

1 Barry S. Fagan, Esq. (SBN 160104)  
2 Law Office of Barry S. Fagan  
3 PO BOX 1213  
4 Malibu, California 90265  
5 Telephone (310) 717-1790  
6 Facsimile (310) 456-6447  
7 pendinglawsuit@yahoo.com

8 Attorney for Plaintiff

9  
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

11 **FOR THE COUNTY OF LOS ANGELES, NORTH CENTRAL DISTRICT**

12 DAVID CAROZZA

13 Plaintiff,

14 vs.

15 INDYMAC VENTURE, LLC A DELAWARE )  
16 LIMITED LIABILTY COMPANY; )  
17 INDYMAC MORTGAGE SERVICES, A )  
18 DIVISION OF ONEWEST BANK, FSB; TD )  
19 SERVICE COMPANY; A CALIFORNIA )  
20 CORPORATION; 10542 Whipple Street, )  
21 Toluca Lake, CA 91602 and described as APN )  
22 2424-014-007, Real property, in Rem )  
23 Defendant; ALL PERSONS UNKNOWN )  
24 CLAIMING ANY LEGAL OR EQUITABLE )  
25 RIGHT, TITLE, ESTATE, LIEN OR )  
26 INTEREST IN THE PROPERTY )  
27 DESCRIBED IN THE COMPLAINT )  
28 ADVERSE TO PLAINTIFF'S TITLE, OR )  
29 ANY CLOUD ON PLAINTIFF'S TITLE )  
30 THERETO; AND DOES 1-10, )  
31 Defendants. )

Case No: EC056230

OPPOSITION TO DEFENDANT TD  
SERVICE COMPANY'S DEMURRER;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF  
AND OBJECTION TO THEIR  
CONCURRENTLY FILED REQUEST FOR  
JUDICIAL NOTICE

DATE: September 23, 2011  
TIME: 9:45 a.m.  
DEPT: D

DATE FILED: JULY 5, 2011  
TRIAL DATE: None set.

32 Comes now Plaintiff David Carozza herewith serves upon Defendants and their Attorneys of  
33 record his Opposition to Defendant TD Service Company's Demurrer to Plaintiff's complaint  
34 for the following reasons:

35 PRELIMINARY STATEMENT

36 Plaintiff David Carozza (hereinafter Plaintiff) respectfully submits this Memorandum of Points  
37 and Authorities in opposition to Defendant TD Service Company's Demurrer to his

1 Complaint. Plaintiff opposes Defendant's Demurrer on the ground it fails to raise any legal and  
2 reasonable basis as the complaint's factual allegations are sufficient to support a cause of action  
3 on any available legal theory (specifically Pled or not), and is without merit and must be denied,  
4 as set forth more fully below. This case presents a classic example of the longstanding rule that  
5 "in passing upon the question of the sufficiency or insufficiency of a complaint to state a cause  
6 of action, it is wholly beyond the scope of the inquiry to ascertain whether the facts stated are  
7 true or untrue" as "[t]hat is always the ultimate question to be determined by the evidence upon a  
8 trial of the questions of fact." (*Colm v. Francis* (1916) 30 Cal.App. 742, 752.) The content of the  
9 July 5, 2011 Complaint speaks for itself. The Defendant continues to look right at the paragraphs  
10 of the document that contain the elements required by law for each cause of action and to falsely  
11 state that the required allegations are not there. Plaintiff relies upon the Court to read the  
12 Complaint and comprehend it independently of the Defendant's misrepresentations.

### 13 INTRODUCTION

14 Defendants, and each of them, aided and abetted, encouraged, and rendered substantial  
15 assistance to the other Defendants in breaching their obligations to Plaintiff, as alleged herein.

16 In taking action, as alleged herein, to aid and abet and substantially assist the commissions of  
17 these wrongful acts and other wrongdoings complained of, each of the Defendants acted with an  
18 awareness of its primary wrongdoing and realized that its conduct would substantially assist the  
19 accomplishment of the wrongful conduct, wrongful goals, and wrongdoing.

