Supreme Court Case No. S198562

Appellate Case No. H035400

Santa Cruz Superior Court Case No. CV162804

The Honorable Jeffrey J. Almquist

IN THE SUPREME COURT OF CALIFORNIA

DAVID BIANCALANA, Plaintiff and Appellant

v.

T. D. SERVICE COMPANY, Defendant and Respondent

After a Decision by the Court of Appeal,
Sixth Appellate District

APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF APPEAL BY T. D. SERVICE COMPANY

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I. INTRODUCTION

Pursuant to California Rule of Court ("CRC") Rule 8.520(f), the United Trustees Association, formerly known as the California Trustees Association ("UTA") respectfully applies to the Court for permission to file this amicus curiae brief (combined with this application) in support of the appeal filed by Appellant T. D. Service Company ("T. D. Service") in the above-captioned matter.

II. INTEREST OF AMICUS CURIAE AND APPLICATION TO FILE AMICUS BRIEF

UTA is a national, non-profit public benefit corporation whose members include trustees who act under deeds of trust secured by real property in California and many other states, as well as members working in industries that provide support services in the nonjudicial foreclosure process (e.g., foreclosure agents, lenders, legal newspapers, title companies, posting services and attorneys). UTA's trustee members conduct thousands of nonjudicial foreclosure sales in California each year.

UTA has been actively involved in the California legislative process for over 25 years. UTA has previously filed amicus curiae briefs before the California Supreme Court, the California Courts of Appeal, the Ninth Circuit Court of Appeals of the United States, and the United States Supreme Court in the cases of: *BFP v. Resolution Trust Corp.* (1994) 511 U.S. 531 [114 S.Ct. 1757]; *I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281 [216 Cal.Rptr. 438, 702 P.2d 596]; and most recently *Trustors Security Service v. Title Recon*

Tracking Service, (1996) 49 Cal.App.4th 592 [56 Cal.Rptr.2d 793]; and, most recently *Mabry v. Superior Court* (2010) 185 Cal App 4th 208 [110 Cal.Rptr.3d 201]; *Banc of America Leasing & Capital, LLC* v. *3 Arch Trustee Services, Inc.* (2009) 180 Cal.App.4th 1090 [103 Cal.Rptr.3d 397]; *Kachlon v. Markowitz* (2008) 168 Cal. App.4th 316 [85 Cal.Rptr.3d 532]; *Bank of America, N.A. v. La Jolla Group II* (2005) 129 Cal. App.4th 706 [28 Cal.Rptr.3d 825]; *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428 [129 Cal.Rptr.2d 436]; and *Prudential Home Mortgage Co., Inc. v. Superior Court* (1998) 66 Cal.App.4th 1236 [78 Cal.Rptr.2d 566].

Trustees have the power under longstanding case law to rescind a completed sale before a trustee's deed has issued, in situations where there have been irregularities or unfairness in foreclosure process and the property was sold for a grossly inadequate price. In cases where the trustee discovers an error after a sale is completed but before a trustee's deed has issued, the trustee will be subject to conflicting demands made by the trustor, the beneficiary, and the successful bidder at the sale. The case at bar is an example for just such a situation.

It is critically important to UTA's trustee members that the circumstances under which a trustee may exercise this power to rescind a sale be clearly defined, by simple, "bright line" rules if possible, in order to avoid litigation.

UTA believes that its amicus brief can assist this Court by discussing the facts and legal issues presented in the context of standard and widespread practices in the foreclosure industry. While

UTA substantially supports Appellant's position and arguments, it believes that neither Appellant nor Respondent have adequately explained the reasons for the practice by trustees of announcing the beneficiary's intended opening credit bid prior to the scheduled date and time of the sale, and for entering the beneficiary's opening bid at the outset of the sale itself.

Appellant requested that UTA consider filing an amicus brief. However, no party or counsel for any party in the above-captioned appeal has authored or proposed the amicus brief being submitted by UTA either in whole or in part. Additionally, with the exception of the amicus curiae, its members, and/or its counsel in the pending appeal, no person, party or counsel for any party in the above-captioned appeal has made a monetary contribution intended to fund the preparation or submission of UTA's amicus curiae brief.

III. STATEMENT OF THE CASE

UTA adopts the procedural history of this matter as presented in both Appellant's and Respondent's briefs.

IV. STATEMENT OF ISSUES ON APPEAL

UTA would state the ultimate issue on this appeal as follows:

Where, as the result of an error, the trustee publicizes a materially incorrect opening bid amount prior to a trustee's sale, or announces a materially incorrect opening bid at the sale itself, and the property is sold for a grossly inadequate price, does the trustee have discretion to rescind the sale by returning the successful bidder's funds prior to the issuance of trustee's deed?

Subsumed within this general question are the following legal issues:

- Does existing case law correctly hold that the trustee has discretion to rescind a foreclosure sale where there has been irregularity or unfairness in the foreclosure process, and the sale has produced a grossly inadequate price?
- If this power exists, does the "foreclosure process" extend any pre-sale announcement of an intended opening bid, and to the announcement of the opening bid at the commencement of the sale?
- How can irregularities in the "foreclosure process" be distinguished from extrinsic mistakes that are outside of that process?
- Is the trustee's status as an "agent" of the parties to the foreclosure relevant to determining the above questions?

UTA has no interest in the other issues on appeal, including whether or not the initial ruling of the trial court was properly reconsidered under Code of Civil Procedure section 1008.

V. FACTUAL SUMMARY

Under the undisputed facts of this case, T. D. Service proceeded in a manner consistent with the standard practice employed in most, if not all, California nonjudicial foreclosures.

