benefit of Macklin and reduces his obligation on the Note. Though argued, Macklin does not allege the legal or contractual basis for his being the beneficiary of any third-party contract.

Id. at 25:8-23.

What Macklin also fails to allege is that DBNTC knew or had reasonable cause to believe that Macklin's defaults under the Note were false. Just as Macklin alleges, the payments were in default. Merely because there is a disagreement as to an amount due, that does not automatically create a FCRA violation. The FCRA establishes a clear process by which disputes concerning furnished information are addressed. There is no indication that the process has been employed with respect to this Matter.

Id. at 25:24-28, 26:1-3.

Macklin admits that he first received a notice of default in December 2008, and did not commence the instant adversary proceeding until January 13, 2011, a month after the statute of limitations expired. No sufficient basis for tolling the statue of limitations as to a

claim arising under the FCRA has been alleged or argued. Merely because Macklin chose to ignore information furnished by DBNTC to a consumer reporting agency until he decided to file a lawsuit alleging various claims is not sufficient.

Id. at 26:13-21.

IV. Fourth Cause of Action — Fraud

With respect to the alleged misrepresentations, Macklin does not allege that he did not receive what was represented to him at the time of the loan transaction. He sought, and obtained, monies on the terms he negotiated. All of the alleged misrepresentations occurred after he obtained the monies and given the note and deed of trust.

Id. at 29:17-22.

There are no allegations of any reasonable reliance on the alleged misrepresentations to Macklin's detriment.

Id. at 29:22, 30:1.

At least two of the necessary elements of fraud are missing — justifiable reliance on the alleged misrepresentation and damages arising from reliance on the alleged misrepresentation.

Id. at 30:5-8.

V. Fifth Cause of Action — Unjust Enrichment

What Macklin does not allege or explain is what `fees' are charged as a loan transaction which are applied to pay the loan (principal and interest). By their very nature, fees are owed in addition to the principal and interest.

Id. at 30:20-23.

Although. Macklin alleges that he received less than what he paid for because defendant extracted fees, he does not assert that he suffered an actual injury.

Id. at 31:10-13.

Here, there is a valid loan agreement (express contract) between Macklin and Defendant.85

Id. at 31:18-19, FN. 85. [Footnote 85, from which there cannot then be a claim for quasi-contract or implied-in-fact contract, citing *Lance Camper Mfb. Corp. v. Republic Indem. Co.,* 44 Cal.App. 4th 194, 203 (1996).]

VI. Sixth Cause of Action — Civil Racketeer Influenced and Corrupt Organizations Act (RICO)

The RICO claim does not attribute specific conduct to individual defendants. The claim also does not specify either the time or the place of the alleged wrongful conduct, except to state that "[a]t all relevant times, Defendants have engaged in a conspiracy, common enterprise, and common course of conduct, the purpose of which is to engage in the violations of law alleged in the complaint." This is insufficient.

Id. at 34:9-15.

VII. Seventh Cause of Action — Unfair Business Practices, Cal. Bus. & Professional § 17200 et seq.

In this case, the seventh claim for relief is dismissed because it does not state a claim under any of the three prongs of the UCL. As to the "unlawful" prong, the Complaint does not allege the violation of any other law that would serve as an underlying violation for the UCL. As to the "unfair" prong, the Complaint does not allege any legislatively-declared policy to which allegedly wrongful conduct may be tethered.

Id. at 36:21-22, 37:1-5.

VIII. Eighth Cause of Action — Breach of Trust Instrument

The Notice of Default [attached as Exhibit 2 First Amended Complaint, Dckt. 129], however, clearly states that Macklin could bring his account into good standing by paying the past-due amounts no later than five days before the foreclosure sale. The Deed of Trust contained an acceleration clause, and the Notice of Default was therefore allowed to contain a notice of acceleration.
Because the text of the Notice of Default contradicts Macklin's claim that Defendant did not to inform him of the possibility of acceleration and his right to cure, the

Motion is granted and the Eighth Cause of Action is dismissed, without leave to amend.

Id. at 39:2-12.

Summary Judgment For Ninth and Tenth Causes of Action

For the remaining two causes of action, the parties completed discovery. The court's discovery, dispositve motion, and pre-trial conference order was filed on June 4, 2012 (after approximately 18 months of motions to dismiss, amended complaint, and an answer being filed). Dckt. 250. All discovery closed on January 31, 2013. Dispositive motions were to be heard by March 22, 2013.

After discovery was completed, on February 21, 2013, Macklin filed his motion for summary judgment. Dckt. 307. DBNTC filed its opposition and requested summary judgment in its favor [*citing* *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311-12 (9th Cir. 1982); *see also* Rule 56(f) (1)]. After hearing and considering the evidence and determining material facts for which there was no genuine dispute (Rule 56(a), Bankruptcy Rule 7056), the court granted summary judgment for DBNTC and against Macklin on all remaining claims.

The court issued a Memorandum Opinion and Decision stating the ruling on the motion for summary judgment. Dckt. 325. A summary of the specific grounds upon which summary judgment was granted by the court for the Ninth Cause of Action (Wrongful Foreclosure) and Tenth Cause of Action (Quiet Title) is:

At this juncture the court notes that **many of the "undisputed facts" asserted by Plaintiff [Macklin] are actually his own personal conclusions of law based upon his review of the undisputed evidence presented by the Parties**. Plaintiff's reading of the Assignment of the Deed of Trust and Substitution of Trustee, results in his legal determination that Defendant [DBNTC] had no interest in the Note. **Plaintiff shows no basis for having any personal knowledge of what Defendant did or did not do with respect to the Note, Allonge, Assignment of Deed of Trust, and Substitution of Trustee, but only draws conclusions in his declaration from the undisputed documents.**

Dckt. 325; Memorandum Opinion and Decision, p. 16:13-22.

The court has before it requests for summary judgment asserted by both the Plaintiff and Defendant. Neither provides conflicting evidence with respect to a material fact. Rather,

both sides argue what conclusions of law should be made from this undisputed universe of evidence presented to the court.

Id. at p. 18:16-21.

Therefore, the court concludes that [Cal. Civ.] § 2932.5 only applies to mortgages and not to deeds of trust.

Id. at p. 29:11-12.

However, the undisputed evidence presented to the court is that Defendant holds the Note, with the Allonge transferring the Note to the Defendant. Defendant recorded the Assignment of Deed of Trust and Substitution of Trustee in advance of the substitute trustee conducting the non-judicial foreclosure sale. No evidence has been presented that the Defendant did not have the Note or the right to enforce the Note when the substitute trustee conducted the non-judicial foreclosure sale.

Id. at p. 29:18-26.

The Plaintiff has come before this court seeking a determination that the Trustee's Deed held by Defendant is invalid. In attacking that deed, **the Plaintiff bears the burden of proof that such deed is ineffective or may be avoided**. The Trustee's Deed contains the recitals that the requirements of law for mailing, posting, and publication of the notice of sale have been complied with for the December 14, 2009 non-judicial foreclosure sale. Trustee's Deed, Pl. Ex. D, Dckt. 129 at 15. This constitutes prima facie evidence that all such notices were given in compliance with the statute. Cal. Civ. Code § 2924(c).

