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July 2, 2015

VIA TRUE-FILING

Hon. Dennis A. Cornell, Acting Presiding Justice
Hon. Stephen J. Kane, Associate Justice
Hon. Charles S. Poochigian, Associate Justice
California Court of Appeal
Fifth Appellate District
2424 Ventura Street
Fresno, California, 93721

REQUEST FOR PUBLICATION OF OPINION

Re: *Andre Torigian v. WT Capital Lender Services*
Case No. F068393 (Fresno County Superior Court No. 10CECG03800)

To the Honorable Justices of the Court of Appeal:

I. Introduction:

As authorized by California Rules of Court Rule 8.1120(a), the United Trustees Association ("UTA"), which filed an amicus brief in support of Appellant in the above-captioned matter, hereby respectfully requests that the Court consider its opinion in this matter for publication.

Pursuant to California Rules of Court Rule 8.1105(c), an opinion "should be certified for publication in the Official Reports if the opinion:

(1) Establishes a new rule of law;

(2) Applies an existing rule of law to a set of facts significantly different from those stated in published opinions;

(3) Modifies, explains, or criticizes with reasons given, an existing rule of law;

(4) Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;

(5) Addresses or creates an apparent conflict in the law;

(6) Involves a legal issue of continuing public interest;

(7) Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law;

(8) Invokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision; or

(9) Is accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law."

The UTA contends that this Court's June 24, 2015 Opinion in *Torigian v. WT Capital Lender Services* ("Opinion") meets at least the Second, Third, Fourth, Fifth and Sixth criteria and, accordingly, should be published.

II. Statement of Interest:

As set forth in its amicus brief in this matter, 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. Appellant WT Lender Services is a member of the UTA. As such the publication of this Opinion is of particular interest to the UTA and its members, as well as being of considerable benefit to the public and the courts.

III. Reasons for Publication of Opinion:

In its amicus brief, the UTA noted that a foreclosure trustee occupies a unique position in most disputes involving a non-judicial foreclosure; unless the trustee is itself properly chargeable with some wrongdoing in the conduct of its statutory and contractual duties *it is utterly irrelevant* to the trustee whether the foreclosure sale of the property is upheld or voided due to an act or omission of the

beneficiary. As explained in the amicus brief, 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.* Those duties 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, 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."

Nonetheless, there has been an unfortunate tendency on the part of many borrowers' counsel to automatically name the foreclosure trustee as a defendant on any and all causes of action arising out of foreclosure proceedings, without regard to whether the trustee has actually done anything improper, engaged in any unprivileged conduct, or acted outside the course and scope of its duties as trustee. Sometimes this is done out of ignorance of the role of the trustee; other times it is done out of malice, to punish the trustee merely for carrying out its duties—foreclosure or reconveyance as requested by the beneficiary—many of which are privileged. *See, e.g.* Civil Code §2924(b), (d).

In an effort to provide some protection to the foreclosure trustees, the Legislature enacted Civil Code § 2924*l*, allowing a trustee who was sued to seek to avoid the time and expense of litigation in which it has no interest beyond its role as trustee to file a declaration of non-monetary interest or status ("DNMS"), representing that it "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" and agreeing to be bound by the Court's orders as to the disposition of the deed of trust. Plaintiffs are then provided under Civil Code § 2924*l* with a 15 day period in which to file any objections to the declaration along with a statement of factual reasons for the objection. In addition, as noted in the UTA's Amicus Brief, the statute provides parties with a second opportunity to bring a trustee into the litigation by allowing a motion under Code of Civil Procedure § 473, should facts later develop that would show liability on the part of the trustee. However, as the Legislature, in amending § 2924*l* in 1997, expressly observed, the purpose of the change to Civil Code § 2924l(e) was as follows: "The bill would require the demand [challenging a DNMS] to set forth the factual basis for the demand." It is thus clear that the legislative intent was to recognize and protect the unique status of the trustee by minimizing 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.

Unfortunately, that legislative intent is not always realized, and the risk is not eliminated, particularly where timely objections are filed, since there is no provision for review of the merits of those objections. It has become all too commonplace for plaintiffs' counsel to throw together boilerplate objections to the DNMS. Even on an application for leave to file belated objections, the review is mostly cursory.

To make matters worse, when—as is often the case given the legal standard to be applied—the objecting plaintiff failed to prove any wrongdoing by the trustee, the plaintiff could (if he or she prevailed on their equitable claims) still seek to recover fees from the trustee by invoking *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316 and claiming to be the prevailing party even if the trustee did not challenge the equitable claims and agreed to be bound by the court's determination of them! That is precisely what Respondents did here. And, but for this Court's opinion, they would have gotten away with it.

This case does not present a unique situation but rather one that occurs with increasing frequency. Absent publication of this opinion to serve as a deterrent, parties will continue to bring the trustee into cases even without a factual or legal basis for doing so. Conversely, publishing this opinion is likely to reduce the number of bad faith objections to DNMS by providing a clear standard for dissuading the frivolous invocation of objections and a serious consequence—the risk of being liable for the trustee's fees—for failing to have a reasonable, good faith basis for the objections before asserting them. If there is a reasonable, good faith basis for objecting to the DNMS, though, a plaintiff can and will still be able to assert it.