Prior to the foreclosure the real property located at 434 Winchester Drive, Watsonville, California (the "Property") was owned by Manuel Escobar. (CT p. 1). It appears from documents included in the record that Mr. Escobar purchased the Property in

July, 2004 for $380,000.[1] The deed of trust in issue was recorded in August, 2005 in favor of Greenpoint Mortgage Funding, Inc. as beneficiary and recited that it secured a promissory note in the amount of $376,000.00. (CT p. 38).

Although this is not directly confirmed in the record, the facts and documents referred to above, coupled with the allegations of the Complaint[2] are consistent with UTA's understanding that this was a first deed of trust.

The foreclosure was commenced by the recording of a Notice of Default and Election to Sell Under Deed of Trust as required by Civil Code section 2924, subdivision (a)(1).[3] After the expiration of

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[1] Attached to the Complaint is a copy of the grant deed recorded when Mr. Escobar purchased the Property in July, 2004. (CT p. 10). The documentary transfer tax appearing on the grant deed indicates a purchase price of $418.00 "computed on the consideration or full value of the property conveyed." Documentary transfer tax is authorized by Rev. & Tax Code §§ 11911 et seq. and is imposed at the rate of $.55 per $500.00 in property value or any fractional part thereof. Applying the statutory formula, ($418.00 ÷ $0.55 = 760) x $500.00 = $380,000.00.

[2] The Complaint names no defendants other than T.D. Service, Mr. Escobar, original beneficiary Greenpoint, and Greenpoint's successor in interest and refers to no other liens on the Property. (CT pp. 1-17)

[3] Civil Code section 2924c subdivision (a)(1) requires that a Notice of Default be recorded and served in order to commence a nonjudicial foreclosure. The Notice of Default must state the amount of existing monetary defaults, which (if the loan has not matured and no incurable non-monetary defaults exist) may be paid in order to exercise the right to cure the default and reinstate. The Notice of Default is not included in the record but its recording information is contained in the Notice of Trustee's Sale. (CT p. 55)

the three month waiting period required by Civil Code section 2924 subdivision (a)(2), T. D. Service caused to be recorded the Notice of Trustee's Sale required under Civil Code section 2924f subdivision (b) (CT pp. 55-56). The statute requires that the Notice of Trustee's Sale contain "a statement of the total amount of the unpaid balance of the obligation secured by the property to be sold and reasonably estimated costs, expenses, advances at the time of the initial publication of the notice of sale . . . ." (Civ. Code § 2924f subd. (b)(1).) In this case, the Notice of Trustee's Sale states that the total amount secured by the Deed of Trust was estimated to be $435,494.74. (CT p. 55)

It is undisputed that the beneficiary requested that T. D. Service announce its opening credit bid at the trustee's sale in the amount of $219,105.00. However, in preparing to conduct the sale T. D. Service mistakenly did not use this amount but instead used the current amount of the arrearages ($21,894.17).[4]

The mistaken use of this incorrect amount by T. D. Service resulted in two material irregularities in the foreclosure process. First, T. D. Service placed incorrect information into a computerized call-in phone system set up for parties to the foreclosure and prospective bidders to inquire about the intended opening bid at future sales. (CT p. 35 ln. 27 – p. 36 ln. 2; p. 83 ll. 9-11). As a result, anyone

[4] The amount of the current arrearages would have been available to T.D. Service. An accounting of the arrearages was necessary in order to prepare the Notice of Default, and current arrearages must be known in the event that reinstatement were tendered.

potentially interested in bidding at the sale could have telephoned and received the erroneous information that the opening bid was going to be $21,894.17. Prior to attending the sale, the plaintiff Mr. Biancalana testified that he telephoned twice and received the erroneous opening bid amount on each occasion. (CT p. 83 ll. 9-16).

Second, T. D. Service communicated the incorrect bid amount to the auctioneer who would actually conduct the trustee's sale.[5] The auctioneer commenced the sale on September 10, 2008 by announcing $21,894.17 as the beneficiary's opening credit bid. Mr. Biancalana was the only other party submitting a bid. His bid of $21,896.00 was accepted by the auctioneer as the successful bid. (CT p. 36, ll. 4-6; p. 84 ll. 6-7)

The error was quickly discovered by T. D. Service, and on either September 11 or September 12, T. D. Service advised Mr. Biancalana that it would cancel the sale and hold it again. T. D. Service returned Mr. Biancalana's check uncashed, but he refused to accept return of his funds and instead demanded that T. D. Service issue a trustee's deed to him. After T. D. Service refused to issue the trustee's deed, Mr. Biancalana filed the instant lawsuit.

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[5] Civil Code section 2924a provides in part that "any duly authorized agent, may conduct the sale and act in the sale as the auctioneer for the trustee." It is a common practice for foreclosure trustees to employ auctioneers as agents to actually appear and conduct trustee's sales, which take place in multiple locations in 58 California counties. UTA does not believe that any legal significance attaches in this case to the use by T.D. Service of an agent as auctioneer.

VI. STANDARD OF REVIEW

An order granting summary judgment is reviewed de novo. (*Tverberg v. Fillner Const., Inc.* (2010) 49 Cal.4th 518, 522 [110 Cal.Rptr.3d 665,232 P.3d 656]; *Lonicki v. Sutter Health Cent.* (2008) 43 Cal.4th 201, 206 [74 Cal.Rptr.3d 570, 180 P.3d 321].) The parties have not argued in their respective briefs that a triable issue of fact exists, precluding summary judgment. Therefore, this appeal "requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently." (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888 [264 Cal.Rptr. 139, 782 P.2d 278] quoted in *Nguyen v. Calhoun* (2003) 105 Cal. App. 4th 428, 438.)