Id. at p. 30:20-28, 31:1.

The undisputed evidence presented to the court is that Defendant holds the Note, with the Allonge transferring the Note to Defendant.

Id. at p. 31:10-12.

At best, after two years of discovery Plaintiff presents this court with only his speculation and argument that the transfer must be defective.

Id. at p. 31:15-17.

Based on the uncontroverted evidence presented, the Plaintiff has not provided the court with any basis for concluding that the Note was not transferred to Defendant, that Defendant did not have the right to substitute the trustee, or that Defendant did not have the right to enforce the deed of trust at the time of the December 2009 non-judicial foreclosure sale.

Id. at p. 32:19-24.

The absence of any discovery obtained during the two years of this litigation by Plaintiff on the point is deafening in its absence**. The Plaintiff offers no evidence to counter the Trustee's Deed. There is no evidence of any material dispute to Defendant asserting ownership of the Property pursuant to the Trustee's Deed.**

Id. at p. 33:3-8.

The court having determined that § 2932.5 does not apply to deeds of trust and that there is no evidence contrary to Defendant having been transferred the Note and being entitled to enforce the Deed of Trust, no basis exists to quiet title to the Property in favor of the Plaintiff exists.

Id. at p. 33:17-21.

Plaintiff was afforded an opportunity and has opposed Defendant's request for entry of summary judgment based on Plaintiff's Motion. **Plaintiff has not provided the court with any evidence disputing the ownership of the Note and right to enforce the Deed of Trust as of the 2009 substitution of trustee and foreclosure.**

Id. at p. 34:15-20.

The Plaintiff put his best evidence forward, which are copies of the Substitution of Trustee, Assignment of Deed of Trust, the two undated allonges, and the Trustee's Deed. Defendant adds the Note and Deed of Trust, Allonge, additional substitutions of attorneys by prior holders of the Note, the Notice of Default, and the Notice of Sale. It is from this undisputed universe of documents that the Parties assert their competing interests.

Id. at p. 35:7-13.

Based on the uncontroverted evidence presented to the court, the court finds that Defendant has title to the Property pursuant to the Trustee's Deed.

Id. at p.35:20-22.

Order Denying October 4, 2012 Motion To File Second Amended Complaint

While not addressing the specifics of the court's ruling on the Motion to Dismiss and the Motion for Summary Judgment, Macklin does point to the court's ruling on Macklin's Motion to File a Second Amended Complaint, which was filed on October 4, 2012. Dckt. 304. Macklin provides what appears to be a block quote from this court's ruling on the Motion to Amend in his Rule 60(b) Motion. The quote as stated by Macklin makes it appear that the only reason for denying the Motion to Amend is that the one-year and three-year statutes of limitation has expired. Such is not a "fair representation" of the ruling, which is set forth in the Civil Minutes for that hearing and states the grounds for the ruling. Dckt. 304.

The court attaches as Addendum A to this ruling the Civil Minutes from the November 8, 2012 hearing on the Motion for File a Second Amended Complaint. The grounds are summarized, and cross-referenced to Addendum A, as follows:

A. "First and foremost, the Plaintiff brings this Motion for Leave to Amend on the close of discovery in the Adversary Proceeding." The court concluded that after more than two years and discovery closing, Macklin had ample opportunity to amend his complaint and raise additional claims. The court determined that granting such leave at the close of discovery, and in light of the prosecution of the Adversary Proceeding by the various attorneys of Macklin's choosing, allowing such further amendment "[i]s prejudicial to the Defendant and frustrating to the court." Addendum A, p. 5 at A.
B. Allan Frumkin, counsel for Macklin, represented to the court in October 2011 that the First Amended needed to be amended to address the deficiencies which resulted in the court having dismissed Causes of Action 1 through 8. Mr. Frumkin testified that he had advised Macklin of such necessary amendments at that time. Addendum A, p. 5 at B.
C. Though Macklin and his counsel knew they need to amend the complaint and Macklin was aware of such possible amendments and claims as early as October 2011, when represented by Alan R. Frumkin, Macklin and Mr. Frumkin did not seek leave to amend the First Amended Complaint. Addendum A, p. 6 at C.
D. At the September 27, 2012 hearing on the Motion to Substitute Daniel Hanecak, Esq. as new counsel in the place of Holly Burgess, Esq. (Macklin terminating her a second time in this Adversary Proceeding), Mr. Hanecak assured the court he was aware of the discovery and pre-trial conference deadlines in this Adversary Proceeding. Addendum A, pg. 6 at D.

E. After 22 months of prosecution of the Adversary Proceeding and the close of discovery, the attempted amendment occurred too late. Macklin's counsel clearly was aware of (and so testified previously) that possible amendments were desired by Macklin. Macklin and his attorneys did not timely seek leave to amend the First Amended Complaint. Addendum A, p. 6 at E.

F. In denying the Motion, the court concluded,

To allow for Mr. Macklin and his latest counsel to reset all of the litigation at the close of discovery for claims which Mr. Macklin and Mr. Frumkin testified that they were well aware of more than 20 months earlier is an abuse of the judicial process. As is clear from this courts decision on the motion to dismiss the FAC, leave was not given to file a second amended complaint due to the abusive and unclear pleading practices of Mr. Macklin and his counsel. The requirement for filing a motion for leave to amended, with a copy of any proposed second amended complaint, afforded the court with a minimally intrusive opportunity to insure that the pleading practices and deficiencies from the original Complaint and [First Amended Complaint] would not be repeated wasting judicial resources and putting the Defendant to unreasonable and repeated duplicate pleadings. Mr. Macklin and his counsel chose not to take up the court on the opportunity to timely and reasonably seek leave to file a second amended complaint.

Addendum A, p. 6 at F.

Macklin's reference to this denial fails to address these grounds for denying the Motion to File a Second Amended Complaint. Rather, the Motion merely strings together several sentences in another portion of the ruling where the court considered the possible amendments and see whether they represented some grossly extraordinary circumstances by which a close of discovery amendment would be warranted. The court found none.

With respect to this review of the proposed Second Amended Complaint, which merely attempted to rehash the First Amended Complaint, the court's comments include the following:

G. **Macklin failed to show any basis for a failure to verify income as the basis of a TILA violation.** Addendum A, p. 7 at G.

H. **Macklin failed to show or plead any basis for an assignee of a note assuming personal liability for TILA violations of the lender.** Addendum A, p. 7 at H.

