

Court of Appeal Case No: F068393

**COURT OF APPEAL
STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

WT CAPITAL LENDER SERVICES, a California Corporation,
Defendant and Appellant,

vs.

ANDRE TORIGIAN and TAKOOHI TORIGIAN,
Plaintiffs and Respondents,

Appeal from the Superior Court of County of Fresno,

Hon. Donald Black

Superior Court Case No: 10 CE CG 03800 DSB

**APPLICATION FOR LEAVE TO FILE AMICUS BRIEF AND AMICUS BRIEF
IN SUPPORT OF APPELLANT**

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FIFTH APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: <p style="text-align: center;">F068393</p>
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Jonathan D. Fink, Esq., SBN 110615 — WRIGHT, FINLAY & ZAK, LLP 4665 MacArthur Court, Suite 200 Newport Beach, CA 92660 TELEPHONE NO.: 949-477-5050 FAX NO. (Optional): 949-477-9200 E-MAIL ADDRESS (Optional): jfink@wrightlegal.net ATTORNEY FOR (Name): Amicus, United Trustees Association	Superior Court Case Number: <p style="text-align: center;">10CECG03800</p>
APPELLANT/PETITIONER: WT CAPITAL LENDER SERVICES, etc. RESPONDENT/REAL PARTY IN INTEREST: ANDRE TORIGIAN, et al.	FOR COURT USE ONLY
<p style="text-align: center;">CERTIFICATE OF INTERESTED ENTITIES OR PERSONS</p> (Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE	
<p>Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.</p>	

1. This form is being submitted on behalf of the following party (name): Amicus, United Trustees Association ("UTA")

2. a. There are no interested entities or persons that must be listed in this certificate under rule 8.208.

b. Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1) UTA	a National, non-profit mutual benefit corporation whose members include trustees, substitute trustees, and foreclosure agents who act under deeds of trust secured by real property in California.
(2) XXXXX	
(3) XXXXX	
(4) XXXXX	
(5)	

Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: December 16, 2014

Jonathan D. Fink, Esq.
(TYPE OR PRINT NAME)


(SIGNATURE OF PARTY OR ATTORNEY)

**APPLICATION OF UNITED TRUSTEES ASSOCIATION FOR LEAVE TO FILE
AMICUS BRIEF IN SUPPORT OF APPELLANT**

Pursuant to California Rule of Court Rule 8.200(c), the United Trustees Association hereby requests leave of this Court to file the following amicus brief in support of the position of Appellant, WT Capital Lender Services. This amicus brief will assert that the lower court erred in awarding attorneys' fees against a foreclosure trustee under a deed of trust, where the Respondents failed to prevail against the trustee on *any* damages claims despite having belatedly objected to the trustee's timely declaration of non-monetary status under Civil Code § 2924l. Where, as here, the trustee takes no position on the merits of the equitable claims of a trustor seeking to stop or undo a foreclosure sale (due to the acts of the beneficiary of the deed of trust) it is manifestly inequitable, unjust and contrary to the carefully crafted statutory scheme of the California Legislature governing non-judicial foreclosures to allow the imposition of such fees against the trustee.

The purpose of this amicus brief is to assist the Court in determining that, at least where a trustee files a timely declaration of non-monetary status ("DNMS") pursuant to California Civil Code § 2924l, it should not be held liable for the attorneys' fees of a borrower/trustor who objects to the DNMS but then fails to obtain any monetary recovery against the trustee. To find otherwise would ignore the purpose and effect of California Civil Code § 2924l, and run contrary to public policy and economic sense. The proposed amicus curiae brief thus seeks to provide the Court with additional insight on the unique role of the foreclosure trustee under California law and explain why the imposition of

attorneys' fees would be improper for a trustee who merely is fulfilling that role. The proposed amicus brief also seeks to inform the Court of the ramifications of the lower court's decision, if not reversed, on various important public policies, including the negative impact on lenders, trustees *and* borrowers.

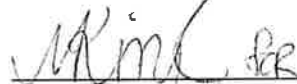
As set forth in the following Statement of Interest, the UTA has specialized knowledge regarding the intent and operation of California's non-judicial foreclosure laws as well as a significant interest in the outcome of this matter.

For these reasons, the UTA respectfully requests the Court to grant its Motion and allow its amicus brief to be filed.

DATED: December 23 2014

Respectfully submitted,

WRIGHT, FINLAY & ZAK, LLP



T. Robert Finlay, Esq.

Jonathan D. Fink, Esq.

Attorneys for Amicus
UNITED TRUSTEES ASSOCIATION

STATEMENT OF INTEREST:

The United Trustees Association (“UTA” or “Amicus”) hereby submits this Amicus Brief in support of an order reversing the lower court’s award of attorneys’ fees against Appellant WT Capital Lender Services, a California Corporation, (“WT” or “Appellant”).