VII. LEGAL ARGUMENT

A. THE TRUSTEE HAS THE DISCRETION TO RESCIND A TRUSTEE'S SALE PRIOR TO ISSUANCE OF THE TRUSTEE'S DEED IF THERE IS GROSS INADEQUACY IN PRICE COUPLED WITH AN IRREGULARITY OR UNFAIRNESS IN THE FORECLOSURE PROCESS

There is no statute which expressly provides authority to the trustee under a deed of trust to rescind or cancel a sale and refuse to issue a trustee's deed after the bidding has been completed. The only statute which directly discusses rescission of a trustee's sale after conclusion of bidding actually contemplates rescission *after* the trustee's deed has been recorded. Civil Code section 1058.5

authorizes a trustee to record a notice of rescission of a trustee's deed "where a trustee's deed is invalidated by a pending bankruptcy *or otherwise*." [*Italics* added] The only circumstance requiring rescission of a completed trustee's sale, other than bankruptcy, that is expressly mentioned in the foreclosure statutes is where it is discovered that the trustee failed to give required notice to the Internal Revenue Service in relation to a junior tax lien. (Civ. Code § 2924b subd. (c)(4)).

Nevertheless, many cases have held that the trustee has the power to rescind a completed trustee's sale before the trustee's deed is recorded. For example, in *Whitman v. Transstate Title Co.* (1985) 165 Cal.App.3d 312 [211 Cal.Rptr. 582] the trustee discovered, after the bidding but before issuance of the trustee's deed, that it had mistakenly refused a request under former Civil Code section 2924g for a mandatory postponement at the request of the trustor. The mistaken refusal was the result of uncertainty as to whether the party requesting the postponement was indeed the owner and therefore entitled to make the request. Just as in the case at bar, the trustee refused to issue a trustee's deed to the successful bidder at the sale, and returned the bidder's cashier's check. The Court of Appeal upheld the trustee's rescission of the sale, holding:

> While mere inadequacy of price, standing alone, will not justify setting aside a trustee's sale, gross inadequacy of price coupled with even slight unfairness or irregularity is a sufficient basis for setting the sale aside. (*Winbigler v. Sherman* (1917) 175 Cal. 270, 275 [165 P. 943]; *Lopez v. Bell* (1962) 207 Cal.App.2d 394, 398 [24 Cal.Rptr.

626]; *Foge v. Schmidt* (1951) 101 Cal.App.2d 681, 683 [226 P.2d 73].)

(*Whitman v. Transtate Title Co.* (1985) 165 Cal. App. 3d 312, 323.)

Bank of Seoul & Trust Co. v. Marcione (1988) 198 Cal.App.3d 113, 119 [244 Cal.Rptr. 1] and *Millennium Rock Mortgage, Inc. v. T. D. Service Co.* (2009) 179 Cal.App.4th 804, 810 [102 Cal.Rptr.3d 544] both quote this same passage of *Whitman*, supra. in upholding the trustee's rescission of a completed sale in cases where unfairness or irregularity was discovered prior to issuance of a trustee's deed. *Bank of Seoul* and *Millennium Rock* are discussed in detail in the next section of this brief.

In *Angell v. Superior Court* (1999) 73 Cal.App.4th 691 [868 Cal.Rptr.2d 657], the trustee rescinded a completed sale prior to the issuance of the trustee's deed, but this time at the initial request of the successful bidder. In *Angell*, the successful bidder claimed to have received misinformation from the trustee prior to the sale concerning the lien priority of the trust deed in foreclosure. It was also discovered, after the sale but prior to the issuance of the trustee's deed, that the notice of default and notice of trustee's sale had materially understated the amounts necessary to reinstate and to redeem. *Angell*, supra. 73 Cal.App.4th at 695.

The Court of Appeal upheld the rescission, stating that "there was an irregularity in the sale which was discovered before a deed was delivered. Discovery of the irregularity allowed the trustee to abort the sale without further liability, provided, of course, that the

trustee returns the consideration paid by the successful bidder, plus interest." (*Angell*, supra. 73 Cal. App. 4th at 702.) The Court applied the general rule as stated in *Whitman*, and quoted Miller & Starr as follows:

> The mere inadequacy of price, standing alone, does not justify setting aside the trustee's sale, but the sale can be set aside where there is a gross inadequacy of the price paid at the sale, together with a slight irregularity, unfairness, or fraud." (4 Miller & Starr, Cal. Real Estate 2d (1989) Deeds of Trust and Mortgages, § 9:154, pp. 506–507, fns. omitted.)
>
> (*Angell v. Superior Court* (1999) 73 Cal.App.4th 691, 700)

All of the above-cited cases refer in broad terms to the trustee's power to rescind a sale which has produced a "grossly inadequate" price if there has been even a "slight unfairness or irregularity." The above-quoted broad statements of the rule are not limited in their language to failures by the trustee to comply with express statutory requirements.[6] UTA believes that the Trustee's power to rescind a sale must extend to all unfairness or irregularities which call into question the *foreclosure process* itself, ie., the process which the

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[6] These statements of the rule also do not require the trustee to attempt to determine whether any irregularity was the proximate cause of a grossly inadequate sale price. In the case of irregularities in noticing, for example, it would be impossible for the trustee to determine whether a potential bidder not receiving proper notice would have actually attended the sale and bid more than the ultimate successful bid.

trustee is responsible to administer. At the heart of this case is a dispute over what types of irregularities and unfairness should be regarded as part of the *foreclosure process*, justifying rescission of a completed sale, and what are completely extrinsic mistakes which do not taint the foreclosure process and need not be within the trustee's power to rectify.