I. **The court applied then controlling Ninth Circuit law in determining whether a claim for rescission was stated, concluding it was not.** Addendum A, p. 8 at I.[8]

J. **The court also still concluded that what Macklin pleads as a Notice of Rescission was not a notice of rescission**. Addendum A, p. 8 at J.[9]

K. Macklin did not plead a claim for a "table-funded loan" and any basis of liability for DBNTC for such a loan. Addendum A, p. 8 at K.
L. Macklin did not plead an unfair business practices claim under California Business and Professionals Code § § 17200 et seq. Additionally, Macklin failed to plead a basis for DBNTC being liable for the acts of others asserted to be such violations. Addendum A, p. 9 at L.
M. Macklin failed to plead a claim for failure to form a contract, by which the loan money could only be funded from a bank account of AHL. Addendum A, p. 9 at M.
N. Macklin failed to plead grounds by which Mortgage Electronic Registration Systems, Inc. could not serve as a nominee of the lender. Additionally, why the current holder of the note could not enforce the note and deed of trust. Addendum A, p. 10 at N.
O. **Macklin failed to plead grounds for which the holder of the note obtaining insurance in the event the borrower defaults absolves Macklin of paying the obligation on the note.** Plaintiff failed to plead grounds for how DBNTC, as the asserted holder of the note, was liable for the alleged misconduct of others. Addendum A, p. 11 at O.
P. Macklin failed to address several other legal issues which were identified by the court if Macklin sought leave to amend after the order dismissing the Causes of Action 1 through 8 of the First Amended Complaint. Addendum A, pp. 11-12 at P.

The Conclusion to the Memorandum Opinion and Decision ties together the grounds for denying the Motion to File a Second Amended Complaint — which would not be altered by the subsequent decisions in *Jesinoski* or *Merritt.*

The court summarizes above the review of the prior Memorandum Opinion and Decision not as an invitation for Macklin's current counsel to "re-chew the cud," but to demonstrate that: (1) the issues presented to the court by Macklin's counsel at the time concerning dismissal of the case were not as "simple" as phrased by Macklin in the current Motion and (2) the court went to extraordinary lengths to review the proposed Second Amended Complaint to see if there was anything presented which would warrant an eleventh and one-half hour, eve of trial amendment.[10]

SUBJECT MATTER JURISDICTION EXISTS FOR THIS ADVERSARY PROCEEDING

Macklin, in his Reply, makes the argument that the court does not have subject matter jurisdiction over the instant Adversary Proceeding in light of the *Jesinoski* and *Merritt* decision. This argument is similar to the standing argument Macklin

makes, contending DBNTC cannot have standing to defend itself since Macklin has determined that DBNTC cannot have any rights.

Subject matter jurisdiction is the cornerstone of federal judicial proceedings. Parties may not "consent" to create federal court jurisdiction, and even if not raised by the parties, a federal judge may, and must, raise the issue if he or she believes that subject matter jurisdiction does not exist. The United States Constitution provides that,

The [federal] judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. Art. III, Sec. 2. The federal judicial power is vested in the Supreme Court and such other inferior court's as Congress establishes. U.S. Const. Art. III, Sec. 1; Art. I, Sec.8, Cl 9. The Constitution also vests in Congress the responsibility, and authority, to establish, as a matter of federal law, "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. Art. 1, Sec.8, Cl 4.

Congress has generally provided for the United States District Courts to exercise federal court jurisdiction when,

§ 1331. Federal question
The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331.

Congress has enacted various uniform bankruptcy laws over time. The current Bankruptcy Code (11 U.S.C. § 101, et *seq.*) provides a comprehensive legal and jurisdictional scheme for the determination of matters arising under the Bankruptcy Code, arising in a bankruptcy case, and state and federal non-Bankruptcy Code matters to a bankruptcy case. A much broader grant of federal judicial power, for which the federal courts (district and bankruptcy judges) has been enacted by Congress in 28 U.S.C. §§ 1334 and 157. In addition to providing that district courts and bankruptcy courts have jurisdiction for all matter arising

under the Bankruptcy Code, in a bankruptcy case, and related to the bankruptcy case, the federal courts have exclusive jurisdiction over property of the bankruptcy estate. 28 U.S.C. § 1334(e).

First, most of the claims asserted by Macklin arise under federal statutes. Second, the claims were property of the bankruptcy estate and the bankruptcy estate retained the right to the first $150,000.00 recovered, if any, in this litigation. Third, the claims are related to the bankruptcy case, both as an asset of the estate and as litigation initially commenced by Macklin as the Chapter 13 debtor (exercising the powers of a bankruptcy trustee with respect to the management of property of the estate), the Chapter 7 Trustee after conversion, and then Macklin in continuing to litigate the claims for the benefit of the bankruptcy estate and himself pursuant to the agreement with the Trustee.

This federal court has subject matter jurisdiction for the claims asserted by Macklin, and the defenses, rights, and interests raised by DBNTC to the First Amended Complaint.

DBNTC HAS STANDING TO ASSERT AND DEFEND ITS RIGHTS, AND LITIGATE TO JUDGMENT THE ACTION COMMENCED BY MACKLIN

Standing is a fundamental requirement for the exercise of federal judicial power. Article III of the Constitution confines federal courts to decisions of "Cases" or "Controversies."

Article III of the Constitution confines federal courts to decisions of "Cases" or "Controversies." Standing to sue or defend is an aspect of the case-orcontroversy requirement. (Citations omitted.) To qualify as a party with standing to litigate, a person must show, first and foremost, "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent.' (Citations omitted.) . . . Standing to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess `a direct state in the outcome.' (Citations omitted.)

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

As the court understands Macklin's standing argument, since Macklin asserts that the loan transaction has been rescinded, the note and deed of trust are void. Therefore, DBNTC cannot have any rights therein and cannot attempt to assert such rights that Macklin alleges do not exist. Further, DBNTC cannot contest or defend

itself and any interest it asserts in the note, deed of trust, or in any rescission asserted by Macklin to have been or to be completed.

Macklin overstates the effect of the asserted rescission turning himself into the judge, jury, and executioner. DBNTC asserts that it obtained the note and deed of trust from AHL. DBNTC disputes that the loan transaction was rescinded and asserts that it, as the owner of whatever interests there are in the note and deed of trust, and the owner of the property pursuant to a non-judicial foreclosure sale, can defend such interests and rights. The court also understands DBNTC to assert that it, as the transferee of the note and deed of trust, is the real party in interest to receive any monies which Macklin would have to pay for his part of the rescission.[11]

While Macklin asserts that he has rescinded the loan transaction, DBNTC contends it is the holder of the note which is the subject of the asserted rescinded transaction, and that it is the owner of the Property, having acquired it through a nonjudicial foreclosure sale. DBNTC has standing to: (1) defend the interests in the note and deed of trust from the asserted rescission; (2) defend the asserted rights and interests in the Property obtained through the non-judicial foreclosure sale; and (3) if the rescission has been properly made, to receive payment of all of the monies due from Macklin as part of the rescission.

FEDERAL RULE OF CIVIL PROCEDURE 60(b) RELIEF

Rule 60(b), as made applicable by Bankruptcy Rule 9024, governs the vacating of a judgment or order. Grounds for relief from a final judgment, order, or other proceeding are limited to:

(1) mistake, inadvertence, surprise, or excusable neglect;
(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
(4) the judgment is void;
(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
(6) any other reason that justifies relief.

