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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF LOS ANGELES, NORTH CENTRAL DISTRICT**

11 DAVID C

12)
13) Plaintiff,

14 vs.

15 INDYMAC VENTURE, LLC A DELAWARE)
16 LIMITED LIABILITY COMPANY;)
17 INDYMAC MORTGAGE SERVICES, A)
18 DIVISION OF ONEWEST BANK, FSB; TD)
19 SERVICE COMPANY; A CALIFORNIA)
20 CORPORATION; 10542 W Street, Toluca)
21 Lake, CA 91602 and described as APN 2424-)
22 014, Real property, in Rem Defendant; ALL)
23 PERSONS UNKNOWN CLAIMING ANY)
24 LEGAL OR EQUITABLE RIGHT, TITLE,)
25 ESTATE, LIEN OR INTEREST IN THE)
26 PROPERTY DESCRIBED IN THE)
27 COMPLAINT ADVERSE TO PLAINTIFF'S)
28 TITLE, OR ANY CLOUD ON PLAINTIFF'S)
TITLE THERETO; AND DOES 1-10,)
Defendants.)

Case No: EC056230

OBJECTION TO TD SERVICE
COMPANY'S REQUEST FOR JUDICIAL
NOTICE

(Filed concurrently with Plaintiff's Opposition
to TD Service Company Demurrer)

Date: September 23, 2011

Time: 9:45 a.m.

Dept.: D

DATE FILED: JULY 5, 2011

TRIAL DATE: None set.

26 Plaintiff, DAVID C, an individual, hereby OBJECTS TO TD SERVICE COMPANY'S
27 REQUEST FOR JUDICIAL NOTICE OF EXHIBITS 1 THROUGH 11 on file herein.
28 Comes now Plaintiff David C herewith serves upon Defendants and their

OBJECTION TO TD SERVICE COMPANY'S REQUEST FOR JUDICIAL NOTICE

1 Attorneys of record his OBJECTION to Defendant T.D. Service Company's Request for
2 Judicial Notice of the Deed of Trust (Exhibit 1) as recorded on Plaintiff's property in July
3 11, 2006 under Instrument No. 20061622, the Notice of Default (Exhibit 3) as recorded
4 on Plaintiff's property on December 28, 2010 and the Substitution of Trustee (Exhibit 4) as
5 recorded on Plaintiff's property January 31, 2011.
6

7 While the official acts of the Recorder's Office, Los Angeles County, California may be subject
8 to judicial notice, defendant's recording of such acts and the rationale that they proffer in that
9 regard, renders these defective documents inappropriate for judicial notice. There is no
10 foundation as to the qualifications of the person making the compilation of records, and the
11 accuracy of this record is the subject of Plaintiff's July 5, 2011 Complaint on file herein. In
12 short, without more these are just records of acts from which nothing may be appropriately
13 deduced.
14

15 "[T]he taking of judicial notice of the official acts of a governmental entity does not in and of
16 itself require acceptance of the truth of factual matters which might be deduced therefrom, since
17 in many instances what is being noticed, and thereby established, is no more than the existence
18 of such acts and not, without supporting evidence, what might factually be associated with or
19 flow therefrom." (Citations) (Mangini v. R. J. Reynolds Tobacco Co., (1994) 7Cal.4th 1057,
20 1062.)
21

22 The original Trustee OLD REPUBLIC TITLE (See Deed of Trust
23 Exhibit 1 on file herein) who was still the Trustee of record was
24 likely not aware that foreclosure had been initiated as evidenced by the January 28, 2011
25 Affidavit Of Mailing of the Substitution of Trustee (Exhibit 4) which was allegedly executed on
26 December 28, 2010. (See Exhibit 4) It's important that the mailing of the Substitution Of Trustee
27
28

1 be mailed to the current trustee BEFORE (emphasis added) the NOTICE OF DEFAULT (NOD)
2 is recorded.

