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July 1, 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, CA 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:

Pursuant to California Rules of Court, Rule 8.1120, we respectfully request the Court to certify for publication its entire opinion in *Torigian v. WT Capital Lender Services* ("Court's Opinion"). We write on behalf of our client, Appellant WT Capital Lender Services ("WT Capital"), and more generally on behalf of all trustees acting under deeds of trust recorded in California.

In 1995, the legislature enacted Civil Code § 2924/ which allows a trustee under a deed of trust, under specific designated conditions, to file a declaration of nonmonetary status ("DNMS") when named in a lawsuit under a deed of trust¹. Absent an objection to the DNMS by another party who has appeared in the lawsuit, the trustee is treated as a non-party but is subject to any nonmonetary judgment in the action.² When there is an objection filed to the DNMS, the objection must "set forth the factual basis on which the objection is based". Thereafter, the trustee must appear and participate in the action or proceeding.³

¹ Civil Code § 2924/(b) amended in 1997.

² Civil Code § 2924/(c) & (d).

³ Civil Code § 2924/(c) & (e).

Since 1995, Civil Code § 2924/ has been cited in a number of unpublished cases and in a handful of published cases. However, no published opinion has interpreted, applied, clarified, construed or explained all three components of Civil Code § 2924/ under facts similar to those in the Court's Opinion. (See discussion below). No prior published case explains the relationship between the trustee remaining neutral in litigation between the trustor ("Borrower"), beneficiary ("Lender"), and trustee and the application of Civil Code § 1717 *as well as Code of Civil Procedure* §§ 1021, 1032(b) and 1033.5(a)(10). (See, discussion of *Kachlon* case below.)

California Rule of Court, Rule 8.1105(c) provides an opinion of a Court of Appeal should be certified for publication in the Official Reports if it meets *any one* of the grounds set forth in that Rule. The Court's Opinion here meets a number of grounds for publication including those set forth in California Rule of Court, Rule 8.1105(c)(2), (3), (4), (5), and (6) as more specifically discussed below.

For these reasons, and as explained more fully herein, we respectfully request the Court's Opinion be certified for publication.

The Court's Opinion involves a legal issue of continuing public interest. (Cal. Rule of Court, Rule 8.1105(c)(6).)

The Supreme Court's 1985 opinion in *I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d. 281 ("*I.E. Associates*") held that: "Trustees, the middlemen, need to have clearly defined responsibilities to enable them to discharge their duties efficiently *and to avoid embroiling the parties in time-consuming and costly litigation* [cts. om.]" (Id., at pp. 287-288.) Thereafter, the legislature passed a number of amendments to the nonjudicial foreclosure statutes including Civil Code § 2924/ [DNMS] and 2924(d) [qualified privilege] designed to minimize or prevent trustees from becoming embroiled in litigation between Borrowers and Lenders particularly where the trustee has no interest in the property and has engaged only in privileged conduct. (See, Appellant's Opening Brief.) Ten years after *I.E. Associates*, Civil Code § 2924/ was passed. Another twenty years have passed without a published opinion that explains, interprets, construes, or clarifies the use of Civil Code § 2924/ as well as its relationship to Civil Code § 1717 *as well as Code of Civil Procedure* §§ 1021, 1032(b) and 1033.5(a)(10).

Many, if not most, deeds of trust used in California contain the same (or similar) attorney's fees and cost language found in the deed of trust which was the subject of the Court's Opinion. Civil Code § 2924/ is clearly intended to keep a trustee who remains neutral from becoming embroiled in costly litigation between the Lender and the Borrower involving a deed of trust. This policy not only benefits parties to litigation but it also promotes judicial economy by reducing unnecessary litigation that burdens the court system. To serve this public interest, all of the parties to a deed of trust must understand the use of the DNMS and the use of the objection under Civil Code § 2924/; what it means for the trustee to "remain neutral"; and how this impacts the determination

of “prevailing party” for the purpose of the award of attorney’s fees and costs. Publishing the Court’s Opinion will help clarify this issue of continuing public interest.