The UTA is a national organization that, since 1968, has been the source for information, expertise, continuing education and opinion on trustee issues and practices for its members. UTA membership is comprised of those acting as trustees under real property deeds of trust, including employees of title companies, financial institutions, and independent companies. UTA members also work in allied and support organizations, including posting and publishing companies and computer service firms. Hundreds of UTA members, including foreclosure trustees, transact business in the State of California. WT is a member of the UTA.

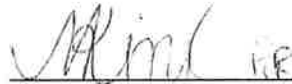
The UTA has been actively involved in the legislative process of various States for over 25 years. The UTA has previously filed amicus curiae briefs before, among others, the California Supreme Court, the California Courts of Appeal, the Federal Ninth Circuit Court of Appeals, and the United States Supreme Court in the cases of: *BFP v. Resolution Trust Corporation* (1994) 511 U.S. 531; *I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 216 Cal.Rptr. 438; *Trustors Security Service v. Title Recon Tracking Service* (1996) 49 Cal.App.4th 592; *Prudential Home Mortgage Company, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1236; *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428; *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316; *Mabry v. Orange*

County Superior Court, (2010) 185 Cal.App.4th 208; and *Biancalana v. T.D. Service Co.*,
(2013) 56 Cal. 4th 807.

Respectfully submitted,

DATED: December 23, 2014

WRIGHT, FINLAY & ZAK, LLP



T. Robert Finlay, Esq.

Jonathan D. Fink, Esq.

Attorneys for Amicus
UNITED TRUSTEES ASSOCIATION

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I. FACTS:

The UTA adopts the facts and procedural history as set forth by Appellant in its Opening Brief.

II. ISSUES:

For purposes of this Amicus Brief, the only relevant issue on appeal is simply whether a trustee who timely files a proper declaration of monetary status should be held liable for attorneys' fees and costs where the objecting plaintiff fails to prevail on *any* of the monetary claims that plaintiff claimed to have against the trustee and the trustee has not actively taken sides in the dispute over the equitable claims.

III. STANDARD OF REVIEW:

To the extent that this is an appeal from an award of attorneys' fees challenging the legal basis for—and right to recover—fees at all, rather than the amount of those fees, the standard of review is properly de novo. The crux of this appeal is the legal effect of Civil Code § 2924l on the right to recover fees here. *Conservatorship of Whitley*, (2010) 50 Cal.4th 1206, 1213-14; *Carver v. Chevron USA, Inc.*, (2002) 97 Cal.App.4th 132, 142.

IV. TRUSTEES SHOULD NOT BE LIABLE FOR ATTORNEYS' FEES WHERE NO OTHER MONETARY DAMAGES ARE AWARDED AGAINST THEM, AT LEAST ABSENT A FINDING OF MALICE OR OTHER WRONGFUL CONDUCT:

A foreclosure trustee occupies a unique position in most disputes over a non-judicial foreclosure; unless the trustee is itself properly chargeable with some wrongdoing in the conduct of its statutory and contractual duties—and the lower court

found no misconduct on the part of WT here--it is utterly irrelevant to the trustee whether the sale of the property is upheld or voided due to an act or omission of the beneficiary.

Indeed, a trustee under a deed of trust is not considered to be a trustee in the traditional sense of that term. As stated in *Stephens, Partain & Cunningham v. Hollis*, (1987) 196 Cal.App.3d 948, 955:

Although commonly called a "trustee," a trustee under a deed of trust is not the kind of trustee identified in former Civil Code section 2229. Just as a panda is not an ordinary bear, a trustee of a deed of trust is not an ordinary trustee. "A trustee under a deed of trust has neither the powers nor the obligations of a strict trustee; he serves as a kind of common agent for the parties. [Citations.]" (3 Witkin, Summary of Cal. Law (8th ed. 1973) Security Transactions in Real Property, § 9, p. 1497; see 7 Witkin, op. cit. supra, Trusts, § 3, pp. 5368-5369.)

Instead, while an ordinary trustee owes certain fiduciary duties to its principals, the trustee under a deed of trust owes only such duties as are specifically set forth by the Civil Code or by contract. *Id. Cf. Monterey S. P. Partnership v. W. L. Bangham, Inc.*, (1989) 49 Cal.3d 454, 462-63 (holding that a trustee had no duty to defend a beneficiary's interest in the property against a competing mechanic's lien); *Heritage Oaks Partners v. First American Title Ins. Co.*, (2007) 155 Cal.App.4th 339, 345-46 (refusing to find any duty owed by the trustee to a third party purchaser at the foreclosure sale: "Recognizing such a duty would upset the "carefully crafted balancing" of interests described in *I.E. Associates v. Safeco Title Ins. Co.*"). Similarly, those duties also do not include deciding whether there has in fact been a default entitling the beneficiary to foreclose nor to being the arbiter in disputes between the trustor and the beneficiary over the debt. *See, e.g., Fleisher v. Continental Auxiliary Co.*, (1963) 215 Cal.App.2d 136,

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139: “Without more, the case authority in California does not support the imposition of any further duty on the trustee, such as to make inquiry as to the status of the underlying debt before making a reconveyance.” *Accord Hatch v. Collins*, (1990) 225Cal.App.3d 1104, 1111-12, rejecting a claim by the trustor of breach of fiduciary duty as against the trustee: “A trustee therefore, while an agent for both the beneficiary and the trustor, does not stand in a fiduciary relationship to either.”