20 Defendants, and each of them, knowingly and willfully conspired, engaged in a common  
21 enterprise, and engaged in a common course of conduct to accomplish the wrongs complained of  
22 herein. The purpose and effect of the conspiracy, common enterprise, and common course of  
23 conduct complained of was, inter alia, to financially benefit Defendants at the expense of  
24 Plaintiff by engaging in fraudulent activities. Defendants accomplished their conspiracy,  
25 common enterprise, and common course of conduct by misrepresenting and concealing material  
26 information regarding the servicing of loans, and by taking steps and making statements in  
27 furtherance of their wrongdoing as specified herein. Each Defendant was a direct, necessary  
28

1 and substantial participant in the conspiracy, common enterprise and common course of conduct  
2 complained of herein, and was aware of its overall contribution to and furtherance thereof.

3 Defendants' wrongful acts include, inter alia, all of the acts that each of them are alleged to have  
4 committed in furtherance of the wrongful conduct of complained of herein.

5 Defendants owed Plaintiff an affirmative duty of full and fair disclosure, but knowingly failed to  
6 honor and discharge such duty. Strict compliance with California Civil Code § 2923.5 is an  
7 indispensable condition precedent to recordation of a valid Notice of Default. Recordation of a  
8 valid Notice of Default is an indispensable condition precedent to any non-judicial foreclosure  
9 pursuant to California Civil Code § 2924, et seq. Filing the notice of default is required under  
10 Civil Code § 2924, and the procedures requiring such filing are strictly construed. Miller v. Cote  
11 (1982) 127 Cal.App.3d 888, 894; Sweatt v. Foreclosure Co. (1985) 166 Cal.App.3d 273, 278;  
12 Wanger v. EMC Mortgage Corporation (2002) 103 Cal.App.4th 1125. A foreclosure process  
13 predicated on a statutorily defective notice of default is invalid as a matter of law. Miller v.  
14 Cote, supra, at 894 [a premature notice of default is fatally defective]. The workout opportunity  
15 and contact of requirements of Civil Code § 2923.5 are mandatory, and the alleged failure to  
16 comply with this statutory duty pleads negligence per se. See Evidence Code § 669(a) (1).  
17 Additionally, whether a defendant has complied with a statutory mandate is a question of fact  
18 that cannot be resolved on demurrer (see e.g., Daum v. SpineCare Medical Group, Inc. (1997)  
19 52 Cal.App.4th 1285, 1306 holding that the question whether a party has complied with a statute  
20 is one of fact for the jury).

21  
22  
23  
24 **PLAINTIFF HAS ADEQUATELY PLEAD EACH AND EVERY CAUSE OF ACTION**  
25 **FOR (1) BREACH OF ORAL CONTRACT;(2) WRONGFUL FORECLOSURE;**  
26 **(3) QUIET TITLE;(4) SLANDER OF TITLE;(5) CANCELLATION OF**  
27 **INSTRUMENTS;(6) PROMISSORY ESTOPPEL;**  
28 **(7) UNFAIR BUSINESS PRACTICES UNDER B&P CODE § 17200 ET SEQ.; AND**  
**(8) DECLARATORY RELIEF**

**The Tender Rule Does Not Apply Here**

Defendants cite several cases for the proposition that Plaintiff is required to tender the amount  
due on the loan that he allegedly had with Defendants. However, said cases are distinguishable