The Court’s Opinion applies an existing rule of law to a set of facts significantly different from those stated in published opinions. (Cal. Rule of Court, Rule 8.1105(c)(2).)

The Court’s Opinion addressed the following factual pattern:

- The trustee timely filed a DNMS under Civil Code § 2924/ (i.e., declaring its “neutrality” in the equitable/contractual causes of action);
- Even after the Borrower’s tardy objection to the DNMS, the trustee limited its defense to the monetary (tort) causes of action (i.e., slander of title and negligence) and remained neutral as to the Borrower’s equitable and contract causes of action (i.e., quiet title, declaratory relief and injunction).
- The trustee prevailed on all monetary (tort) causes of action. The Borrower obtained relief against the Lender and trustee (WT Capital) on the equitable/contract causes of action regarding which the trustee remained neutral.
- Because the trustee’s litigation goal was to “remain neutral” on all equitable/contract causes of action and only to defend on the monetary (tort) causes of action (upon which it prevailed), the court had to determine the prevailing party for the purpose of costs and attorney’s fees. (Code of Civil Procedure §§ 1021, 1032(b) and 1033.5(a)(10) and under Civil Code § 1717.)

Kachlon v. Markowitz (2008) 168 Cal. App. 4th 316 (“*Kachlon*”) is the only published opinion dealing with the “neutrality of the trustee” and Civil Code §§ 1717 and 2924/. However, *Kachlon* was based upon significantly different facts. As noted herein and in more detail in the Court’s Opinion, even though both cases address the award of attorney’s fees and costs in an action involving the foreclosure of a deed of trust where the Borrower obtained equitable/contract relief against the beneficiary and the trustee prevailed on the related nonmonetary (tort) causes of action, the facts in *Kachlon* are totally distinguishable and significantly different from those in the Court’s Opinion. Among many other distinctions, in *Kachlon*, the trustee was represented by the same attorney as the beneficiary; joined with the beneficiary in the beneficiary’s motions opposing equitable/contract relief; and failed to timely file a DNMS under Civil Code § 2924/.

Because of the complete lack of neutrality by the trustee in *Kachlon* and the untimely filing of a DNMS, the court of appeal in *Kachlon* only cited Civil Code § 2924/ twice and did not address the application of Civil Code § 2924/ to facts which were the subject of

the Court's Opinion (i.e., where the trustee in fact filed a timely DNMS and, after objection, remained neutral throughout the litigation as to the equitable/contract causes of action). While *Kachlon* used the term "neutrality" regarding the trustee's conduct and entitlement to attorney's fees and costs, the majority of the *Kachlon* opinion instead dealt with the qualified privilege under Civil Code §2924(d) and who was the prevailing party for the purposes of costs and attorney's fees under Civil Code § 1717 (i.e., contract actions). Unlike the Court's Opinion here, in *Kachlon*, the issue of who was the prevailing party under Code of Civil Procedure § 1021 was not raised in the trial court or on appeal.

Because the facts in the Court's Opinion are significantly different from those in *Kachlon* or any other published case, the Court's Opinion should be certified for publication.

The Court's Opinion explains, clarifies and construes an existing rule of law or statute. (Cal. Rule of Court, Rule 8.1105(c)(3)&(4).)

The Court's Opinion should be published as no written opinion since the enactment of Civil Code § 2924/ in 1995 explains the three components of that section or the impact of the trustee remaining neutral throughout this type of litigation. *Kachlon* discussed what *not* remaining neutral meant but—unlike this Court's Opinion--it did not explain, construe, apply or interpret what remaining "neutral" *means* where the trustee timely filed a DNMS under Civil Code § 2924/ and where the trustee's other conduct in the litigation further supported its litigation objective of remaining "neutral."

Unlike *Kachlon*, the Court's Opinion thoroughly discusses the application of the trustee remaining neutral in its determination of the prevailing party under the broad provisions of the deed of trust (covering any "any action or proceeding") under Code of Civil Procedure § 1021 as well as under Civil Code § 1717, and under the costs provisions of Code of Civil Procedure §§ 1032(b) and 1033.5(a)(10).