B. THE "FORECLOSURE PROCESS" INCLUDES ANY PRE-SALE NOTICE OF THE INTENDED OPENING BID, AND THE ANNOUNCEMENT OF THE OPENING BID AT THE SALE

California statutes provide a detailed and comprehensive framework for conducting non judicial foreclosures under deeds of trust. However, these statutes do not specify everything a trustee must actually do in order to put their requirements into effect. They contain no scripts for responding to inquiries and telephone calls, for example. Nor can the statutes anticipate every "irregularity" or "unfairness" which might come to a trustee's attention in the course of conducting hundreds of nonjudicial foreclosures.

The courts have recognized this fact when they have held that "[a] trustee under a deed of trust owes a duty to conduct the sale fairly and openly and to secure the best possible price for the benefit of the trustor." (*Block v. Tobin* (1975) 45 Cal.App.3d 214, 221 [119 Cal. Rptr. 288].) "In satisfying these duties, the trustee retains a measure of discretion." *Bank of Seoul & Trust Co. v. Marcione* (1988) 198 Cal. App. 3d 113, 119 [244 Cal. Rptr. 1].) The opinion in *Bank of Seoul* goes on to state:

> The courts scrutinize a sale held under power in a trust deed carefully, and will not sustain it unless it is conducted with fairness, openness, scrupulous integrity, *and the trustee exercises sound discretion to protect the rights of all interested parties* and obtain the best possible price. (*Kleckner v. Bank of America* (1950) 97 Cal.App.2d 30, 33, 217 P.2d 28; *Hill v. Gibraltar Sav. & Loan Assn.* (1967) 254 Cal.App.2d 241, 243, 62 Cal.Rptr. 188; *System Inv. Corp. v. Union Bank* (1971) 21 Cal.App.3d 137, 153, 98 Cal.Rptr. 735.)[*italics* added]
>
> (*Bank of Seoul & Trust Co. v. Marcione* (1988) 198 Cal.App.3d 113, 119.)

In *Bank of Seoul*, two parties appeared at a trustee's sale. The opening bid was a credit bid on behalf of the beneficiaries (the Marciones, who were present at the sale) in the amount of $107,348.63. A representative of Bank of Seoul, a junior lienholder, appeared at the sale and said simply "we bid." The auctioneer ignored this attempt to bid and the opening bid was accepted as the successful bid, and a trustee's deed was delivered to the Marciones.[7] The court stated:

> [I]t would have taken no more than a few moments for the auctioneer-trustee to explain to plaintiff's representatives at the auction that to be valid, a bid must be more specific and exceed the amount of a

[7] *Bank of Seoul*, supra. does not discuss the effect of issuance of the trustee's deed on the rights of the Marciones. Presumably they would not be considered to be bona fide purchasers without notice of the irregularity or unfairness in the foreclosure proceedings, because they were present at the sale and witnessed the failed attempt to bid.

> prior bid. Given the negligible difficulty which pursuing a fair and open procedure would have imposed upon the auctioneer-trustee, and the severe detriment incurred by the junior lienholder, the conduct of this sale far exceeds the level of "slight unfairness or irregularity."
>
> (*Bank of Seoul & Trust Co. v. Marcione* (1988) 198 Cal.App.3d 113, 119.)

The foreclosure statutes do not expressly impose on the trustee a duty to explain to prospective bidders what to say in order to enter an effective bid. Yet, the trustee's failure to explain in that particular case was held *in Bank of Seoul,* supra., to be an irregularity and unfairness in the foreclosure process which justified setting aside a trustee's sale.

Millennium Rock Mortg., Inc. v T. D. Service Company (2009) 179 Cal App.4th 804 also involved an irregularity and unfairness in relation to the foreclosure process which did not involve a specific statutory violation. In *Millennium Rock* the trustee employed Trustee's Assistance Corporation as the auctioneer which conducted the trustee's sale. The beneficiary provided a credit bid amount to the trustees. After adding fees and costs, the trustee instructed the auctioneer to announce an opening credit bid of $382,544.46, which was the correct amount. However, due to an error by the auctioneer, the property address was switched with another foreclosure being conducted at that same time, resulting in a credit bid in the amount of only $51,447.50 being entered. Plaintiff Millennium entered a cash bid of $51,500.00 which was accepted by the auctioneer as the

successful bid. The mistake was later discovered and the trustee refused to issue the trust deed, returning Millennium's bid funds.

Civil Code section 2924g does not specify the details of how bidding at a trustee's sale must be conducted. It does not require any particular announcement at the commencement of the sale, or specify how bidding should be commenced. However, the Court in *Millennium Rock* correctly held that "due to the contradictory descriptions of the property, the auctioneer's mistake went to the heart of the sale" and justified the trustee's rescission of the sale. (*Millennium Rock Mortg., Inc.,* supra. 179 Cal.App.4th at 811.) *Millennium Rock* is therefore another example of an "irregularity" and "unfairness" which was part of the foreclosure process but which did not violate any express or specific statutory provision.

In this case the irregularities in publication and announcement of the opening bid were errors of the trustee (i.e., of the auctioneer as the trustee's agent) which must be regarded as part of the foreclosure process. Although it had received the correct credit bid amount of $219,105.00 from the beneficiary, T. D. Service posted on its computerized call in system prior to the sale the information that the opening credit bid would be only $21,894.17.