1 as Plaintiff is not a junior lienholder but rather the trustor. Moreover, in Munger v. Moore  
2 (1970) 11 Cal. App. 3d 1, 7, the court held that that “a trustee or mortgagee may be liable to the  
3 trustor or mortgagor for damages sustained where there has been an illegal, fraudulent or  
4 wilfully oppressive sale of property under a power of sale contained in a mortgage or deed of  
5 trust.” Similarly, Plaintiff alleges that the sale of his property was illegal and fraudulent. The  
6 court in Munger made no mention of any tender requirement for the borrower to bring a claim  
7 against the trustee or mortgagee. As Munger is on point and Defendants’ cases are factually  
8 distinguishable, Munger governs this case. Moreover, tender may not be required where it would  
9 be inequitable to do so, Onofrio v. Rice (1997) 55 C.A.4th 413, 424, and if the tender rule does  
10 apply, it is to set aside a VOIDABLE sale. Karlsen v. American Savings & Loan Assn. (1971)  
11 15 Cal.App.3d 117. The cases known to counsel for Plaintiff which require tender are for  
12 maintaining an action for irregularity in the procedure of a trustee’s sale. Here, Plaintiff alleges  
13 that the foreclosure sale is VOID, not voidable. Additionally, California recognizes that:  
14  
15 "Equity does not wait upon precedent which exactly squares with the facts in controversy, but  
16 will assert itself in those situations where right and justice would be defeated but for its  
17 intervention." Bisno v. Sax (1959) 175 Cal. App. 2d 714, 728. Therefore, the tender rule does  
18 not apply. California Civil Code 2924h(b) distinguishes between purchase money bids by third  
19 parties and credit bids by the foreclosing beneficiary. With regard to credit bids, it provides, in  
20 pertinent part, that:  
21  
22 (b) The present beneficiary of the deed of trust under foreclosure shall have the right to offset his  
23 or her bid or bids only to the extent of the total amount due the beneficiary including the  
24 trustee's fees and expenses. In comparison, Section 2924h(b) provides that purchase money  
25 bidders (“PMBs”) are given the status of good faith purchasers unless there is a lis pendens or  
26 obvious title flaw. Regardless of whether the PMB has notice of title flaws or not, any and all  
27 PMBs are required to pay the amount of their winning bid with cash or check at the conclusion  
28

1 of the sale. With regard to credit bids, the creditor on the note applies the amount of  
2 indebtedness toward its bid on the property, thereby allowing it to take title without paying a  
3 single dollar out of pocket at the sale. The rationale is that the creditor has already lent the  
4 borrower/trustor a sum of money in exchange for the trust deed. Credit bidders are not allowed  
5 the status of a "good faith purchaser for value" because they are deemed to be aware of any  
6 improprieties of title which would undermine their title position. The trustee deed is a mere  
7 matter of paperwork, without a penny out of pocket. The only tender that would be required to  
8 put a credit bidder in a pre-sale condition is 1) cost of the trustee sale, 2) interest and fees, and 3)  
9 reinstatement of the preexisting debt which would still be serviced by the creditor but for the  
10 sale.  
11

12       Where, as here, it may be shown that a sale was knowingly wrongful and without right,  
13 equity weighs heavily against requiring the borrower to make a full tender of the challenged debt  
14 rather than what is required to put the creditor in a pre-sale position. Defendants argue that the  
15 tender in these cases should not be the sale price, i.e., the amount required to put the defendant  
16 in a pre-sale position, but the full amount of the debt.  
17

18       In Storm v. America's Servicing Company et. al., No. 09cv1206, 2009 WL 3756629, at 6  
19 (S.D.Cal. Nov. 6, 2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955,  
20 167 L.Ed.2d 929 (2007), the court stated that it was "unaware of any case holding there is a  
21 bright-line rule requiring tender of the unpaid debt to set aside a sale in other circumstances" and  
22 that tender was a "matter of discretion left up to the Court." Moreover, "[A]t the procedural  
23 stage the Court only decides whether Plaintiffs have pleaded "enough facts to state a claim to  
24 relief that is plausible on its face."  
25

26       Here, tendering the full debt alleged owed to IndyMac Venture, LLC would unjustly  
27 enrich IndyMac Venture, LLC as it was not expecting payment in full for another 25 or more  
28 years. The imposition of full debt tender on borrowers as to credit bid grantees by many courts

1 in this state has caused the floodgates to open for massive abuse of the California non-judicial  
2 foreclosure system because banks view wrongful foreclosure as having no practical recourse.  
3 That is, the only penalty for a wrongful foreclosure sale is getting a 30-year debt paid in full 25  
4 or more years early which, of course, is not a penalty at all, but rather an incentive to hold more  
5 foreclosure sales whether they are wrongful or not. If the sale was wrongful, no rationale exists  
6 for overburdening the Plaintiff with a full debt tender where the sale has been a matter of  
7 paperwork rather than payment. Thus, this court can impose the tender requirement on Plaintiff  
8 at judgment if the court deems it appropriate.  
9