In this regard, it should be noted that Civil Code § 2924(b) expressly states: “In performing acts required by this article, the trustee shall incur no liability for any good faith error resulting from reliance on information provided in good faith by the beneficiary regarding the nature and the amount of the default under the secured obligation, deed of trust, or mortgage.”¹ [emphasis added] Thus, the trustee has no obligation to confirm the accuracy of the creditor’s claim regarding the existence and amount of the default, even in the face of a debtor’s insistence that no debt is owed. In the recent federal court case of *Flores v. EMC Mortg. Co.*, (E.D. Cal. 2014) 997 F.Supp.2d 101088, 1127, the court held that, as to the trustee, “[the] alleged wrongs are subject to section 2924(b) and (d) immunity. In the absence of allegations of [trustee’s]

¹ Any temptation on the part of Respondents, or the lower court, for that matter, to argue the second clause of that Section (“on information provided in good faith by the beneficiary”) as a limitation or exception to the protection otherwise provided to the trustee should be tempered by *Kachlon v. Markowitz*, (2008) 168 Cal.App.4th 316, 342-43, which rejected the argument that the beneficiary’s lack of good faith suffices to impose liability on the trustee regardless of its own good faith reliance. Indeed, the statement appears to refer to the act of the provision of the information to the trustee being in good faith, that is to say, non-collusively, rather than referencing the beneficiary’s secret intent, motive or honesty in making the statement.

malice or other significant wrongdoing, section immunity 2924(d) bars purported claims against [trustee]. No facts support that [trustee] acted in bad faith to erode section 2924(b) protection. There is nothing to suggest that [trustee] exceeded its DOT trustee authority to initiate property foreclosure. As such, [trustee] is immunized from the complaint's claims." *See also Mora v. U.S. Bank N.A.*, 2012 WL 2061629, at *7 (N.D. Cal. June 7, 2012): "Plaintiffs have pled no facts that could subject [the foreclosure trustee] to liability, given that California law shields foreclosure trustees from liability for certain good faith errors."

Similarly, here, the lower court's decision voiding the foreclosure sale turned not on any malice or significant wrongdoing by WT, which had been exonerated on such theories as a result of its successful motion for summary adjudication (granted based in part on the privilege under Civil Code § 2924(d) and the absence of any showing of malice of WT) but, rather, was a result of the misconduct of the beneficiary in misrepresenting that Respondents had not paid the sums due on the loan which the Deed of Trust secured [6 CT 1146-1405, 12 CT 2799-2805, 14 CT 3269-73, 20 CT 4971 at ll.17-23]. Nonetheless, the lower court awarded fees against WT despite the fact that it had, in good faith, relied upon the representations of the beneficiary of the deed of trust that the loan was in default and had not been cured. The lower court's decision thus violated the protections provided to the trustee by Civil Code §§ 2924(b) and (d).

In an attempt to justify the lower court's award, Respondent contends, and the lower court determined, that WT did not act as a "neutral" and should have taken active steps to investigate the dispute over the payment of the loan, filed a declaratory relief

action, or, at least, suspended the foreclosure proceedings pending resolution of the dispute [*see, e.g.* 20 CT 4941-63; Respondents' Brief at p.32].² The problem is that none of these "options" actually exists, let alone are required of the trustee.

A trustee is not the arbiter of disputes between a beneficiary and a borrower and, at that time, was not authorized by law, let alone equipped, to incur the time and expense of an investigation, nor to delay the sale at the demand of the borrower over the objection of the beneficiary.³ Thus, the California Supreme Court in *I. E. Associates v. Safeco Title Ins. Co.*, (1985) 39 Cal.3d 281 rejected claims that trustee has any duty to search for the trustor's current address in order to provide the trustor with notice of the sale. The Court cautioned that "imposing on the trustee a duty of taking reasonable steps to discover the trustor's current address would bring far more cost and uncertainty into the system." *Id.* at 289. *Accord Perez v. 222 Sutter Street Partners*, (1990) 222 Cal.App.3d 938, 945. *See also Residential Capital, LLC v. Cal-Western Reconveyance* (2003) 108 Cal.App.4th 807, 825 (trustee not liable to third party purchaser for failure to verify status of pending foreclosure); *Heritage Oaks Partners, supra*; *Monterey S. P. Partnership, supra*; *Fleisher, supra*.