Although a trustee is not required to do so by statute, it is the standard practice of trustees throughout the state to adopt some system (whether an automated call-in line, a website, or just responding to telephone inquiries) to answer the question that all prospective bidders want to know before they decide to attend a trustee's sale: What will be the beneficiary's opening credit bid? Making this information

public is not statutorily required but is done in the trustee's discretion in furtherance of the trustee's general duty "to secure the best possible price for the benefit of the trustor." (*Block v. Tobin* (1975) 45 Cal. App. 3d 214, 221; *Bank of Seoul & Trust Co. v. Marcione* (1988) 198 Cal. App. 3d 113, 119.)

The facts of the case at bar illustrate why trustees typically in advance of the sale release information as to the intended opening bid. Here, according to the information required by Civil Code section 2924f subd, (b)(1) to be included in the Notice of Trustee's Sale, the public knew only that the beneficiary was entitled to credit bid up to $435,494.74. In fact the beneficiary had instructed T. D. Service shortly before the sale to bid only $219,500.00 and make no further bids. Obviously, this would make a huge difference to those who were considering whether to attend the trustee's sale. Particularly under present market conditions, the beneficiary is often willing to allow the subject property to be sold for far less than what is owed. The fact that the beneficiary intends to make a lower opening bid, if made known, should usually stimulate interest in bidding.

Beneficiaries or loan servicers typically do not communicate the opening bid to the trustee until less than 48 hours prior to the scheduled sale. Beneficiaries are understandably reluctant to announce a bid amount until they are confident that no further significant advances for taxes, insurance and the like will have to be made which would add to the debt. In addition, beneficiaries are working with the borrower to avoid foreclosure usually until right before the sale.

Mr. Biancalana may argue that publicizing an opening bid of $21,894.17 on a *first trust deed* on which $435,494.74 was owing per the Notice of Trustee's Sale could only have stimulated bidding and was therefore non-prejudicial. But how do we really know this? Why would a prospective bidder believe that a first trust deed lender would open bidding at a number so grossly disproportionate to the presumed value of the Property? A prospective bidder might have concluded that there was something seriously wrong with the Property. Or a prospective bidder might have wondered if either the Notice of Trustee's Sale or the announced bid amount was an error, creating a risk of litigation that the bidder chose to avoid. Of course, litigation is exactly what happened as the result of this glaring mistake – a mistake which should have been obvious to Mr. Biancalana as well as other members of the public.

There is no reason to differentiate in this analysis between an error by the trustee in publicizing the amount of an intended opening bid, and an error by the trustee in announcing the opening bid at the sale itself. Trustee's sales are usually cried in groups by an auctioneer, who may appear at the scheduled place and time in order to conduct perhaps a dozen sales. On these occasions, a group of generally interested bidders will appear. All or most of them will have done their homework prior to arriving, by investigating the properties to be sold on that day, their location, the extent of any unpaid taxes or senior liens, and the beneficiary's intended opening bid if that information is available from the trustee. When the sale is commenced by the announcement of an erroneous opening bid, the

amount of that bid will affect the conclusions and behavior of other bidders in the manner described above. The lender on whose behalf the opening bid is submitted is assumed to be the most knowledgeable party at the sale. The announcement of an erroneous opening bid that is out of all proportion to the expected value of the property could well deter, not encourage, an experienced bidder. There is no way of knowing whether that happened in the instant case.

There are many circumstances that constitute an irregularity or create unfairness in the foreclosure process that are not addressed by specific statutory provisions. The law is correct in vesting in the trustee the discretion to correct these circumstances by rescinding and re-noticing a trustee's sale before a deed has issued.

C. THIS CASE MAY BE DISTINGUISHED FROM THOSE INVOLVING EXTRINSIC ERRORS OUTSIDE THE FORECLOSURE PROCESS

There are obviously situations in which a mistake will cause a third party bidder to submit a bid which was ill-advised or even unintended. For example, a bidder could attend a trustee's sale and bid in the mistaken belief that the subject property was zoned "commercial" rather than "residential." Such a mistake does not in any way implicate the foreclosure process, and the trustee would have no role in rectifying that kind of mistake. Several cases have distinguished between such a completely extrinsic error, which is said to be "dehors" the foreclosure process, and an irregularity or unfairness in the foreclosure process itself.

Crofoot v. Tarman (1957) 147 Cal.App. 2d 443 [305 P.2d 56] is a case which clearly involved such an extrinsic mistake. In *Crofoot*, a prospective bidder at a trustee's sale was misinformed as to the postponed date of the trustee's sale. The misinformation came not from the trustee but from a secretary employed by the attorney for another third party. Although evidence was presented to establish that a grossly inadequate price was obtained at the sale, the Court did not conclude that there were irregularities in the sale which would support rescission. The Court explained:

> It appears that they do not in fact claim there were irregularities in the trustee's conduct of the sale, nor that anything done or left undone by the trustee was in violation of the trustee's authority or contrary to the trustee's duties. . . . . There is nothing in the record to the effect that anything done or left undone by the trustee prevented the public from attending at the sale or in anywise discouraged bidding. Therefore, the trustee's sale cannot be set aside by reason of irregularities plus inadequacy of price. Crofoot's contention that the sale should be set aside is in reality based upon matters de hors the sale proceedings, that is, upon a claim of fraud or mistake inhering in the misinformation as to the date of sale.
>
> (*Crofoot v. Tarman* (1957) 147 Cal.App.2d 443, 447, 305 P.2d 56.)