This Opinion therefore meets the grounds for publication under Rule 8.1105 as follows:

A. **The Opinion applies an existing rule of law to a set of facts significantly different from those stated in published opinions:**

On pages 15 – 23 of the Opinion, the Court discussed at length the applicability of Civil Code § 1717 to claims against a foreclosure trustee but did so in a manner that was plainly different from that in the leading published opinion in that area, *Kachlon, supra*, and which came to a significantly different conclusion based on the different facts presented by the two cases. Indeed, as this Court observed in its opening sentences in Section D of its Opinion (p.15):

> The trial court and the Torigians both relied on *Kachlon, supra*, 168 Cal.App.4th 316, as authority for the award to the Torigians. They claim the facts in that case are almost exactly the same as those here. Not so.

Accordingly, this Opinion seems to plainly fit within the scope of this criterion notwithstanding the fact that the end result differed from that in *Kachlon.*

B. **The Opinion modifies, explains, or criticizes with reasons given, an existing rule of law:**

Similarly, the Opinion clearly "modifies, explains, or criticizes" the *Kachlon* decision and its interpretation of Civil Code § 1717—and provides ample reasons for doing so. For example, on p.22 of its Opinion alone, this Court listed several points of distinction between this case and *Kachlon.* In fact the opening sentence on that page states: "Thus, this case is distinguishable from *Kachlon.*" The UTA believes, based on its review and understanding of other such cases, that the facts presented by this case are more typical of what occurs with law suits naming the trustee than the facts in *Kachlon* were. Moreover, the Opinion also explains with reasons given the interplay of Civil Code § 2924*l* and the

parties' respective requests for attorney fees under Civil Code § 1717 and Code of Civil Procedure § 1021 (which was not discussed by *Kachlon* at all), particularly where the trustee has remained neutral on the equitable claims and prevailed on the tort claims.

C. **The Opinion advances a new interpretation, clarification, criticism, or construction of a provision of a statute:**

This Opinion clearly advances " a new interpretation, clarification, criticism, or construction of a provision of a...statute" at least to the extent that § 1717 has previously been interpreted, in light of *Kachlon, supra,* as either: (1) allowing a borrower to recover fees against a trustee who filed a DNMS, even if it only prevails on its *unchallenged* equitable claims and not on any tort claims, or (2) prohibiting a trustee who filed a DNMS and then prevailed on the tort claims but did not challenge the equitable claims from recovering its fees as the prevailing party on the tort claims (presuming, of course, that the language of the fee provision is broad enough to encompass the tort claims). At minimum, and in particular, the Court's extended discussion and analysis of the litigation objectives of the respective parties throughout the Opinion cuts a much clearer path than prior published decisions in the foreclosure area have done and would thus be of great use to future litigants and judges in determining precisely who should be found to have actually prevailed.

D. **The Opinion addresses or creates an apparent conflict in the law:**

Obviously, to the significant extent that it disagreed with, or at least distinguished, the holding in *Kachlon, supra*, this Opinion has created—and/or addressed--an apparent conflict in the law concerning the interpretation of Civil Code § 1717.

E. **The Opinion involves a legal issue of continuing public interest:**

As has often been noted, there is considerable litigation over foreclosures in the California courts since the banking crisis of 2007 and that litigation has only increased as a result of the efforts by the government to address the effects of that crisis, for example, the recent enactment of the California Homeowners' Bill of Rights. Foreclosure trustees have been caught up in the surge of litigation, even where they have attempted to extricate themselves by filing a DNMS under Civil Code § 2924*l*. The question of the parties' respective rights to recover attorney fees upon prevailing—and, indeed, even what it means to prevail under these circumstances is thus an issue of serious and continuing public interest. The publication of this Opinion would provide much needed guidance *to all the parties* in that regard. Further, because trustees are middlemen in the process, whose fees are limited by statute (Civil Code §§ 2924c and 2924d), publication of the Opinion would help ameliorate the undue burden litigation can place on the trustee by clarifying who is the prevailing party in the litigation where a declaration under Civil Code § 2924*l* has been filed and improvidently challenged.

IV. Conclusion:

In conclusion, there is every reason for this Court's Opinion in *Torigian v. WT Capital Lender Services* to be published and no compelling, countervailing reason for not publishing it. A published opinion here would foster judicial efficiency and economy by potentially reducing the number of bad faith claims against trustees or at least acknowledging a right to recovery of fees and costs for improperly named trustees who have timely invoked the protections of § 2924*l* but were nonetheless forced to defend themselves against unsubstantiated tort charges as a result of improvident and unsupported objections to the DNMS. Accordingly, the UTA respectfully requests and urges that this Court certify the Opinion for publication.

Respectfully submitted,
The United Trustees Association
By:

Jonathan D. Fink, Esq.
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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 July 2, 2015, I served the within **REQUEST FOR PUBLICATION OF OPINION** on all interested parties in this action as follows:

[X] by placing [ ] the original [X] a true copy thereof enclosed in sealed envelope(s) and via Electronic Service through True Filing addressed as follows:

SEE ATTACHED SERVICE LIST

[X] (BY MAIL SERVICE) I placed such envelope(s) for collection to be mailed on this date following ordinary business practices.

[X] ELECTRONIC SERVICE – TRUE FILING–I caused electronic submission to the Court of Appeal through True Filing. Thereafter, a copy is automatically emailed to the Parties.

[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 July 2, 2015, at Newport Beach, California.

Julie L. Hansen

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