² The lower court also noted what it called non-neutral litigation activity on the part of WT [*Id.*]; however, the lower court seems to have forgotten that, as a result of its order relieving Respondents from their waiver of objections to the DNMS, WT was required to defend itself against the tort claims. None of the conduct identified by the lower court was unique to the equitable claims and WT consistently asserted that it took no position as to those [*See, e.g.* AOB at pp. 42-47].

³ Civil Code § 2924g(c)(1) provides the only bases for "mandatory" postponement: (a) court order, (b) operation of law, (c) mutual agreement of the beneficiary and the trustor, or (d) discretion of the trustee. However, none of the first three bases apply here and the last item, by its very nature, presupposes the discretion to say no without consequence.

The reason for this is that *Civil Code* §§ 2924 – 2924k provides “the comprehensive statutory framework established to govern non-judicial foreclosure sales” and “is intended to be exhaustive.” *See Moeller v. Lien* (1994) 25 Cal. App. 4th 822, 834; *see also Homestead Sav. v. Darmiento*, (1991) 230 Cal. App. 3d 424, 432-433. As noted in *Vournas v. Fidelity National Title Ins. Co.*, (1999) 73 Cal.App.4th 668, 677, the trustee’s “only duties are: (1) upon default to undertake the steps necessary to foreclose the deed of trust; or (2) upon satisfaction of the secured debt to reconvey the deed of trust.” *Accord Heritage Oaks Partners, supra*, at 345. The holding in *I. E. Associates, supra*, at 287-89 also reflects this limited role, stating:

The rights and powers of trustees in nonjudicial foreclosure proceedings have long been regarded as strictly limited and defined by the contract of the parties and the statutes.... [¶] ... [T]here is no authority for the proposition that a trustee under a deed of trust owes any duties with respect to exercise of the power of sale beyond those specified in the deed and the statutes.

The Court then went on to acknowledge that: “There are, moreover, persuasive policy reasons which militate against a judicial expansion of those duties. The nonjudicial foreclosure statutes -- an alternative to judicial foreclosure -- reflect a carefully crafted balancing of the interests of beneficiaries, trustors, and trustees.” *Id.* at 288.

In *6 Angels, Inc. v. Stuart-Wright Mtge., Inc.*, (2001) 85 Cal.App.4th 1279, 1287, another court further explained: “The public policy underlying the comprehensive framework governing foreclosure sales is a concern for swift, efficient, and final sales. (*Moeller v. Lien, supra*, 25 Cal.App.4th at pp. 830, 832, 30 Cal.Rptr.2d 777.) In our view, which we elaborate below, granting relief under the circumstances present here would

frustrate, rather than promote, this policy, by adding uncertainty to the finality of foreclosure sales.” The “options” that Respondents’ seek to impose on Appellant beyond its statutory and contractual duties would vitiate the public policies announced in *I.E. Associates, supra*, and reiterated in *6 Angels, Inc., supra*, and would involve the courts in precisely the sort of judicial expansion of the statutory duties prohibited under the holding of *I.E. Associates, supra*.

Imposing attorney fees on a trustee who: (a) in fulfilling its statutory and contractual duties, was merely relying in good faith on the representations of the beneficiary as to the validity of the debt, and (b) filed a timely and proper DNMS where, as here, the borrower/trustor fails to establish facts showing any malice or wrongdoing on the part of the trustee (and thus failed to recover any monetary damages against the trustee), would clearly frustrate the well-established and sensible public policy and would only serve to cause even more considerable—and unwarranted—additional costs and uncertainty into the carefully crafted, statutory non-judicial foreclosure system. The trustee, who typically does not have the access to the information or resources needed to independently resolve disputes between the borrower/trustor and the beneficiary, would be put at risk every time it commenced a foreclosure and the costs of foreclosure *for all parties, including the struggling borrower*, would increase exponentially. The statutorily authorized non-judicial foreclosure process would jam up, if not grind to a halt.

This is not baseless speculation; according to Realty Trac, when Nevada implemented its new, more stringent, foreclosure proceedings in October, 2011, the number of non-judicial foreclosures dropped over 75% from September, 2011 to October,

2011 when the new laws took effect; in fact, according to the records maintained by Nevada's court-mandated Foreclosure Mediation Program (which gets paid a fee upon the filing of every Notice of Default), the number of foreclosures in September 2011—the month before the new law went into effect—were 4,684 notices of default while the following month the number was just 80.⁴ Whether or not that is a desirable outcome is a decision that is reserved to the Legislature, not the Courts.