This distinction between irregularities in the foreclosure process and those "dehors the sale" was applied again in the case of *6 Angels, Inc. v. Stuart-Wright Mortgage, Inc.* (2001) 85 Cal. App. 4th 1279 [102 Cal.Rptr.2d 711].) In *6 Angels*, the loan servicer for the

beneficiary mistakenly told the trustee to announce an opening bid of $10,000.00 rather than $100,000.00. A third party bidder appeared at the sale and bid one penny more - $10,000.01, which was accepted as the high bid. The servicer later realized its mistake and notified the trustee, which refused to issue the trustee's deed to the successful bidder and tendered back the bid funds. The Court held that the the beneficiary's mistake in not communicating its opening bid correctly to the trustee, "falls outside the procedural requirements for foreclosure sales described in the statutory scheme, and, like the secretary's error in *Crofoot,* is 'dehors the sale proceedings.'" (*6 Angels, Inc. v. Stuart-Wright Mortgage, Inc.* (2001) 85 Cal.App.4th 1279, 1285.)

One factor present in the case at bar which is not discussed in *6 Angels* is whether the trustee had, prior to the sale, made the intended opening bid amount available to the public via a call-in service, a website, or simple response to an inquiry. As noted above, it would be difficult to know whether making such information available to the public prior to the sale would have encouraged or discouraged bidding at the sale. *6 Angels* may therefore be distinguished on this basis, if the Court believes it should do so.

UTA believes, however, that the trustee should have the discretion to rescind a sale prior to the issuance of a trustee's deed whenever it discovers that an incorrect opening credit bid was announced by mistake. It is UTA's position that this power should not depend on the trustee's belief at the moment as to who was at fault in causing the mistake. The reasons for allowing rescission should

apply equally whether the error is that of the beneficiary or servicing agent in providing bidding instructions (as in *6 Angels*) or that of the trustee in ignoring or misconstruing those instructions (as in *Millennium Rock*).

The policy reasons for allowing the trustee to rescind the sale are exactly the same in both cases. First, as explained above, the amount of the intended opening bid is customarily provided to the public by trustees in advance of the sale, and this practice is consistent with the trustee's duty to bring the best possible price. Deciding this case without reference to that critical fact would not provide a clear guide to trustees and would create new questions and an opening for future litigation.

As explained above, the opening credit bid customarily announced at the commencement of a trustee's sale is fundamentally different and more significant in its impact on the real world foreclosure process than is a subsequent third party bid. The bid of the lender at whose direction the foreclosure is taking place is presumed by all interested bidders to be authoritative and likely based on knowledge of the value of the property and its condition which might not be available to the general public. In this case, even in the absence of pre-sale disclosure of the intended bid amount, the announcement of a $21,894.17 opening bid on a *first trust deed* on which $435,494.74 was owing per the Notice of Trustee's Sale would likely have created confusion which could have discouraged bidding due to a reasonable belief that the opening bid reflected either: (i) a

very serious defect in the property or, (ii) more likely, a mistake which could lead to post-sale litigation.

A rule based on who, as between the trustee and the beneficiary, is responsible for a mistake is also not desirable because it makes the trustee's power to rescind a sale depend on facts which may not be clear at the time the decision must be made by the trustee. In the case at bar, after a great deal of time was available to investigate, file a lawsuit and conduct discovery, the Court is presented with the parties' agreed upon conclusion that the mistake was that of the trustee (i.e., a mistake of the auctioneer acting as an agent on behalf of the trustee). In the heat of the moment in other cases, it may not be clear who made the mistake and the parties will have strong incentive to blame one another.

The trustee's power to rescind should not depend on an exercise to allocate the blame for a mistake as between the trustee and beneficiary. The parties could disagree as to whether the beneficiary's instructions to the trustee were ambiguous or misinterpreted. Or, in the course of investigating, the first question uttered might well be "didn't you get that email?' It is not always easy to answer that question, because email can easily be misaddressed by the sender or deleted or misplaced by the recipient. Coloring this entire exercise would be the fact that it is the beneficiary which selects the trustee and provides the trustee with ongoing work assignments. The beneficiary is the party responsible for paying the trustee's fees and costs in the event that a credit bid is successful.

In the UTA's view, the damage to the parties which can arise from a mistaken opening bid is potentially much greater than the inconvenience sustained by a bidder which must immediately receive its bid funds back in connection with a rescission. Based on all of these reasons, UTA urges the Court to hold clearly and generally that a trustee's sale may be rescinded in the discretion of the trustee, prior to issuance of a trustee's deed, in the case of a mistaken opening bid, without regard to fault in the origin of the mistake.

D. THE STATUS OF THE TRUSTEE AS AN AGENT IS NOT RELEVANT HERE

In *6 Angels*, supra, an erroneous bidding instruction was given to the trustee by a loan servicer, acting as the agent of the beneficiary. As discussed above, the basis for the decision in *6 Angels* was the admitted fact that the mistake made in relation to the bid was that of the beneficiary (or more precisely, the beneficiary's agent) and not that of the trustee. Because the trustee made no mistake, and because the effect of pre-sale publication of the intended bid amount was not raised in *6 Angels*, the Court concluded that the mistake in bidding was extrinsic, outside or dehors the foreclosure process.

Mr. Biancalana takes this argument one step further by citing cases which refer to the trustee as the "agent of the beneficiary." (See, e.g., *Scott v. Security Title Insurance & Guarantee Co.* (1937) 9 Cal.2d 606 [72 P.2d 143]; *Munger v. Moore* (1970) 11 Cal.App.3d 1 [89 Cal.Rptr. 323].) The argument goes that since the trustee is the agent of the beneficiary, then a negligent mistake by the trustee is

attributable to the beneficiary under general agency principles, and rescission cannot relieve the beneficiary from the consequences of the trustee's mistake.