10 **THE FORECLOSURE SALE WAS VOID, NOT VOIDABLE**

11 There is no dispute that the tender rule only applies if the foreclosure sale was voidable, not  
12 void. Here, Plaintiff alleges that the foreclosure sale is VOID, not voidable. According to the  
13 second edition of Black's Law Dictionary something that is "void" is something that is "[o]f no  
14 legal effect; null. The distinction between *void* and *voidable* is often of great practical  
15 importance. Whenever technical accuracy is required, void can be properly applied only to those  
16 provisions that are of no effect whatsoever-those that are an absolute nullity." Something that is  
17 "voidable" is "[v]alid until annulled; esp., (of a contract) capable of being affirmed or rejected at  
18 the option of one of the parties. This term describes a valid act that may be voided rather than an  
19 invalid act that may be ratified."  
20

21 **THE FIRST CAUSE OF ACTION FOR BREACH OF ORAL CONTRACT AND SIXTH**

22 **CAUSE OF ACTION FOR PROMISSORY ESTOPPEL IS PROPERLY PLEAD** On

23 December 28, 2010, INDYMAC VENTURE LLC, through its alleged employee Jean Caldwell  
24 (no title) executed a Substitution of Trustee ("SOT") naming TD SERVICE COMPANY as  
25 Substitute Trustee. After TD SERVICE COMPANY recorded the NOS on May 6, 2011 Plaintiff  
26 began to stay in constant contact with TD Service Company by calling them for updates on the  
27 impending sale. Plaintiff forwent seeking other remedies in reliance on the Defendant's  
28

1 promises and assurances. If TD Service Company had not purported to engage in delaying the  
2 trustee sale process Plaintiff would have focused his time on seeking alternatives to foreclosure  
3 other than loan modification, such as reorganization under Bankruptcy law. Plaintiff's phone  
4 records show constant contact with Defendant TD Service Company at 714-543-8372, 714-480-  
5 5690 and 800-675-7795 between May 31, 2011 and June 28, 2011. **Exhibit "F"** on file herein.  
6 Given that TD SERVICE COMPANY delayed the first NOS date of June 1, 2011, Plaintiff  
7 received unwritten notice that the next sale would be June 16th and than that date was delayed  
8 until June 28<sup>th</sup>, 2011. So given the history of two previous delays, Plaintiff did not find it  
9 unusual to be told on June 27, 2011 when he called TD Service Company once again to inquire  
10 of the sale date and spoke to someone by the name of Mary that his sale date was delayed again  
11 until July 18, 2011. When Plaintiff contacted TD Service Company on June 28, 2011, Plaintiff  
12 was blindsided when he was told that his home did indeed go to public auction. Plaintiff had  
13 been relying to his detriment on TD Service Company's previous delay announcements and  
14 promises of another delay. The fact that TD Service Company admits that the previous sale  
15 delays were caused because two individuals by the name of Ponciano Adorno and Wendy  
16 Montenegro filed for bankruptcy protection showing an interest in the subject property and has  
17 even requested that this Court take Judicial Notice of those facts is reason why the Plaintiff is  
18 entitled to a trial on the merits as TD Service Company purposely lied to Plaintiff in order to  
19 prevent him from exercising his right to file his own bankruptcy application. If anything TD  
20 Service Company has shown that it was frustrated with the Plaintiff's ability to protect his  
21 interests and TD Service Company went out of their way to lie in order to illegally foreclose  
22 upon his home. The filing of a bankruptcy action shall not be considered a scheme and the fact  
23 that plaintiff himself could have filed his own bankruptcy petition but for TD Service  
24 Company's lies and deception is precisely why Plaintiff is entitled to a trier of fact adjudication.  
25 This is a question of fact that cannot be resolved on demurrer. The gravamen of Plaintiff's  
26  
27  
28