It is presumably with these sorts of concerns in mind that the California Legislature enacted various statutory protections for foreclosure trustees. *See, e.g., Kachlon v. Markowitz*, (2008) 168 Cal.App.4th 316, 342-43 (discussing the 1999 amendment adding the above-quoted provision of § 2924(b) but only applying it to reject the borrower's claim that it limited the scope of the privilege in § 2924(d), finding, instead, the legislative purpose was to *expand* protections to the trustee). In addition to that right provided by Civil Code § 2924(b) to rely on the representations of the beneficiary, under Civil Code 2924(c):

A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof shall constitute prima facie evidence of compliance with these requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.

While under *Civil Code* § 2924(d):

⁴ In the ensuing 28-month period, October 2011 to February 2014, the average number of NOD filings in Nevada was just under 1,040 per month (including an unusually robust 4,855 NODs in September, 2013).

All of the following shall constitute **privileged communications pursuant to Section 47**:

(1) The mailing, publication, and delivery of notices as required by this section.

(2) Performance of the procedures set forth in this article.

(3) Performance of the functions and procedures set forth in this article if those functions and procedures are necessary to carry out the duties described in Sections 729.040, 729.050, and 729.080 of the Code of Civil Procedure.

This privilege is a broad one. As recognized in *Kachlon, supra*, at 340:

[T]he plain language of the 1996 amendment grants privilege protection not only to trustees, but also to beneficiaries insofar as they may act as trustees. Section 2924 (at the time of the 1996 amendment and now) expressly permits the *beneficiary*, as well as the trustee, to record the notice of default which commences the nonjudicial foreclosure process.

Civil Code § 2934a(d) provides additional protections, declaring that:

A trustee named in a recorded substitution of trustee shall be deemed to be authorized to act as the trustee under the mortgage or deed of trust for all purposes from the date the substitution is executed by the mortgagee, beneficiaries, or by their authorized agents....Once recorded, the substitution shall constitute conclusive evidence of the authority of the substituted trustee or his or her agents to act pursuant to this section.

The legislative history of § 2924(d) is instructive. The stated purpose was to protect trustees in the performance of their contractual and statutory duties. In connection with the 1996 amendment to § 2924, the proponents expressly stated that:

Trustees who record and send notices of default and of sale can be vulnerable to defamation suits despite the fact that when the same allegations are made in the context of a judicial foreclosure, they are clearly privileged communications. This appears to be because a nonjudicial foreclosure is a private, contractual proceeding, rather than an official,

governmental proceeding or action. Essentially, the required communications of default are the same and made for the same purpose.

[Assembly Comm. on Judiciary, Analysis of Sen. Bill No. 1488 (1995–1996 Reg. Sess.) as amended June 26, 1996, p. 2; see also Senate Rules Comm., Off. of Sen. Floor Analysis, unfinished business analysis of Sen. Bill No. 1488 (1995–1996 Reg. Sess.) as amended July 9, 1996, p. 3.]

The protection of § 2924(b) is also reinforced by Civil Code § 2924f(b)(7), which states in pertinent part: “...provided, that *the trustee shall incur no liability for any good faith error in stating the proper amount*, including any amount provided in good faith by or on behalf of the beneficiary.” [emphasis added]. The existence and amount of the default was, of course, the key issue in the dispute between Respondents and the beneficiary in the court below. It is no longer an issue whether Appellant acted in good faith reliance on the representations of the beneficiary—the summary adjudication resolved that question in favor of Appellant.

Of particular significance here, though, given the genesis of Appellant’s involvement as a defendant in this action, is the protection the Legislature granted to trustees by *Civil Code* § 2924l, which states, in pertinent part:

(a) In the event that a trustee under a deed of trust is named in an action or proceeding in which that deed of trust is the subject, and in the event that the trustee maintains a reasonable belief that it has been named in the action or proceeding solely in its capacity as trustee, and not arising out of any wrongful acts or omissions on its part in the performance of its duties as trustee, then, at any time, the trustee may file a declaration of nonmonetary status.

....

(c) The parties who have appeared in the action or proceeding shall have 15 days from the service of the declaration by the trustee in which to object to the nonmonetary judgment status of the trustee. **Any objection shall set forth the factual basis on which the objection is based** and shall be served on the trustee.

(d) In the event that no objection is served within the 15-day objection period, the trustee shall not be required to participate any further in the action or proceeding, **shall not be subject to any monetary awards as and for damages, attorneys' fees or costs**, shall be required to respond to any discovery requests as a nonparty, and shall be bound by any court order relating to the subject deed of trust that is the subject of the action or proceeding.