There are several flaws in this argument. First, a foreclosure trustee is an independent third party with a duty to both trustor and beneficiary to proceed "fairly and openly and to secure the best possible price for the benefit of the trustor." *Block v. Tobin* (1975) 45 Cal.App.3d 214, 221. A trustee under a deed of trust is not an "agent" of the foreclosing lender in the sense that a loan servicing company might be considered to be an agent. Rather, a trustee "is the common agent of both parties and is required to act impartially." (*Ainsa v. Mercantile Trust Co. of San Francisco* (1917) 174 Cal. 504, 510, [163 P. 898, 901].) The trustee "acts as a common agent for the trustor and the beneficiary of the deed of trust. (*Hatch v. Collins* (1990) 225 Cal.App.3d 1104, 1111–1112 [275 Cal.Rptr. 476].)" (*Vournas v. Fidelity National Title Ins. Co.* (1999) 73 Cal.App.4th 668, 677 [86 Cal.Rptr.2d 490].) It has been held repeatedly that the independent foreclosure trustee has no fiduciary relationship to the beneficiary or any party to the deed of trust. The distinction between an agent holding fiduciary duties of loyalty to a particular party, and a trustee under a deed of trust is explained in *Hatch v. Collins*, supra.

> A trustee has a general duty to conduct the sale "fairly, openly, reasonably, and with due diligence," exercising sound discretion to protect the rights of the mortgagor and others. **481 (*Baron v. Colonial Mortgage Service Co.*, supra, 111 Cal.App.3d at p. 323, 168 Cal.Rptr. 450; *Bank of Seoul & Trust Co. v. Marcione* (1988) 198

> Cal.App.3d 113, 118, 244 Cal.Rptr. 1; *Block v. Tobin* (1975) 45 Cal.App.3d 214, 221, 119 Cal.Rptr. 288.) It by no means follows, however, that this duty is a fiduciary one.
>
> By analogy, it is generally recognized that the law imposes upon a real estate agent a duty toward his own client of " ' "undivided service and loyalty that it imposes on a trustee in favor of his beneficiary."'[Citations.]" (*Wyatt v. Union Mortgage Co.,* supra, 24 Cal.3d 773, 782, 157 Cal.Rptr. 392, 598 P.2d 45.) On the other hand, a realtor has a general duty of "honesty and fairness" toward all parties to the sale transaction. (*Nguyen v. Scott* (1988) 206 Cal.App.3d 725, 735–736, 253 Cal.Rptr. 800; *Easton v. Strassburger* (1984) 152 Cal.App.3d 90, 100–101, 199 Cal.Rptr. 383.) While the first duty might aptly be called "fiduciary," the latter most definitely is not. (See *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 42, 269 Cal.Rptr. 228; 2 Miller & Starr, op. cit. supra, § 3.27, p. 157.) Likewise, while a breach of the trustee's duty to conduct an open, fair and honest sale may give rise to a cause of action for professional negligence, breach of an obligation created by statute, or fraud, it cannot be called a breach of any fiduciary relation.
>
> (*Hatch v. Collins* (1990) 225 Cal.App.3d 1104, 1111-13.)

If the trustee in conducting a foreclosure is acting as the agent of the beneficiary in the broad legal sense, then by extension of Mr. Biancalana's argument *any* mistake by the trustee in the foreclosure process, including for example mistakes in mailing required notices, should be attributable to the beneficiary as well, and the beneficiary

should suffer the consequences of whatever mistake is made. This would be contrary to the entire line of cases which hold that the trustee has the discretion to rescind a sale prior to issuance of a trustee's deed in cases where a gross inadequacy of the sale price is accompanied by an irregularity or unfairness in the foreclosure process. In most of these cases upholding rescission which are cited in this brief, as in the case at bar, the irregularity consists of a mistake *made by the trustee.*

Mr. Biancalana may argue that in this case the trustee's mistake was dehors the foreclosure process because T. D. Service undertook to announce the beneficiary's credit bid, rather than requiring that a representative of the beneficiary appear at the sale and announce the bid in person. This argument is disingenuous if intended to create the impression that a trustee's announcement of the opening credit bid is an unusual act and outside of the normal foreclosure process.

Beneficiaries, or their loan servicers, do not generally attend trustee's sales. In fact, such attendance is very rare. These sales are required to be held in the county in which the property is located. (Civ. Code § 2924g subd. (a).) Institutional lenders require that a foreclosure company seeking their business be able to conduct sales in all of California's 58 counties. This is one reason why trustees employ auctioneers who reside in locations which enable them to conduct sales in a particular county, and who are experienced in doing so.

Nothing in the foreclosure statutes requires the beneficiary to attend the sale or announce its opening bid at the sale. Such a

requirement, if imposed, would create the huge logistical problem of getting well-informed lender employees to each sale site (the larger counties have multiple locations where sales are conducted on a daily basis.). Sales would inevitably be delayed due to weather conditions, traffic congestion or family emergencies while bidders waited for the beneficiary to appear at a sale location far from its place of business. Many beneficiaries under California trust deeds are located far from the county in which the trustee's sale must take place, and many are located outside the state or outside the country.

The practice has long been to have the auctioneer conducting the sale announce the beneficiary's opening credit bid. Since a sale cannot be held unless the auctioneer is present, having the auctioneer announce the opening bid helps assure that a sale will go forward as scheduled.