1 complaint is that Defendants conducted a foreclosure sale of the Subject Property without any  
2 legal authority or standing to do so, and in violation of State laws which were specifically  
3 enacted to protect consumers such as Plaintiff from the type of abusive, deceptive, and unfair  
4 conduct in which Defendants engaged which are detailed herein by failing to follow the  
5 procedure prescribed by such laws to foreclose property. Additionally, the Defendants'  
6 foreclosure was wrongful as they purported to engage in negotiations with Plaintiff to delay the  
7 trustee's sale and Plaintiff relied on such negotiations and/or promises of further delay and as a  
8 result Plaintiff forwent seeking relief under Bankruptcy law, among other things, but Defendants  
9 surreptitiously (i.e., without providing adequate notice) sold the Subject Property at a  
10 foreclosure sale even though they had promised two previous delays before lying about the third  
11 promised delay to July 18, 2011. A California court of appeals held an owner of property is  
12 entitled to money losses from a lender who orally promises to postpone the trustee's sale of the  
13 owner's property when the owner relies on the promise to his detriment since the owner's  
14 detrimental reliance on the lender's promise serves as a substitute for the consideration  
15 necessary to enforce an oral promise. Garcia v. World Savings 183 Cal. App. 4th 1031 (2010)

18 **PLAINTIFF'S SLANDER OF TITLE CAUSE OF ACTION IS PROPERLY PLEAD**

19 Specifically, in the cause of action, Plaintiff clearly alleges that TD Service Company  
20 wrongfully and without privilege recorded the Notice of Default, Notice of Trustee's Sale and  
21 Trustee's Deed Upon Sale and other documents and was acting as the agent of the beneficiary  
22 which was allegedly Indymac Venture, LLC. Moreover, Indymac Venture, LLC acted  
23 intentionally when it foreclosed on the Subject Property and caused the Trustee's Deed Upon  
24 Sale to be recorded when it knew that it was not the beneficiary with the right to foreclose for  
25 the reasons set forth above. Accordingly, Plaintiff has properly alleged intent, wrongfulness and  
26 malice, along with each of the Defendants acted with an awareness of its primary wrongdoing  
27 and realized that its conduct would substantially assist the accomplishment of the wrongful  
28



1 conduct, wrongful goals, and wrongdoing. Defendants, and each of them, knowingly and  
2 willfully conspired, engaged in a common enterprise, and engaged in a common course of  
3 conduct to accomplish the wrongs complained of herein. Alternatively, If the court does not  
4 believe that it has been properly alleged, Plaintiff respectfully requests leave of court to further  
5 allege intent and malice with regard to Defendants within this cause of action.

6 **PLAINTIFF PROPERLY PLEAD A CAUSE FOR CANCELLATION OF INSTRUMENT**

7 TD Service Company has caused to be filed documents clouding title to Plaintiff's property.  
8 Plaintiff has properly pled these causes of action. Plaintiff has pled each and every Count in  
9 these causes of action, these facts are intelligible, and they are certain as to TD Service  
10 Company. Plaintiff has plead each and every Count in these Causes of Action with specificity  
11 and the Demurrers should be overruled or in the alternative allow Plaintiff leave to amend to  
12 improve the pleadings as details from discovery may be accumulated. Defendants responses are  
13 irreproachable, and to ignore such warning demonstrates malice. The premature Notice of  
14 Default disparaged Plaintiff's property cast a cloud on title, purposely acted as alleged without  
15 privilege. Plaintiff has sent numerous warnings to TD Service Company to stand down and halt  
16 this non-judicial foreclosure for all of the above stated and yet they too have failed to comply.  
17 Plaintiff has alleged that he suffered pecuniary damage as a result of the publication. TD  
18 Service Company have failed to meet the requirements of a demurrer (CCP 430.60) and TD  
19 Service Company waives certain arguments (CCP 430.80) as related to these causes of action  
and are now liable to Plaintiff for Slander of Title.