(e)

Additionally, in the event that the parties elect not to, or fail to, timely object to the declaration of nonmonetary status, but later through discovery, or otherwise, determine that the trustee should participate in the action because of the performance of its duties as a trustee, the parties may file and serve on all parties and the trustee a motion pursuant to Section 473 of the Code of Civil Procedure **that specifies the factual basis for the demand.**

[emphases added]

It should be noted that, in amending § 2924l in 1997, through SB 665, the Legislative Counsel's Digest expressly observed that the purpose of the change to § 2924l(e) was as follows: "The bill would require the demand [challenging a DNMS] to set forth the factual basis for the demand." Again, it is clear that the legislative intent is to recognize and protect the unique status of the trustee by minimizing, if not eliminating, the risk that the trustee would be cavalierly named as a defendant in an action challenging a foreclosure sale absent a showing of facts warranting naming it as a defendant.

These Sections, along with § 2924(b) discussed above, are the crux of the issue for purposes of this amicus brief.⁵ Indeed, the UTA maintains that, under §§ 2924(b)⁶ alone, the award of fees against Appellant trustee were improper under the circumstances of this action and should be reversed on that basis if not also pursuant to the provisions of §§ 2924(d) and/or 2924l(d), especially since Respondents failed to establish any facts to support their contentions that they were entitled to relief under § 2924l(e) here. *See Owens v. Wells Fargo Bank, N.A.*, 2009 WL 3353313, *3 (N.D. Cal. Oct 16, 2009): “Thus, to the extent [the trustee's] conduct occurred in reliance on the lender's information as provided under California statutes and § 2924, [the trustee] is immune, in the absence of allegations establishing bad faith-which have not been stated here.” *See also Valenzuela v. Wells Fargo Bank Nat. Ass'n*, 2014 WL 309438 at * 23-24 (E.D. Cal. Jan. 28, 2014): “Northwest's alleged wrongs are subject to section 2924(b) and (d) immunity. In the absence of allegations of Northwest's malice, section immunity 2924(d) bars purported claims based on cited California statutes or related wrongs. No facts support that Northwest acted in bad faith to erode section 2924(b) protection.”

⁵ The UTA is aware that Appellants, in their Reply Brief, at p.2, have taken the position that § 2924l “is irrelevant except as a statute further evidencing the public policy underlying the comprehensive framework...” The UTA disagrees that § 2924l otherwise becomes irrelevant as a result of the objections, though. Instead, the UTA believes that, where, as here, a plaintiff has made an objection to a timely DNMS and it is later determined that the plaintiff lacked a proper factual basis for that objection, the protections of § 2924l(d) should still apply to preclude an award of attorneys' fees on the equitable claims. Of course, if the Court agrees that § 2924(b) and (d) already apply to preclude such an award against a trustee, it need not consider this alternative argument.

⁶ And, to the extent applicable, § 2924f(b)(7).

The lower court, instead, relying on *Kachlon, supra*, deemed that, *notwithstanding the filing of the DNMS* and the failure of Respondent to show any malice or wrongful conduct on *its* part, the trustee should nonetheless be liable for the attorney fees incurred by the borrower/trustor merely because the borrower/trustor prevailed on its non-monetary claims against the trustee. The problem with this analysis is that, like the lower court here, *Kachlon* never considered the effect of §§ 2924(b) on the trustee's liability for attorney fees, focusing mainly on the bar under § 2924(d).⁷ As conceded in *Kachlon*, itself, *supra* at 342-43, § 2924(b) *expanded* on the immunities provided by § 2924(d) and, unlike those under the latter Section (which relies upon Civil Code § 47 for its scope), the protections provided by § 2924(b) do not appear to be limited to tort claims.

Even under its narrower focus, *Kachlon* should not be found to control the result here since Appellant, *unlike the trustee in Kachlon*, not only timely filed its DNMS but, *after* the lower court granted Respondents' motion for leave to file late objections to the DNMS [pursuant to *Civil Code* § 2924(e)] thereby requiring Appellant to appear and

⁷ The court in *Kachlon*, did, however, determine that the privilege under § 2924(d) only applied to tort claims, thus not barring the award of fees under the contractual claims. In the instant case, though, the fees sought to be recovered from Appellant by Respondent appear to primarily be those incurred in connection with its tort claims against the beneficiary. At minimum, as to the fees incurred in connection with those claims, the trustee remains entitled to its immunity and neither Respondent nor the lower court can properly bootstrap the beneficiary's liability to require Appellant to pay those fees. As argued in the Appellant's briefs [*see, e.g.* Reply Brief at pp.12-14], which are incorporated herein by reference, any award of fees against Appellant must be based solely on the successful claims against Appellant, if any, with apportionment for those properly attributable to the conduct of the beneficiary. The lower court, though, made its award against the beneficiary and Appellant joint and several—*i.e.* without any apportionment for the tort claims on which Respondents prevailed against the beneficiary but lost against Appellant [20 CT 4941-63].

answer the operative complaint, Appellant reiterated its position that it was only disputing the claims for monetary relief and was completely neutral as to the non-monetary claims and would be bound by the Court's disposition [see Affirmative Defense No. 15 to Answer to Third Amended Complaint, 4 CT 818-31 at 827-28]. Moreover, throughout the litigation, Appellant repeated to the lower court (and Respondents' counsel) that it was only challenging the claims for monetary relief and would remain neutral on the non-monetary claims and would agree to be bound by the court's disposition of the non-monetary claims. Neither the lower court nor Respondents paid any attention.