Red. R. Civ. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199 (5th Cir. La. 1993). The court

uses equitable principals when applying Rule 60(b). See 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §2857 (3rd ed. 1998). The so-called catch-all provision, Rule 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Compton v. Alton S.S. Co.,* 608 F.2d 96, 106 (4th Cir. 1979) (citations omitted). The other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive,*Liljeberg v. Health Servs. Corp.,* 486 U.S. 847, 863 (1988), and relief under Rule 60(b)(6) may be granted in extraordinary circumstances. *Id.* at 863 n.11.

A condition of granting relief under Rule 60(b) from the entry of a default judgment is that the requesting party show that there is a meritorious claim or defense. This does not require a showing that the moving party will or is likely to prevail in the underlying action. Rather, the party seeking the relief must allege enough facts, which if taken as true, allows the court to determine if it appears that such defense or claim could be meritorious. 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶¶ 60.24[1]-[2] (3d ed. 2010); *Falk v. Allen,* 739 F.2d 461, 463 (9th Cir. 1984) ("Second, judgment by default is a drastic step appropriate only in extreme circumstances; a case should, whenever possible, be decided on the merits.")

The Ninth Circuit in *Falk* further addressed the proper application of Rule 60(b) in even the default judgment context, stating,

We note, however, that these concerns are not intended to allow challenges to the correctness of the judgment itself. See *Inryco, Inc. v. Metropolitan Engineering Co. Inc.,* 708 F.2d 1225, 1230. (7th Cir.),*cert. denied,* 464 U.S. 937, 104 S. Ct. 347, 78 L. Ed. 2d 313 (1983). A Rule 60(b) motion to vacate should not be treated as a substitute for an appeal. *De Filippis v. United States,* 567 F.2d 341, 342 (7th Cir. 1977).

Id.

The judgment in this Adversary Proceeding was not granted as a default judgment, but based on the evidence Macklin and DBNTC chose to present on cross summary judgment requests. **As stated by the court, the evidence was not in dispute**. Even considering the standard for vacating default judgments, in which the defendant is not afforded the opportunity to conduct discovery and present evidence, Macklin has not shown (1) he has meritorious claims; (2) that DBNTC will not be prejudiced by continued delay and further multiple court litigation over the same issues with respect to its interests in the note and Property; and that (3) that Macklin and his multiple attorneys are not culpable in connection with the entry of the final judgment in this case in light of how they chose to draft the complaints, prosecute the case, not seek to amend the complaint, conduct discovery,

requesting summary judgment, and present evidence to the court. See discussion in *Falk* of the three basic considerations of vacating a default judgment.*Id.*

THE POST-JUDGMENT RULINGS IN *JESINOSKI*AND *MERRITT* DO NOT WARRANT VACATING THE JUDGMENT AND ORDERS IN THIS ADVERSARY PROCEEDING PURSUANT TO RULE 60(b)(6)

Conspicuously missing from Macklin's Motion is any discussion of the controlling law of when a final judgment may be vacated based upon a post-final judgment change in controlling law stated by an appellate court. Macklin merely asserts that it is fair, right, equitable, and necessary to prevent Macklin from being further prejudiced.

The court begins its consideration of the application of Rule 60(b) (6) based on the 2015 decision in *Jesinoski* and the 2014 decision in *Merritt* by reviewing the Supreme Court ruling in *Ackermann v. United States,* 340 U.S. 193 (1950). When presented with a request for relief under Rule 60(b) (6), the Supreme Court held that the requisite "extraordinary circumstances" warranting such relief did not exist where a party, who was otherwise able to, failed or elected not to prosecute an appeal of the judgment. *Id.* at 201.

More recently, the Supreme Court addressed the Rule 60(b) (6) standards in*Gonzalez v. Crosby,* 545 U.S. 524 (2005), stating:

Second, our cases have required a movant seeking relief under Rule 60(b)(6) to show "extraordinary circumstances" justifying the reopening of a final judgment. *Ackermann v. United States,* 340 U.S. 193, 199, 95 L. Ed. 207, 71 S. Ct. 209 (1950); accord, id., at 202, 95 L. Ed. 207, 71 S. Ct. 209; *Liljeberg,* 486 U.S., at 864, 100 L. Ed. 2d 855, 108 S. Ct. 2194; id., at 873, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (Rehnquist, C. J., dissenting) ("This very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved").
...
Petitioner's only ground for reopening the judgment denying his first federal habeas petition is that our decision in *Artuz* showed the error of the District Court's statute-of-limitations ruling. We assume for present purposes that the District Court's ruling was incorrect. As we noted above, however, relief under Rule 60(b)(6)—the only subsection petitioner invokes—requires a showing of "extraordinary circumstances." Petitioner contends that *Artuz's* change in the interpretation of the AEDPA statute of limitations meets this description. We do not agree. The District Court's interpretation was by all appearances

correct under the Eleventh Circuit's then—prevailing interpretation of *28 U.S.C. § 2244 (d)(2).* It is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation.
...
The change in the law worked by *Artuz* is all the less extraordinary in petitioner's case, because of his lack of diligence in pursuing review of the statute-of-limitations issue. At the time *Artuz* was decided, petitioner had abandoned any attempt to seek review of the District Court's decision on this statute-of-limitations issue.
...
This lack of diligence confirms that *Artuz* is not an extraordinary circumstance justifying relief from the judgment in petitioner's case. Indeed, in one of the cases in which we explained *Rule 60(b)(6)'s*extraordinary-circumstances requirement, the movant had failed to appeal an adverse ruling by the District Court, whereas another party to the same judgment had appealed and won reversal. *Ackermann, 340 U.S., at 195, 95 L. Ed. 207, 71 S. Ct. 209.* Some years later, the petitioner sought *Rule 60(b)* relief, which the District Court denied. We affirmed the denial of *Rule 60(b)* relief, noting that the movant's decision not to appeal had been free and voluntary, although the favorable ruling in the companion case made it appear mistaken in hindsight. See *id., at 198, 95 L. Ed. 207, 71 S. Ct. 209.*

Id. at 535-538.

In 2009, the Ninth Circuit visited the "extraordinary circumstances" requirement for Rule 60(b)(6) in *Phelps v. Alameida,* 569 F.3d 1120 (9th Cir. 2009). As with*Gonzales,* the Ninth Circuit was considering whether an order relating to a *habeas corpus* petition (involving the liberty interests of an incarcerated person) should be vacated. The vast majority of the appellate cases addressing this issue relate to such writs, as opposed to basic civil litigation.[12]

In applying the "extraordinary circumstances" requirements for Rule 60(b)(6) relief required under the Supreme Court decisions in connection with *habeas corpus* petitions, the Ninth Circuit considered factors used by the Eleventh Circuit in *Ritter v. Smith,* 811 F.2d 1398 (11th Cir. 1987) and the Supreme Court in *Gonzales.* The factors considered (and expressly stated not to be a "rigid or exhaustive checklist") in *Phelps* were:

A. Did the change in law overrule what was otherwise settled legal precedent and was the trial court ruling correct under the prior law? *Gonzales,* 545 U.S. at 536. "It is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation [of the law]." *Id.*

B. Had the party seeking the Rule 60(b) (6) been diligent in pursuing review of the issue for which the relief is now sought? *Id.* The lack of diligent pursuing an appeal "[c]onfirms that [a subsequent change in the law by the Supreme Court] is not an extraordinary circumstance justifying relief from the judgment. . . ." *Id.*[13]
C. Would reconsidering the final judgment undo the past, executed effects of the judgment. *Ritter v. Smith,* 811 F.2d at 1402.
D. The delay between the finality of the judgment and the Rule 60(b) (6) motion. *Id.* at 1403.
E. The close relationship between the original judgment and the subsequent decision changing the law. *Id.* at 1402.[14]
F. When considering a petition for habeas corpus, there is a serious issue of comity between the state and federal judiciaries. *Id.* at 1404.