3 **See Fannie Mae Release 98-06 states the following:**

4 "A trustee that is not the original trustee named in the mortgage documents must not submit the
5 "notice of default" for recordation in connection with a non-judicial foreclosure of a California
6 property until after a "substitution of trustee" has been recorded. When the "notice of default" is
7 recorded first, it may carry the name of the trustee of record or the name of the new trustee. If
8 the "notice of default" is recorded in the name of the trustee of record, that trustee will have no
9 knowledge of the foreclosure and the powers, duties, and authority of the trustee will actually be
10 exercised by a trustee that is not yet of record. If the "notice of default" names the new trustee,
11 that trustee is acting without power because (under Section 2934a of the California Civil Code)
12 it
13 is the filing of the "substitution of trustee" that provides authority to the new trustee. When a
14 "substitution of trustee" is required in connection with non-judicial foreclosures in California, a
15 servicer should make sure that the trustees it uses have the "substitution of trustee" recorded
16 before the "notice of default" is recorded. The two documents can be submitted for recordation
17 on the same day, as long as the trustee requests that the "substitution of trustee" be recorded
18 immediately before the "notice of default".
19
20

21 Further arguments to support that the Trustee was unlawful is that when the Notice of Default
22 was filed on December 28, 2010, the Substitution of Trustee must be sent to "required persons"
23 at that time. In this case the Substitution Of Trustee was mailed on January 28, 2011 and
24 recorded as instrument number 2011016 on January 31, 2011. If the Trustee is changed
25 after the Notice of Default, then it needs to be sent prior to the Notice of Trustee Sale.

26 So, given that the Substitution of Trustee was not sent with the Notice of Default, then the
27 indication is that the Substitution Procedure was unlawful.
28

1 Former trustees and all others who are not the properly appointed and serving trustee at the time
2 of the step taken will be unable to convey title and the sale will be “void” and not just
3 “voidable”. See **Dimock v Emerald Props. (2000) 81 CA 3th 868, 97 CR2d 255.**

4 In Dimock, the trustee service agent abandoned the notice of default recorded by a substituted-in
5 trustee when it discovered an earlier notice of default recorded by the predecessor trustee,
6 without mollifying the documents installing the new trustee, the service agent conducted a
7 trustee sale and had the former trustee sign the trustee’s deed. The Court of Appeal held that the
8 sale “void” and not just “voidable” because the former trustee had no power to convey title at
9 the time of sale.
10

11 The following excerpt is taken straight from the December 28, 2010 Notice of Default.

12 TS No.: B521741 CA Unit Code: B Loan No.: 1231686/C

13 NOTICE OF DEFAULT AND ELECTION TO SELL UNDER DEED OF TRUST If you have
14 any questions, you should contact a lawyer or the governmental agency, which may have
insured your loan.

15 Notwithstanding the fact that your property is in foreclosure, you may offer your property for
16 sale provided the sale is concluded prior to the conclusion of the foreclosure.

17 Remember, YOU MAY LOSE LEGAL RIGHTS IF YOU DO NOT TAKE PROMPT ACTION.
18 NOTICE IS HEREBY GIVEN: That T.D. SERVICE COMPANY is either the original Trustee,
the duly appointed Trustee, or acting as agent for the Trustee or Beneficiary under the following
described Deed of Trust:

19 Trustor: DAVID C

20 Recorded 07/24/2006, (as Instrument No. 20061622, (in Book) ,(Page) of Official Records in the
21 Office of the Recorder of LOS ANGELES COUNTY, CALIFORNIA describing land therein as:
22 SAID DEED OF TRUST secures certain obligations including ONE NOTE FOR THE
ORIGINAL sum of \$2,762,500.

23 Section “2934(a) (D) (c) of the California Civil Code does not state that a trustee can initiate a
24 foreclosure when they are not yet the Trustee.” This piece of legislation simply allows for the
25 substitution after the NOD and assumes that the original Trustee of record initiated the
26 foreclosure. T.D. Service Company’s role is intentionally misleading in that they use
27 language that they are; “either the original Trustee, the duly appointed Trustee, or acting
28

OBJECTION TO TD SERVICE COMPANY’S REQUEST FOR JUDICIAL NOTICE

1 as agent for the Trustee or Beneficiary.”