Contrary to the opinion of the lower court in its order awarding the fees here [20 CT 4941-63], the record is clear that Appellant in fact remained neutral as to the non-monetary claims, thereby further distinguishing this case from the conduct found to warrant payment of fees in *Kachlon*. Conversely, Appellant not only actively resisted the claims for monetary relief brought against it by Respondents, *it prevailed against Respondents on each of those claims*.

Despite prevailing on all the monetary claims, the lower court not only denied attorney fees to Appellant (finding that they did not fall under the terms of the fee provision in the Note and Deed of Trust)⁸ but then, in essence, penalized them a second

⁸ This misinterpretation of the applicability of the fee provision to the claims for monetary relief is also the subject of Appellant's appeal but is not among the issues being addressed in this Amicus Brief as being more an issue of individual concern to Appellants than one necessarily affecting trustees as a group since fee provisions can vary depending on the form of the Deed of Trust utilized in each particular case.

time by awarding attorney fees against them for *not having opposed* the non-monetary claims. Even worse, those fees included the fees Respondents had incurred on their unsuccessful (as to Appellant) tort claims. The bottom line is: What more could a trustee reasonably do to protect itself against a fee award under these circumstances?

Obviously, had Respondents either not sued Appellant on claims seeking monetary relief against it, or not gotten leave to file belated objections to the DNMS, Respondents would not have been entitled to any fees against Appellant, as stated in § 29241(d). Unfortunately, there is no ability under the Code to simply refile the DNMS after the monetary claims were disposed of as being without merit as to the trustee, nor is there a procedure to formally reinstate the original DNMS.

It is no answer to argue that the trustee can seek indemnity from the beneficiary who seeks to conduct the foreclosure. Not only would a trustee making such a demand soon find its foreclosure referrals drying up but, more practically, not all beneficiaries are large financial institutions that can afford the costs of an indemnity. Many beneficiaries—such as the beneficiary in this particular case--are individuals or small businesses that would lack the financial resources to actually provide indemnity, or to reimburse the trustee in the event that indemnity were awarded. As a result, the trustee could be placed on the hook for hundreds of thousands of dollars in attorneys' fees even though it had represented before those fees were incurred that it would agree to be bound by the court's judgment as to the disposition of the property.

The lower court's ruling would, if allowed to stand, place a trustee in the position of becoming a guarantor of the beneficiary's right to foreclose. If the Legislature had

intended such an obligation, it would have imposed it in the comprehensive statutory scheme governing non-judicial foreclosures. Instead, even under the recently enacted Homeowners' Bill of Rights, the only obligation of verification the Legislature elected to place was on mortgage servicers, not foreclosure trustees. *See* Civil Code § 2924.17.

As held by the California Supreme Court in *Dreyfuss v. Union Bank of California*, (2000) 24 Cal. 4th 400, 411:

The nonjudicial foreclosure provisions evince the legislative intent to establish an equitable trade-off of protections and limitations affecting the defaulting borrower and his or her creditor. In a nonjudicial foreclosure, the borrower is protected, inter alia, by notice requirements and a right to postpone the sale, in order to avoid foreclosure either by redeeming the property from the lien before the sale or finding another a purchaser. (Civ. Code, §§ 2903, 2924, 2924g.) Nonjudicial foreclosure proceedings must be conducted by auction in a fair and open manner, with the property sold to the highest bidder (id., § 2924g), permitting the borrower, or anyone else, to participate in setting the price for the property. Most important, the borrower is relieved from any personal liability on the debt. (See *Roseleaf Corp. v. Chierighino* (1963) 59 Cal. 2d 35, 42 [27 Cal.Rptr. 873, 378 P.2d 97].) Thus, in the event of a default, the borrower stands to lose only such property as he or she specifically chose to place at risk, leaving the creditor to carry the burden of any additional loss in value if the amount of the debt exceeds the value of the assets pledged as security for the loan. **For its part, the creditor gains the certainty of a "quick, inexpensive and efficient remedy."** (*Moeller v. Lien, supra*, 25 Cal. App. 4th at p. 832.) **A properly conducted sale does not require judicial oversight and constitutes "a final adjudication of the rights of the creditor and debtor."** (ibid).

[emphases added].