In *Phelps,* the Ninth Circuit concluded that the movant hit all six of the non-exclusive, non-mechanical application factors:

In this case, the lack of clarity in the law at the time of the district court's original decision, the diligence Phelps has exhibited in seeking review of his original claim, the lack of reliance by either party on the finality of the original judgment, the short amount of time between the original judgment becoming final and the initial motion to reconsider, the close relationship between the underlying decision and the now controlling precedent that resolved the preexisting conflict in the law, and the fact that Phelps does not challenge a judgment on the merits of his *habeas* petition but rather a judgment that has prevented review of those merits all weigh strongly in favor of granting *Rule 60(b) (6)*relief.

Phelps, 569 F.3d at 1140.[15]

Macklin Fails to Provide Grounds For Relief Pursuant to Rule 60(b)(6)

Macklin requests the court vacate the judgment and order dismissing Causes of Action 1-8 based on the pronouncement of law in *Jesinoski* and *Merritt.* However, the Motion does not have any discussion of the proper application of Rule 60(b) (6) based on a change of law for cases in which there is a final judgment. Rather, it contains only a general discussion of Rule 60(b) itself and the conclusion, "[t]he catch-all provision, Rule 60(b)(6), has been invoked to relive a party of a final judgment in `extraordinary circumstances.' This case warrants extraordinary circumstance." Motion, p. 10:16-17.

As addressed above, Rule 60(b) (6) is not a "catch-all," "judge make up whatever rule you want" grant of power. It is a very carefully circumscribed power which is to be executed only in limited "extraordinary circumstances." It cannot overlap with or be used to circumvent the requirements of other provisions of Rule 60.

In *Jesinoski,* the Supreme Court was presented with a very narrow issue to address — whether a borrower was required to commence suit to enforce a rescission under 15 U.S.C. § 1635 within three years of the transaction, or provide notice of the election to rescind within the three-year period. The Supreme Court decided,

The language leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. It follows that, so long as the borrower notifies within three years after the transaction is consummated, his rescission is timely. The statute does not also require him to sue within three years.

Jesinoski v. Countrywide Home Loans, 135 S. Ct. at 792.

The first question for the court is whether any portion of the prior ruling on the motion to dismiss or the summary judgment is based on the grounds that suit had to be commenced within three years, not merely a notice of rescission provided by Macklin.

With respect to the Supreme Court determining that the suit for rescission need not be filed within the three-year period**, Macklin does not direct the court to any portion of the ruling on the motion to dismiss or ruling on the summary judgment motion in which the decision was made on that ground.** The court's own review of both rulings, as discussed *supra,* does not uncover any such grounds being relied upon by the court.

The Ninth Circuit decision in *Merritt* is equally narrow, addressing only whether the tender, or the ability to tender, by borrower as a condition of rescission must be pleaded. The *Merritt* court held:

For all these reasons, we hold that plaintiffs can state a claim for rescission under TILA without pleading that they have tendered, or that they have the ability to tender, the value of their loan. Only at the summary judgment stage may a court order the statutory sequence altered and require tender before rescission — and then only on a "case-by-case basis," *Yamamoto,* 329 F.3d at 1173, once the creditor has established a potentially viable defense.

Merritt v. Countrywide Financial Corporation, 759 F.3d at 1033.

With respect to the Ninth Circuit decision in *Merritt,* the court again looks to the ruling on the motion to dismiss and the ruling on the motion for summary judgment. In ruling on these, **the court did not base the decision on Macklin failing to plead tender** or the ability to tender. The various causes of action were dismissed for much more substantial deficiencies.

The Motion fails for this reason.

Consideration Of *Gonzalez, Ackermann,* and*Phelps* Factors

Assuming, *arguendo,* that the decisions in *Jesinoski* and *Merritt* changed the law upon which the orders dismissing Causes of Action 1-8 and denying the Motion to File a Second Amended Complaint after discovery closed, and the Summary Judgment were based, Macklin has failed to show that such changes should apply to vacate the orders and judgment.

First, the law at the time of the orders and Summary Judgment was not unsettled in this Circuit and other Circuits. All of the rulings of this court were in compliance with the then—binding appellate case law. Those appellate cases were consistent with ruling in other Circuits.

Second, Macklin has not been diligent in pursuing an appeal of the orders and judgment. Rather, he abandoned the appeal, failing to respond to the Bankruptcy Appellate Panel notice or seek relief pursuant to Bankruptcy Rule 8002(c)(2) in effect at the time of the appeal. Further, it is clear that Macklin's strategy has been to pursue a parallel action in the District Court rather than pursuing an appeal. It is now, after the District Court dismissed that action, that Macklin now seeks to reopen the final orders and judgment in this Adversary Proceeding.

At this juncture, denying the Motion falls squarely in the rulings of the Supreme Court in *Gonzalez* and *Ackermann.* Nothing more is required for denial of a Rule 60(b)(6) motion pursuant to the standard established by Supreme Court.

Third, this court issued a final judgment in which it has determined that DBNTC owns the Property. While Macklin may have worked to cloud the title to the Property and collaterally undo the judgment of this court by improperly pursuing the parallel action in District Court after final judgment in this Adversary Proceeding, that does not diminish the rights and interests of DBNTC as owner of the Property. The court determined that title had changed

and DBNTC is the owner of the Property. With that judgment, from which no appeal was taken, DBNTC could move forward as the judicially determined owner of the Property.

Fourth, this Rule 60 (b) motion is being brought twenty months after the Judgement was entered. It is nineteen months after Macklin abandoned any effort to pursue an appeal of that Judgment. It is being made after Macklin has attempted to relitigate, and ultimately lost, in the District Court the same issues which were determined in the final judgment issued by the bankruptcy court. Macklin has engaged in slipping back and forth between the Bankruptcy Court and District Court, attempting to shop for the most favorable ruling from whomever Macklin believes is the most favorable judge at the moment. Macklin has not been diligent in the prosecution of his rights and the appeal of the final judgment of this court.

Fifth, the changes in law stated in *Jesinoski* and *Merritt* bear no relation to the basis for the rulings in the Order and the Judgment. Therefore, Macklin's request for relief pursuant to Rule 60(b) (6) is denied.