2 When in fact, the first line of the last paragraph of the DECEMBER 28, 2010 NOD states; “the
3 present Beneficiary under such Deed of Trust has executed and delivered to said duly
4 appointed Trustee, a written Declaration of Default and Demand for Sale, and has
5 deposited with said duly appointed Trustee such Deed Of Trust and all documents
6 evidencing obligations secured thereby.” Since T.D. SERVICES COMPANY is the only
7 entity disclosed on the NOD, and they are allegedly in possession of the Deed Of Trust
8 and security instruments to effect the foreclosure, that by definition defines them as a
9 Trustee.
10

11 As a result, the Deceptive Business Act, Invalid Substitution Of Trustee - Page 13
12 paragraph 24 of the Deed Of Trust (Exhibit A of the JULY 5, 2011 Complaint on file
13 herein) under “Substitute Trustee”, the language clearly states that
14 the Lender, may appoint successor trustees via an instrument acknowledged by the
15 Lender and recorded in the County in which the property is located. This paragraph also
16 states in relevant part, that this procedure for substitution shall govern to the exclusion of
17 all other provisions for substitution. This implies that only the Lender can substitute a
18 trustee. The alleged Lender as defined on page 1 of the Deed Of Trust is INDYMAC BANK,
19 FSB. This paragraph does not state that successors, assigns, or nominees may
20 appoint a Successor Trustee. Therefore, The Substitution Of Trustee is invalid as it was
21 executed by an officer of INDYMAC VENTURE, LLC. Given that Plaintiff contends that
22 INDYMAC BANK, FSB. AND INDYMAC VENTURE, LLC lacks the requisite standing to
23 declare a Default and to initiate foreclosure, it goes without saying that T.D.SERVICE
24 COMPANY had no legal authority to record a Notice of Default and a Substitution of Trustee.
25
26
27
28

1 The Federal Deposit Insurance Corporation (hereinafter FDIC) acting in the capacity of “AS
2 RECEIVER FOR INDYMAC BANK, FSB” and located at 550 17th Street, NW, Washington,
3 D.C. 20249 had allegedly by way of a Omnibus Assignment dated June 22, 2009 transferred all
4 rights, title and interest in and to the loan originally made by IndyMac Bank, FSB to IndyMac
5 Venture, LLC A Delaware Limited Liability Company.

6 The FDIC was merely the RECEIVER for IndyMac Bank, FSB and as such could not legally
7 assign any rights or obligations that IndyMac Bank, FSB did not have. The FDIC acting as
8 Receiver auctioned off loans without endorsements and as such IndyMac Venture, LLC cannot
9 prove their legal standing.
10

11 Therefore, IndyMac Venture, LLC is not a real party in interest in this wrongful foreclosure and
12 is not the beneficiary of the note and has no standing. On June 10, 2011, the Bankruptcy
13 Appellate Panel for the 9th Circuit held that Wells Fargo Bank lacked “Prudential Standing” to
14 foreclose along with the following findings of fact. In re Veal, 9th Circuit BAP Nos. AZ-10-
15 1055, az 10-1056, (June 10, 2011) The Court discusses the issue of Constitutional Standing,
16 Prudential Standing, the real party in interest issue, the relationship of both Articles 3 and 9 of
17 the Uniform Commercial Code to the sale and transfer of mortgage notes, and then brings all of
18 these theories together under the central concept of who is the “person entitled to enforce the
19 note.”
20