20 **PLAINTIFF HAS PROPERLY ALLEGED A CAUSE OF ACTION FOR VIOLATION**

21 **OF CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 17200**

22 No California appellate case has addressed the application of California Business and  
23 Professions ("B&P") Code Section 17200, *et seq.*, to the business practices of subprime  
24 mortgage lenders and servicers at issue here. However, the California state courts have  
25 repeatedly held that all that is necessary to establish a violation of B&P § 17200 *et seq.*, is to  
26 show that the defendant is a business engaged in acts or practices that are unlawful, fraudulent or  
27 unfair. Thus, "there are three varieties of unfair competition: practices which are unlawful,  
28 unfair or fraudulent." Daugherty v. American Honda Motor Co., Inc. (2006) 144 Cal. App.

1 4th 824, 837. The unlawful practices prohibited by the statute are any practices forbidden by  
2 law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court made.  
3 Saunders v. Superior Court (1994) 27 Cal. App. 4th 832, 838-39. It is not necessary that the  
4 predicate law provide for private civil enforcement. “Unfair,” as used in the statute, simply  
5 means any practice whose harm to the victim outweighs its benefits. “Fraudulent,” as used in the  
6 statute, does not refer to the common law tort of fraud but only requires a showing that members  
7 of the public are likely to be deceived. Bank of the West v. Superior Court (1992) 2 Cal.4<sup>th</sup>  
8 1254, 1267.

10 The “unfair” prong of section 17200 intentionally provides courts with broad discretion  
11 to prohibit new schemes to defraud. Motors, Inc. v. Times-Mirror Co. (1980) 102 Cal. App. 3d  
12 735, 740. An unlawful business practice or act is “unfair” when it “offends an established  
13 public policy or when the practice is immoral, unethical, oppressive, unscrupulous or  
14 substantially injurious to consumers. People v. Casa Blanca Convalescent Homes, Inc. (1984)  
15 159 Cal. App. 3d 509, 530. “[T]he court must weigh the utility of the defendant’s conduct  
16 against the gravity of the harm to the alleged victim.” State Farm Fire & Casualty Co. v.  
17 Superior Court (1996) 45 Cal. App. 4<sup>th</sup> 1093, 1104.

19 Here, the July 5, 2011 Complaint alleged that Defendants’ business acts and practices,  
20 include, but are not limited to, the following: (1) instituting improper or premature foreclosure  
21 proceedings to generate unwarranted fees; (2) Executing and recording false and misleading  
22 documents; and (3) acting as beneficiaries and trustees without the legal authority to do so.  
23 Defendants are correct in their assertion that actual physical possession of the original note is not  
24 a requirement for a non-judicial foreclosure. However, said assertion is not relevant. The  
25 relevant law is California Civil Code Section 2932.5 which provides that “Where a power to sell  
26 real property is given to a mortgagee, or other encumbrancer, in an instrument intended to secure  
27 the payment of money, the power is part of the security and vests in any person who *by*  
28

1 *assignment* becomes entitled to payment of the money secured by the instrument. The power of  
2 sale may be exercised by the assignee if the assignment is *duly acknowledged and*  
3 *recorded.*” Cal. Civ.Code § 2932.5 (emphasis added). (See Objection to Request for Judicial  
4 Notice on file herein)

5 Thus, Plaintiff has properly alleged with specificity that Defendants engaged in deceptive, unfair  
6 and fraudulent conduct under both the “unlawful” and “unfairness” prongs of B&P § 17200.

7 Defendants’ practices are in violation of the laws set forth in Plaintiffs’ other causes of action.

8 Additionally, the harm to Plaintiffs outweighs any benefit. Accordingly, Defendants’ demurrer  
9 to Plaintiffs’ B&P § 17200 should be overruled in its entirety.

11 **CONCLUSION**

12 TD Service Company should answer this complaint as Plaintiff has plead sufficiency to  
13 withstand the Demurrer. In the alternative Plaintiff would request leave to amend his complaint.

14 Defendants have failed to provide any evidence that they have any legal rights including the  
15 beneficial interest in either the Note or the Deed of Trust. Defendants’ Motion has been  
16 interposed for no other purpose than to delay this action, squander this Court’s time and  
17 resources, and frustrate the legitimate prosecution of this action.

18  
19 DATED: Sept. 6, 2011

LAW OFFICES OF BARRY S. FAGAN

20 By:  /s/Barry Fagan

21 Barry S. Fagan

22 Attorney for Plaintiff  
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