THE POST-JUDGMENT RULINGS IN *JESINOSKI* AND *MERRITT* ARE NOT A BASIS FOR RELIEF PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b)(4)

Macklin argues that, pursuant to Rule 60(b) (4), *Jesinoski* and *Merritt* have made the court's decisions void and that the orders violated due process. Rule 60(b) (4) allows for a party to seek relief from a final judgment if the judgment is void. Rule 60(b) (4) applies "only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010). For instance, a judgment is not void "simply because it is or may have been erroneous." *Id.* at 270 (internal citations omitted). A motion under Rule 60(b) (4) is not a substitute for a timely appeal. *Id.*

Under Rule 60(b) (4), a judgment may be set aside as void for lack of jurisdiction generally when the rendering court lacked even an "`arguable basis' for jurisdiction." *DiRaffael v. California Military Dep't,* No. 12-57200, 2015 WL 625197, at *1 (9th Cir. Feb. 13, 2015) (citing *Espinosa*, 559 U.S. at 271).

It is worth noting first that Macklin does not specifically argue anywhere in the Motion or the Reply specifics grounds to justify relief under Rule 60(b) (4). Rather, the one reference to Rule (b) (4) is the reference to the Seventh Circuit decision in *Simer v. Rios,* 661 F.2d 655 (7th Cir. 1981), for the proposition that vacating a judgment is proper when it is void because it was obtained in violation of the party's procedural Due Process rights. Macklin fails to state what Due Process violation was sufficient for vacating the judgment in *Simer.* The Seventh Circuit provides the following guidance in its decision:

Mere error in the entry of a judgment does not render a judgment void for purposes of Rule 60(b) (4). *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 374-78, 60 S. Ct. 317, 318-20, 84 L. Ed. 329 (1940). But where an error of constitutional dimension occurs, a judgment may be vacated as void. One such constitutional error for concluding that a judgment is void for purposes of Rule 60(b) (4) is if the judgment was entered in violation of due process.
As is discussed below, in greater detail, entry of the settlement decree without notice to putative class members violated the due process rights of the class members. Entry of the settlement decree, while not binding on absent individuals, nonetheless did prejudice the rights of these individuals. Therefore, as a matter of due process, notice was required to protect their rights. Because this notice never was delivered the judgment must be vacated as void. *Sertic v. Cuyahoga Lake, etc., Carpenters District Council,* 459 F.2d 579, 581 (6th Cir. 1972); *Sagers v. Yellow Freight System, Inc.,* 68 F.R.D. 686 (N.D. Ga.1975).

Id. at 663-664.

Macklin does not contend that he was not provided notice, nor provided with the opportunity to petition the court, nor provided the opportunity to file his motion for summary judgment, nor provided the opportunity to respond to the defense and request for relief by DBNTC. Macklin does not allege any procedural deficiency. Rather, he merely argues that the court got it wrong, based on his reading of the post-judgment decisions in *Jesinoski* and *Merritt* (and ignoring the detailed rulings of the court on the various motions in this Adversary Proceeding).

First, as discussed *supra,* DBNTC clearly is a party-in-interest with standing. **Macklin attempts to argue that under *Jesinoski* and *Merritt* that the recession was valid and thus the security interest is void. As such, Macklin argues that DBNTC has no interest and thus the court has no subject-matter jurisdiction. This is incorrect and DBNTC can defend its rights and interests against Macklin's claims, including asserting that it held the title to the Property. Further, this federal court had and has subject matter jurisdiction.**

Second, a motion under Rule 60(b) (4) cannot be a substitute for an appeal. Macklin, after having attempted and lost in both the District Court and this court in his actions against DBNTC, Macklin now seeks to reverse the final judgment of this court. Macklin's grounds are that because the court made an alleged error of law, the final judgment of this court is void. It is clear that Macklin has engaged in forum shopping in order to try and achieve a favorable ruling. Once Macklin the final judgment was entered in this court, Macklin attempted to prosecute a nearly identical complaint in the district court.

Instead of taking an appeal from this court's ruling, Macklin implemented a litigation strategy to prosecute the same claims in the District Court. Macklin made a conscious decision to forego the appellate process and instead circumvent it through collaterally attacking the judgment by seeking a different decision in another court. The time to appeal the final judgment in this court has come and gone, and a Rule 60(b) (4) motion will not serve as a substitute for Macklin's decision not to pursue an appeal.

This court has and had subject matter jurisdiction, has and had *in personam* jurisdiction of parties who have and had standing to litigate the rights and interests at issue, and no Due Process violation have been identified (such as failure to be provided notice of the proceeding(s)). Macklin's request for relief under Rule 60(b)(4) is denied.

THE POST-JUDGMENT RULINGS IN *JESINOSKI* AND *MERRITT* ARE NOT A BASIS FOR GRANTING RELIEF PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b)(5)

Rule 60(b) (5) allows a party to obtain relief from a judgment or order if, in relevant part, "applying [the judgment or order] prospectively is no longer equitable." A party may not challenge the legal conclusions on which a prior judgment or order rests. *Horne v. Flores,* 557 U.S. 433, 447, 129 S. Ct. 2579, 2593, 174 L. Ed. 2d 406 (2009). Instead, Rule 60(b) (5) provides a means by which a party can ask a court to modify or vacate a judgment or order if "a significant change either in factual conditions or in law" renders continued enforcement "detrimental to the public interest." *Id. (citing Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 384, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992)). The party seeking relief bears the burden of establishing that changed circumstances warrant relief. *Rufo* at 383.

Rule 60(b) (5) applies only to those judgments that have prospective application. "The standard used in determining whether a judgment has prospective application is whether it is executory or involves the supervision of changing conduct or conditions." *Harvest v.*

Castro, 531 F.3d 737, 748 (9th Cir. 2008) (citing *Maraziti v. Thorpe,* 52 F.3d 252, 254 (9th Cir.1995) (internal quotation marks and citations omitted). Merely because a court's actions have some continuing consequences, "does not necessarily mean that it has `prospective application' for the purposes of Rule 60(b) (5)." *Twelve John Does v. District of Columbia,* 841 F.2d 1133, 1138-1139 (D.C. Cir. 1988). For instance, declaratory judgments that have no "future-directed" declarations are not considered prospective for purposes of Rule 60(b) (5). 12 MOORE'S FEDERAL PRACTICE, § 60.47[1] [c] (Matthew Bender 3d ed.).

Here, Macklin asserted various federal law and related state law claims against DBNTC, as well as seeking a determination of whether Macklin or DBNTC held title to the Property. The court has made those determinations, which are embodied in the final judgment issued by this court, for which no appeal was prosecuted. The court in its final judgment made determinations as to the rights and obligations of the parties as they existed at the time of the litigation. No part of the judgment is prospective. The court has not ordered parties to do anything in the future, does not have to "supervise" the enactment of the judgment, and has no further hearings to determine the rights, conduct, and actions of the parties in the future. There was nothing in either the order dismissing, the order granting summary judgment, nor the final judgment which has prospective application. The determinations made by the court were not ones that required continued court oversight nor were they executory — they were determinations of the rights of the parties.