- 21
- 22 **1. “IN THIS CASE, ONE COMPONENT OF PRUDENTIAL STANDING IS**
- 23 **PARTICULARLY APPLICABLE. IT IS THE DOCTRINE THAT A PLAINTIFF**
- 24 **MUST ASSERT ITS OWN LEGAL RIGHTS AND MAY NOT ASSERT THE LEGAL**
- 25 **RIGHTS OF OTHERS. SPRINT, 554 U.S. AT 589; WARTH, 422 AT 499; OREGON V**
- 26 **LEGAL SERVS. CORP., 552 F. 3D 965, 971 (9TH CIR., 2009).**
- 27 **2. “Civil Rule 17(a)(1) starts simply: “An action must be prosecuted in the name of the real**
- 28 **party in interest... The modern function of the rule... is simply to protect the defendant**
- against a subsequent action by the party actually entitled to recover, and to insure**
- generally that the Judgement will have its proper effect as res judicata.”**
- 3. “The party asserting it has standing bears the burden of proof to establish standing.**
- Sumers v Earth Island Inst., 555 U.S. 488 (2009)**

1 4. “Real party in interest analysis requires a determination of the applicable substantive
2 law, since it is that law which defines and specifies the wrong, those aggrieved, and the
3 redress they may receive. 6A Federal practice and Procedure sec 1543 at 480-481

4 Moreover, the obligation that arose as a result of the funding of the loan and the
5 acceptance of the benefits of said funding, gave rise to an obligation between the
6 borrower and the actual lender (investor). The documentation utilized by the parties at
7 many levels in the securitization chain, do not reflect the intention of the real parties in
8 interest, and therefore do not constitute complete evidence of the obligation. The Deed of Trust
9 utilizing a nominee or strawman (INDYMAC BANK, FSB) as the beneficiary, where said
10 nominee was never involved in the funding of the transaction, and elsewhere any interest or
11 claim regarding the obligation note or mortgage (Deed of Trust) is the equivalent of the
12 failure to state any beneficiary under the Deed of Trust or any mortgagee under mortgage
13 deed. Lastly, the party who can exercise the power of sale under non-judicial statutory
14 authority, is limited to a party who could plead and prove a case in foreclosure in a
15 judicial proceeding. Without proof, the Defendant’s are opening the door to moral
16 hazard, and allowing the taking of Plaintiff’s property without due process.

17 Plaintiff has already indicated that this was a table-funded loan, which was funded like
18 hundreds of others originated by INDYMAC BANK, FSB, through third parties that were not
19 disclosed nor were the fees for the origination, yield spread premiums or other
20 compensation relating to the funding disclosed to the Plaintiff. This is presumptively a
21 predatory loan under regulation Z of the Federal Reserve, and the Federal Truth in
22 Lending Act. This means that the identity of the creditor has been misstated and the issue
23 of whether the obligation is secured is dependent upon whether there was a split of the
24 note from the mortgage which is a question of fact.
25 The simple answer is that if the note is payable to one party and the beneficiary under the
26 note is another party, the obligation is not secured.

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28 note is another party, the obligation is not secured.

1 deed of trust is another party, the note and mortgage were separated and the obligation is
2 no longer secured. This goes to the heart of plaintiff's Complaint on file herein and is
3 why Plaintiff objects to the Deed of Trust. (Exhibit 1)

4 Therefore, there is no valid Notice of Default or Notice of Sale. (EXHIBIT 5) The substitute
5 trustee has failed to perform due diligence or is ignoring the duty to do so.

6 If interest in the promissory note has been sold to a REMIC which is stated in Plaintiff's
7 Complaint on file herein, and proper assignment was never done at the county, then the
8 terms of the DOT has been violated, making it invalid. This will convert the debt from a
9 secured instrument to an unsecured instrument. This means that the lender might be able
10 to sue to collect the money, but can never sell Plaintiff's property to collect on the
11 collateral.
12

13 Based on the above, the substitute Trustee T.D. Service Company on the deed of trust had
14 a duty to cease any proceedings. The substitution of trustee was, as indicated above, most
15 likely executed by a party with no interest, beneficial or otherwise, in the obligation, note
16 or mortgage. See David C Securitization Audit as prepared by Certified Forensic Loan
17 Auditors indicating that Plaintiff's loan was placed into INDYMAC RESIDENTIAL
18 MORTGAGE-BACKED TRUST, Series 2006-L3 Issuing Entity and therefore Indymac
19 Venture, LLC could not have possibly received any interest from which to both declare
20 a default and execute a Substitution of Trustee. (ATTACHED HERETO AND MADE A
21 PART HEREOF AS Exhibit A)
22
23