The Court's Opinion advances a new clarification and or construction of a provision of a statute. (Cal. Rule of Court, Rule 8.1105(c)(4).)

The Court Opinion's construction of Civil Code § 2924/ and of the consequence of the trustee remaining (or not remaining) neutral in the litigation for the purpose of determining a prevailing party under the applicable attorney's fees and costs provisions will guide trustees, Borrowers, and Lenders in handling deed of trust litigation, particularly where the only alleged misconduct of the trustee is engaging in privileged acts. (Civil Code § 2924(d).) Publication will further the public policy of not "embroiling the parties in time-consuming and costly litigation".

The Court's Opinion addresses apparent conflicts in the law. (Cal. Rule of Court, Rule 8.1105(c)(5).)

In *Huckell v. Matranga* (1979) 99 Cal.App.3rd 471, the Borrower filed a quiet title action against the Lender and the trustee. The trial court ruled in favor of the Borrower on the quiet title action and entered judgment against both the Borrower and the trustee. Even though the trustee did not oppose the plaintiff's requested relief and was found not to have violated any trustee's duties, as here, the trial court held that the Borrower was the prevailing party as to both the Lender and the trustee and awarded the Borrower attorney's fees and costs against both. As in the Court's Opinion, the court of appeal in *Huckell* reversed the trial court's decision holding that the trustee must be considered separately from the Lender when the court determines the prevailing party for the purposes of attorney's fees and costs. *Huckell* was decided before the enactment of Civil Code § 2924I, although the court's holding remains good law.

Kachlon, on the other hand, considered the Lender and the trustee together because the trustee had not remained neutral throughout the litigation. While *Kachlon* is factually distinguishable from the instant case, there is an apparent conflict in the law between *Huckell* and *Kachlon* which the Court's Opinion addresses in detail.

The tripartite relationship under the deed of trust is an unusual one. There is no published opinion that explains more clearly than the Court's Opinion how, in this tripartite relationship, the trial court should determine the "prevailing party" for the purposes of awarding attorney's fees and costs where the Borrower successfully obtains equitable/contract relief and where the trustee remained neutral as to the equitable/contract causes of action and prevails on the nonmonetary (tort) causes of action.

For the reasons set forth above, WT Capital respectfully requests that the Court certify the Court's Opinion for publication.

Respectfully submitted,

ADLESON, HESS & KELLY, APC



PHILLIP M. ADLESON, Attorneys for
WT Capital Lender Services

PMA/tlc

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July 1, 2015
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cc: Catherine E. Bennett, Esq. (Attorney for Respondents)
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David J. Cooper, Esq. (Attorney for Respondents)
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Don J. Pool, Esq. (Attorney for Appellant)
Matthew J. Backowski, Esq. (Attorney for Appellant)
Lisa J. Parrella, Esq. (Attorney for Appellant)

PROOF OF SERVICE

I am over the age of eighteen years and not a party to the within-entitled action. I am employed in Campbell, California, with the law firm of Adleson, Hess & Kelly, a PC. My business address is 577 Salmar Avenue, 2nd Floor, Campbell, CA 95008

On July 1, 2015, I served upon the interested party(ies) in the action the foregoing document described as:

***TORIGIAN v. WT CAPITAL LENDER SERVICES –
REQUEST FOR PUBLICATION OF OPINION –
Fifth Dist. Court of Appeal Case No: F068393***

X by placing _____ the original X true copies thereof enclosed via True-Filing and in sealed envelopes addressed to:

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CM/ECF CERTIFICATE OF ELECTRONIC FILING, the undersigned hereby certifies that he/she caused to be electronically filed the foregoing with the clerk of the Court using the CM/ECF system which sends a Notice of Electronic filing to the parties listed above that are part of the CM/ECF system.

- X **ELECTRONICALLY TRUE-FILING:** by emailing to the party(ies), upon consent of each party, as shown above.
- X **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

(FEDERAL) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on July 1, 2015 at Campbell, California.



TAMMY CLARK