Macklin argues, though not stating grounds with particularity as required by Rule 7(b) nor specifically citing Rule 60(b) (5) (C), that the rulings in *Jesinoski* and*Merritt* have somehow altered the court's rulings in such a way that the orders themselves are "no longer equitable." However, relief under Rule 60(b) (5) requires that the judgment is prospective before the court determines whether its continued application is no longer equitable. Macklin has failed to reach the initial burden of showing that the dismissal and summary judgment orders (although Macklin attempts to have all orders vacated) are somehow executory or require further court oversight. Instead, **Macklin merely makes a blanketed assertion that the two recent cases act as an automatic reset for Macklin's claim with no regard to the requirements under Rule 60(b) (5).**

Macklin's request to vacate under Rule 60(b) (5) is denied.

RELIEF PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b)(1) IS NOT PROPER, MACKLIN

FAILING TO SEEK RELIEF WITHIN ONE YEAR OF THE JUDGMENT

Macklin argues that under Rule 60(b)(1), the court should vacate all prior orders and judgments. However, the time for Macklin to make a motion to vacate under 60(b)(1) has come and gone.

Pursuant to Rule 60(b)(1), the court may vacate a final judgment, order, or proceeding for "mistake, inadvertence, surprise, or excusable neglect." However, Rule 60(c) (1) specifically limits the timing of motions "for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order of the date of the proceeding."

Here, the order dismissing the first (Trust in Lending Act), second (Real Estate Settlement Procedures Act), third (Fair Credit Reporting Act), fourth (Fraud), fifth (Unjust Enrichment), sixth (Civil RICO, seventh (Business and Professions Code § 17200), and eighth (Breach of Security Agreement) causes of action was entered February 16, 2012. Dckt. 221. The order granting summary judgment to DBNTC for the ninth (Wrongful Foreclosure) and tenth (Quiet Title) cause of action was entered May 24, 2013.

Macklin did not file the instant Motion until January 22, 2015. This is thirty-four months after the order dismissing the first eight causes of action and eighteen months after the judgment was entered by this court. As stated by the Supreme Court in *Ackermann, "[A]* motion for relief because of excusable neglect as provided in Rule 60 (b) (1) must, by the rule's terms, be made not more than one year after the judgment was entered." *Ackerman v. United States,* 340 U.S. at 197. "The one-year limitations period for filing a Rule 60(b) (1) motion is absolute.*Warren v. Garvin,* 219 F.3d 111, 114 (2d Cir. 2000) (citing 12 James Wm. Moore,*Moore's Federal Practice,* P 60.65[2] [a], at 60-200 (3d ed. 1997)); *United States v. Berenguer,* 821 F.2d 19, 21 (1st Cir. 1987) (citing 11 Wright & Miller, § 2866)."*Tool Box, Inc. V. Ogden City Corp.,* 419 F.3d 1084, 1088 (10th Cir. 2005).

Therefore, because Macklin filed the present Motion seeking relief pursuant to Rule 60(b)(1) more than one year after the orders and the judgment were entered, the relief is denied.

THE POST-JUDGMENT RULINGS IN *JESINOSKI* AND *MERRITT* DO NOT WARRANT VACATING THE JUDGMENT AND ORDERS IN THIS

ADVERSARY PROCEEDING PURSUANT TO RULE 60(d)

Macklin lastly requests relief under Rule 60(d). In Macklin's Motion, the only mention of Rule 60(d) is where Macklin states: "FRCP Rule 60(d) Other Powers to Grant Relief. This rule does not limit a court's power to: (1) entertain an independent action to relieve a party from a judgment, order, or proceeding." Dckt. 380, pg. 3. Even in Macklin's conclusion, Macklin fails to raise any grounds that would support relief pursuant to Rule 60(d). Rather, Macklin leaves it for the court to determine what, if any, of the statements in the Motion would be the grounds that Macklin seeks to assert to support this relief. Macklin does not even address any grounds for Rule 60(d) relief in Macklin's reply to the Opposition. Dckt. 400.

Rule 60(d) provides that the rule does not limit a court's power to: "(1) entertain an independent action to relieve a party from a judgment, order, or proceeding; (2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or (3) set aside a judgment for fraud on the court." Rule 60(d) does not create a new right of action but rather it merely preserves the existence of a "procedural remedy . . . by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action." Rule 60, Advisory Committee note of 1946. The typical grounds justifying an independent actions in equity is fraud. *See* *United States v. Beggerly*, 524 U.S. 38 (1998).

In order for a party to seek relief under Rule 60(d), the moving party must also show a meritorious claim or defense. Furthermore, courts have found that when there is both a Rule 60(b) motion and an independent action based on the very same ground, the Rule 60(d) motion should be dismissed since the court is considering the same issues in the context of Rule 60(b). *Goodyear Tire & Rubber Co. v. H.K. Porter Co.*, 521 F.2d 699, 700 (6th Cir. 1975).

Here, Macklin has not provided any grounds in which a motion under Rule 60(d) (1) is proper. Nowhere in the Motion nor Reply does Macklin mention any fraud or independent actions in equity that may even be construed as a ground for relief under Rule 60(d) (1).

From the court's review of the case law, the court finds no basis that justifies relief under Rule 60(d) (1) for the post-judgment rulings. Rule 60(d) (1) is not the catch-all provision that allows a party a last gasp attempt to retry litigation which they lost. Instead, Rule 60(d)(1) was meant to "preserve whatever power federal courts had prior to the adoption of Rule 60 to relieve a party of judgment by means of an independent action according to traditional

principles of equity." 12 MOORE' S FEDERAL PRACTICE, § 60.80 (MATTHEW BENDER 3D ED.) (citing *Treadaway v. Academy of Motion Picture Arts & Sciences,* 783 F.2d 1418 (9th Cir. 1986).

Macklin has not identified any independent action which predates Rule 60 that would justify relief under Rule 60(d) (1). Rather**, this appears to be a hail mary reference** for the court to just set the judgment aside because Macklin lost, irrespective of Macklin not having, and failing to show, proper grounds for relief under Rule 60(b).

Therefore, because Macklin failed to provide grounds of an independent action in equity and failed to plead with particularity as required by Rule 7(b), the relief is denied.

CONCLUSION

After review of the law; consideration of all arguments presented by the parties; the orders, findings of fact and conclusions of law, and final judgment in this Adversary Proceeding; the documents and evidence presented; and the proceedings in the District Court; this court concludes that Macklin has failed to show grounds for relief under Federal Rule of Civil Procedure 60. The court denies Macklin's Motion in its entirety.

This Memorandum Opinion and Decision constitutes the court's findings of fact and conclusions of law pursuant to Rule 52 and Bankruptcy Rule 7052.

The court shall issue a separate order consistent with this Memorandum Opinion and Decision.

[1] Unless other wise stated, the court shall refer to the Federal Rules of Civil Procedure as "Rule [number]" and the Federal Rules of Bankruptcy Procedure as "Bankruptcy Rule [number]."