UTA is very concerned about the confusion in the role and duties of the trustee which is created by any published decision describing the trustee as merely the agent of a foreclosing lender. For good reason, it is the common practice of trustees to make information concerning the opening credit bid available and to commence a trustee's sale by announcing that bid themselves. These actions should be regarded as part of the foreclosure process, and a mistaken opening bid, where accompanied by a gross inadequacy of the sale price, should be grounds for the trustee to exercise its discretion to rescind the sale before a trustee's deed is issued.

VIII. CONCLUSION: A "BRIGHT LINE" RULE IS NEEDED IN CASES INVOLVING MISTAKEN OPENING BIDS

The release to the public, shortly before a trustee's sale, of the amount of the intended opening credit bid, and the announcement of that bid by the trustee or auctioneer in commencing the sale, have become standard and customary practices for good reasons. These actions are part of the foreclosure process. The trustee should continue to have the discretion to rescind a trustee's sale which has resulted in a grossly inadequate price, based on irregularities or unfairness in the foreclosure process including handling the opening bid.

As discussed above, the case of *6 Angels, Inc. v. Stuart-Wright Mortgage, Inc.* (2001) 85 Cal.App.4th 1279 may be distinguished from the case at bar due to the fact that the practice of pre-sale publication of the intended opening credit bid was not discussed in *6 Angels*. Nevertheless, UTA believes that a ruling in this case which attempts to reconcile *6 Angels* with *Millennium Rock Mortgage, Inc. v. T. D. Service Co.* (2009) 179 Cal.App.4th 804, based upon which party (the trustee or the beneficiary) is to blame for the mistake would be unworkable when applied by trustees who are called upon to make this decision on short notice.

Whatever this Court's decision will be, UTA hopes that it will provide a "bright line" rule that its trustee members can confidently use and apply in dealing with cases involving a mistaken opening bid. UTA submits that this rule should be as follows:

Where, as the result of an error, the trustee publicizes a materially incorrect opening bid amount prior to a trustee's sale, or announces a materially incorrect opening bid at the sale itself, and the property is sold for a grossly inadequate price, the trustee has discretion to rescind the sale by returning the successful bidder's funds prior to the issuance of trustee's deed.

Respectfully submitted,

Dated: May 31, 2012 KIRBY & McGUINN, A P.C.

By:_____
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Martin T. McGuinn
Attorneys for Amicus Curaie
United Trustees Association

CERTIFICATE OF WORD COUNT

The undersigned attorney of record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief of is produced using 14-point Roman type, including footnotes, and contains approximately 7,705 words, which is less than the total words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: May 31, 2012 KIRBY & McGUINN, A P.C.

By:_____
Dean T. Kirby, Jr.
Martin T. McGuinn
Attorneys for Amicus Curaie
United Trustees Association

CERTIFICATE OF INTERESTED PARTIES

The following entities or persons have either: (1) an ownership interest of 10% or more in the party or parties filing this certificate (Cal. Rules of Court, Rule 8.208(e), or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves ((Cal. Rules of Court, Rule 8.208(e)(2)):

NONE

Dated: May 31, 2012 KIRBY & McGUINN, A P.C.

By:_____
Dean T. Kirby, Jr.
Martin T. McGuinn
Attorneys for Amicus Curaie
United Trustees Association

PROOF OF SERVICE

I am over the age of eighteen years and not a party to the within-entitled action. I am employed in San Diego County, California, by the law firm of Kirby & McGuinn, A P.C. 707 Broadway Suite 1750, San Diego, CA 92101.

On June 1, 2012, I served upon the interested party(ies) in the action the foregoing document described as:

APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF APPEAL BY T. D. SERVICE COMPANY

[X] By placing ____ the original X true copy(ies) thereof enclosed in sealed envelope(s) addressed to:

VIA FEDERAL EXPRESS
California Court of Appeal (Orig. + 4)
Sixth Appellate District
[Address]

VIA FEDERAL EXPRESS
CALIFORNIA SUPREME COURT (4 copies)
Ronald Reagan Building
300 S. Spring Street, 2nd Floor
Los Angeles, CA 90013
213-830-7570

VIA FEDERAL EXPRESS
Attorney for

VIA FEDERAL EXPRESS
Attorney for

VIA FEDERAL EXPRESS
Santa Cruz County Superior Court Clerk (1 Copy)
The Honorable

VIA FEDERAL EXPRESS
Santa Cruz County Superior Court Clerk (1 Copy)
The Honorable

[ ] BY MAIL I deposited such envelope(s) with postage thereon fully prepaid in the United States mail at a facility regularly maintained by the United States Postal Service at San Diego, California. I am "readily familiar" with the firm's practice of collecting and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at San Diego, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing, pursuant to this affidavit.

[X] BY FEDEX I caused such envelope(s) to be placed for FedEx collection and delivery at San Diego, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for FedEx mailing. Under that practice it would be deposited with the FedEx office on that same day with instructions for overnight delivery, fully prepaid, at San Diego, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the FedEx delivery date is more than one day after date of deposit with the local FedEx office, pursuant to this affidavit.

[ ] BY FACSIMILE I caused the transmission of the foregoing document by facsimile to the offices of the addressee(s), and such transmission was reported as complete and without error.

[ ] BY PERSONAL SERVICE I caused such envelope(s) to be delivered by hand to the offices of the addressee(s) pursuant to CCP § 1011.

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

Executed on June 1, 2012 at San Diego, California.

JACQUELYN RIGG