There is no legitimate issue over whether Appellant conducted the sale and acted in accordance with its obligations under the non-judicial foreclosure statutes and the DOT. Respondents' prevailed below solely because *the beneficiary* was found to have misrepresented that their debt was in default. As discussed above, a trustee is not

chargeable with the beneficiaries' misrepresentations or misconduct so the only sensible and equitable result here would be to recognize that, if a plaintiff fails to prevail on its monetary claims against a trustee who asserted a timely and proper DNMS, even if the protections of § 2924l(d) do not come back into effect to protect the trustee from having to pay attorney fees on the non-monetary claims it already indicated it would not be opposing, the protections afforded by Civil Code §§ 2924(b) and (d), and perhaps § 2924f(b)(7), remain to preclude imposing such fees against the trustee.

In essence, this appeal boils down to two questions:

First, whether the protections of Civil Code §§ 2924(b) and (d)—and, to the extent applicable, § 2924f(b)(7)—preclude an award of fees in favor of the trustor on any claims against a foreclosure trustee absent a finding of malice or wrongdoing by the trustee?

Second, whether a borrower/trustor can maintain a right to seek fees against a foreclosure trustee on purely equitable claims merely by asserting pro forma objections to a timely DNMS or, as here, by moving to bring the trustee back into the action, in bad faith and without probable cause?

In terms of the former, a plain, fair reading of the statute warrants finding that fees cannot properly be awarded against the foreclosure trustee without making the requisite showing of malice and/or actual wrongdoing. It would seem obvious that the phrase “the trustee shall incur no liability” in § 2924(b) and § 2924f(b)(7) would necessarily encompass liability for an award of attorney fees against the trustee. Although a subtler point, it would also be a strained interpretation of the term “privilege” if the privilege afforded by § 2924(d) for acts of the trustee done in the normal course and scope of its

duties excluded protection from fee awards absent the showing of malice and/or wrongdoing sufficient to defeat the privilege.

As to the latter, arguably, the legislative history behind the 1997 amendment to § 2924l(e)—requiring the party objecting to a DNMS to provide a factual basis for the objection--and the public policy of protecting trustees to insure their ability to freely and fairly perform their statutory and contractual duties under the Deed of Trust and California law is best advanced, and equity well-served, by restoring the parties to the positions they occupied *prior to* the failed objections to the DNMS. In other words, perhaps the protections of § 2924l(d) should be held to be resurrected under those circumstances; anything less rewards the making of frivolous or bad faith objections.

V. CONCLUSION:

Accordingly, the UTA respectfully submits that this Court should rule that absent a finding of malice or other wrongful conduct on its part, a foreclosure trustee is not liable for the borrower/trustor's attorney fees, particularly where the trustee has filed a timely and proper DNMS and the borrower/trustor fails to recover any monetary damages against the trustee in the action.

Respectfully submitted,

DATED: December 23, 2014

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CERTIFICATE OF WORD COUNT
Cal. Rules of Court, Rule 8.204(c)(1)

The text of this brief consists of 6,558 words as count in the Microsoft Word 2010 word-processing program used to generate this brief.

Respectfully submitted,

DATED: December 23, 2014

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PROOF OF SERVICE

I, Julie L. Hansen, declare as follows:

I am employed in the County of Orange, State of California. I am over the age of eighteen (18) and not a party to the within action. My business address is 4665 MacArthur Court, Suite 200, Newport Beach, California 92660. I am readily familiar with the practices of Wright, Finlay & Zak, LLP, for collection and processing of correspondence for mailing with the United States Postal Service. Such correspondence is deposited with the United States Postal Service the same day in the ordinary course of business.

On December 23, 2014, I served the within **APPLICATION FOR LEAVE TO FILE AMICUS BRIEF AND AMICUS BRIEF IN SUPPORT OF APPELLANT** on all interested parties in this action as follows:

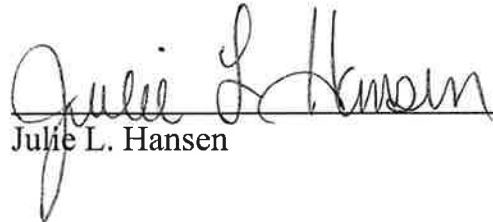
- [X] by placing [] the original [X] a true copy thereof enclosed in sealed envelope(s) addressed as follows:

- [X] (BY NORCO OVERNITE - NEXT DAY DELIVERY) I placed true and correct copies thereof enclosed in a package designated by Norco Overnite with the delivery fees provided for.

- [X] ELECTRONIC SUBMISSION – Pursuant to CRC, rule 8.212(c)(2), I caused electronic submission to the First District Court of Appeal, Division Four. Thereafter, a copy is automatically sent to the Supreme Court.

- [X] (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 23, 2014, at Newport Beach, California.



Julie L. Hansen

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