[2] Ms. Burgess was also Macklin's counsel in his Chapter 13 case filed on September 16, 2010, and continued in that representation when it was converted to one under Chapter 7. On October 28, 2011, Allan Frumkin, Esq. was substituted in as counsel for Macklin in the bankruptcy case and Ms. Burgess was allowed to withdraw. On January 31, 2015, Charles T. Marshall, Esq. was substituted in as counsel for Macklin in the bankruptcy case.

[3] On this point, the court's findings and conclusions stated in the Civil Minutes for the September 27, 2012 hearing on the motion to substitute counsel include:

This Adversary Proceeding has been pending for 21 months. While such a time period may not seem long when compared to California Superior Court cases or even cases pending in the District Court, this is a very old case for bankruptcy courts in this District. The Plaintiff-Debtor has changed counsel in this case multiple times, and for at lease one counsel firing her and then rehiring her when he became dissatisfied with her replacement counsel (Allan R. Frumkin) who apparently told a tale of the virtues of hiring him. That counsel sought to withdraw after losing one motion to file a second amended complaint in this Adversary Proceeding. In requesting to withdraw from representing the Plaintiff-Debtor, Allan R. Frumkin sought to leave the Plaintiff-Debtor unrepresented.

. . .

At the hearing, Daniel J. Hanecak, the proposed new counsel, confirmed that he has reviewed the file and has knowledge of the deadlines in this case. Further, he confirmed that he has spoken with the Plaintiff-Debtor and with full knowledge of the deadlines and scheduling in this case, is prepared to accept the responsibility of being counsel for the Plaintiff-Debtor. The court also reviewed with Mr. Hanecak the causes of action which remain in this case following the partial granting of the motion to dismiss filed by the Defendant. Order, Dckt. 222.

Civil Minutes, pg. 3; Dckt. 285.

In Ms. Burgess' declaration in support of the present motion she professionally and tactfully states the basis for the Plaintiff-Debtors desire to once again change counsel. The court paraphrases these grounds as follows. The Plaintiff-Debtor does not believe that Ms. Burgess understands the causes of action he wants to present and does not arguments [sic] the way the Plaintiff-Debtor would if he were the attorney. Because of the differences as to how Ms. Burgess believes that the case should be presented and that of the Plaintiff-Debtor, there has been a strain created on the attorney-client relationship.

Id.

[4] **The court allowed Macklin to essentially serve as co-counsel to afford Macklin the opportunity to present whatever arguments he believed appropriate, notwithstanding his attorney of record not being willing to present the motion or Macklin believing that this attorney, as others, did not have the same understanding of the law as Macklin.**

[5] Bankruptcy Rule 8002(c)(2) in effect at the time of the Notice of Appeal allowed a party to seek leave to file a notice of appeal after the 14-day period expired upon the grounds of excusable neglect.

[6] Memorandum Opinion and Decision, FN. 8, Motion to Dismiss First Amended Complaint, Dckt. 221.

[7] If Macklin's contention is correct that, by virtue of the alleged rescission, DBNTC could have no rights and federal subject matter jurisdiction could not exist, then the Supreme Court in *Jesinoski* would have concluded that it did not have subject matter jurisdiction to determine the dispute between that borrower, who asserted that it had timely rescinded the loan and the defendant who disputed the alleged rescission, and dismissed the federal action. The same would be true for the Ninth Circuit in *Merritt,* and the Ninth Circuit would not of had subject matter jurisdiction to determine the TILA claims.

[8] While Macklin latches on this one point, this was not the basis for the court denying the Motion to File Second Amended Complaint.

[9] Again, this was not the basis for denying the Motion to File Second Amended Complaint. It reflects that Macklin was merely continuing to rehash old pleadings, attempting to repeatedly present the same thing to the court.

[10] As bankruptcy attorneys know, Congress has done parties a great favor in establishing the bankruptcy courts and having judges dedicated to getting matters quickly to trial. Because a bankruptcy judge is able to focus on the bankruptcy and the state and federal law bankruptcy related matters (as opposed to state court and district court judges who are presented with criminal, family law, immigration, Social Security, environmental, Constitutional challenges, administrative, maritime cases; to name just a few), a bankruptcy judge can get a matter to a guaranteed trial date within two months of a pre-trial conference — if the parties are actively prosecuting their matter in good faith.

[11] **In *Merritt,* the Ninth Circuit concluded that for purposes of basic pleading, the borrower seeking rescission need not plead that tender had been made or was possible. However, the Ninth Circuit stated that tender, and the ability of the borrower seeking to enforce rescission could be a requirement at the time of summary judgment or judgment. Clearly, a party had standing to assert the rights of the holder of the note being rescinded to receive the required tender of monies back from the borrower.**

[12] In *Phelps,* the Ninth Circuit noted that Rule 60(b)(6) has application well beyond petitions *for habeas corpus,* and "while some of the factors we emphasize here may be useful in contexts other than the one before us, we express no opinion on their applicable *vet non* [or not] beyond the scope of*habeas corpus. Phelps v. Alameida,* 569 F.3d at 1135 n. 19.

[13] In making this point, the Supreme Court cited to its decision in *Ackermann* in which it denied Rule 60(b)(6) relief to one party to the action who failed to appeal, notwithstanding another party to the same action who did prosecute an appeal and won reversal of the ruling as to that party. "We affirmed the denial of Rule 60(b) relief, noting that the movant's decision not to appeal had been free and voluntary, although the favorable ruling in the companion case made it appear mistaken in hindsight." *Id.* at 538.

[14] This factor presents the court with an interesting dilemma. If the change in law in the second case is not closely related, then it is unlikely that the change will have a significant impact on other case. Thus, the subsequent change in law decision will be relevant only when it is closely related. To give this factor disproportionately significant weight would be to say that it is a *per se* basis for granting such relief. That interpretation would be contrary to the well-established Supreme Court rulings for when Rule 60(b)(6) relief should be granted.

[15] The facts considered by the Ninth Circuit in coming to this conclusion included:

(1) the prevailing law upon which the trial court decision was based was not well settled, but in flux. The same issue was pending before three different Ninth Circuit, which reached diametrically opposite outcomes, for which no published decisions were issued. The law was unsettled.

(2) Phelps had actively appealed the decision and sought reconsideration, including seeking a rehearing *en banc* and a petition for certiorari, all while litigating from his jail cell.

We cannot imagine a more sterling example of diligence than Phelps has exhibited. At every stage of this case over the past decade, Phelps has pressed all possible avenues of relief, has been remarkably undeterred by the repeated and often unjustified setbacks he has suffered, and has put forward cogent, compelling, and correct legal arguments, at times doing so without the benefit of professional legal advice. No one should have to work so hard to have the merits of his constitutional claims reviewed by a federal judge.

Id. at 1137.

(3). The judgment at issue did not alter the positions of the parties taken in reliance thereon. For Phelps, he merely stayed in custody and the state held him in custody.

(4). The Motion for relief was originally filed only four months after the original judgment became final.

(5). The change in law was directly related to the issue advanced by Phelps and resolved a conflict between competing and coequal legal authorities.

(6). Granting 60(b)(6) relief does not raise significant comity concerns because the order being vacated was not one based on the merits.