24 **Unauthorized Agent, Deceptive Business Act**

25 Before a Trustee can commence a foreclosure, they must be empowered by the beneficiary
26 either
27 by a Deed Of Trust or a valid Substitution Of Trustee recorded in the County in which the trust
28

1 property is situated. Plaintiff has noted that the original Trustee on the Deed Of Trust was
2 Old Republic Title. A Substitution Of Trustee (Exhibit 4) was signed on 12/28/2010
3 by Jeannie Caldwell as “NO TITLE” INDYMAC VENTURE, LLC by INDYMAC
4 MORTGAGE SERVICES, a division of ONEWEST BANK, FSB.

5 Therefore, ONEWEST BANK, FSB appointed oneself as Trustee without any documentary
6 proof of being “Beneficiary” of INDYMAC RESIDENTIAL MORTGAGE-BACKED TRUST,
7 Series 2006-L3 Issuing Entity and in doing so, initiated foreclosure on a Plaintiff’s principle
8 residence by promptly executing and recording a Notice Of Default. If this act stands, what’s to
9 stop anyone from appointing oneself as a substituted trustee?
10

11 Given this discovery, all instruments originated, executed and recorded by T.D. Service
12 Company may be void.

13 This is in violation of Civil Code Sections 2923.5 and 2924.

14 Also, Pursuant to California Civil Code Section 2943(b), and Under UCC §3502 a
15 promissory note is not dishonored until the maker refuses to pay it when presentment
16 thereof is made. “Presentment” is defined by the UCC as “a demand to pay the
17 instrument made by a person entitled to enforce an instrument.” The UCC also requires
18 that “Upon demand of the person to whom presentment is made, the person
19 making presentment must 1) exhibit the instrument” [emphasis added]
20 (UCC3501(B)(2)(a)).
21

22 Until the proper presentment is made the UCC requires that the “obligation is suspended
23 to the same extent the obligation would be discharged if an amount of money equal to the
24 amount of the instrument were taken, and the following rules apply: ...2) In the case of a
25 note, suspension of the obligation continues until dishonor of the note or until it is paid.”
26 (UCC 3310(b)) Therefore, the borrower is not in default until the lender can exhibit the
27

1 instrument, proving dishonor. Default is not simply missing payments. It also includes
2 refusal to pay after presentment has been made. Default must also include an exhibit of
3 the instrument. Plaintiff David C **denies the authenticity of the Note, the**
4 **Defendant INDYMAC VENTURE, LLC must authenticate the Note, and its signatures.**
5 Thus Indymac Venture, LLC, Onewest Bank, FSB and T.D. Service Company in this EC056230
6 lawsuit cannot
7 claim that Plaintiff David Carozza was in default unless they can produce the original note
8 and deed of trust. Under California law, the enforcement of a promissory note that is secured by
9 a deed of trust is governed by the California Uniform Commercial Code ("California UCC").
10 Therefore, plaintiff strongly requests that Defendant's Request for Judicial Notice of the Deed of
11 Trust recorded as instrument number 20061622, the Corporate Assignment of Deed of trust
12 recorded on June 30, 2009 as instrument number 20090980, the Notice of Default recorded as
13 instrument number 20100924 and the recorded Substitution of Trustee under instrument number,
14 Notice Of Trustee Sale recorded as instrument number 20110660, Grant Deed –Trust Transfer
15 recorded as instrument number 20110744 and the Trustee Deed Upon Sale recorded as
16 instrument number 20110895 be denied as all instruments originated, executed and recorded by
17 T.D. Service Company may be void.
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19
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21

22 DATED: AUG. 31, 2011

LAW OFFICES OF BARRY S. FAGAN

23 By: [/S/BARRY FAGAN](#)

24 Barry S. Fagan

25 Attorney for Plaintiff
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