

LAW OFFICES OF TIMOTHY L. MCCANDLESS
820 Main Street, Suite #1
P.O. Box 149
Martinez, California 94553
Telephone (925) 957-9797 / Facsimile (925) 957-9799

1 Timothy L. McCandless, Esq., SBN 147715
2 LAW OFFICES OF TIMOTHY L. MCCANDLESS
3 820 Main Street, Suite #1
4 P.O. Box 149
5 Martinez, California 94553

6 Telephone: (925) 957-9797
7 Facsimile: (925) 957-9799
8 Email: legal@prodefenders.com

9 Attorney for Defendant(s): Alexander B. Paragas

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **IN AND FOR THE COUNTY OF SAN MATEO**
12 **SOUTHERN BRANCH - HALL OF JUSTICE & RECORDS**

13 FEDERAL HOME LOAN MORTGAGE
14 CORPORATION, ITS ASSIGNEES
15 AND/OR SUCCESSORS,

16 Plaintiff(s),

17 VS.

18 ALEXANDER B. PARAGAS; PERLA O.
19 PARAGAS; and DOES 1 -10, Inclusive,

20 Defendant(s)

21 CASE NO: CLJ205995

22 TRIAL BRIEF

23 Hearing's:
24 Date : September 24, 2012
25 Time : 9:00 a.m.
26 Dept. : Presiding
27 Reservation No.:

28 Defendant and Movant herein, ALEXANDER B. PARAGAS ("Defendant"), submits the following Trial Brief

29 **POINTS AND AUTHORITIES**
30 **I**
31 **FACTUAL BACKGROUND OF THIS LITIGATION**

1 On or about January 24, 2008, Defendant executed an "Adjustable Rate Note" promising to
2 pay INDYMAC BANK, F.S.B. (hereinafter "INDYMAC")¹, the sum of \$417,000.00, by monthly
3 payment commencing February 1, 2008.

4 The Deed of Trust ("DOT") and the Note are between Defendant, Defendant's wife Mrs.
5 Paragas and INDYMAC, Plaintiff was never a signatory to this Note, or DOT. *See* Exhibit "1" to
6 concurrently-filed Request for Judicial Notice ("RJN").

7 The issue is does Plaintiff has a right as a stranger to the Note to foreclose on the Note and
8 DOT that was not in its name and for which Plaintiff was not party to the Note or financing
9 transaction nor a disclosed beneficiary by virtue of a recorded assignment.

10 Furthermore Defendant alleges that MORTGAGE ELECTRONIC REGISTRATION
11 SYSTEMS INC., a/k/a MERSCORP, INC. (hereinafter "MERS") was not listed anywhere on his
12 Note executed at the same time as DOT. Furthermore Defendant is informed and believes that
13 directly after INDYMAC caused MERS to go on title as the "Nominee Beneficiary" this is
14 routinely done in order to hide the true identity of the successive Beneficiaries when and as the
15 loan was sold.

16 Based upon published reports, including MERS' web site, Defendant believes and hereon
17 allege, MERS does not: (1) take applications for, underwrite or negotiate mortgage loans; (2)
18 make or originate mortgage loans to consumers; (3) extend credit to consumers; (4) service
19 mortgage loans; or (5) invest in mortgage loans.

20 MERS is used by Plaintiff and foreclosing entities to facilitate the unlawful transfers or

21 ¹ Independent National Mortgage Corporation "INDYMAC" before its failure was the largest savings and loan association in the
22 Los Angeles area and the seventh largest mortgage originator in the United States. The failure of INDYMAC on July 11, 2008, was the
23 fourth largest bank failure in United States history, and the second largest failure of a regulated thrift.

24 The primary causes of INDYMAC's failure were largely associated with its business strategy of originating and securitizing Alt-
25 A loans on a large scale. During 2006, INDYMAC originated over \$90 billion of mortgages. INDYMAC's aggressive growth strategy, use
26 of Alt-A and other nontraditional loan products, insufficient underwriting, credit concentrations in residential real estate in the California
27 and Florida markets, and heavy reliance on costly funds borrowed from the Federal Home Loan Bank (FHLB) and from brokered deposits,
28 led to its demise when the mortgage market declined in 2007. As an Alt-A lender, INDYMAC's business model was to offer loan products
to fit the borrower's needs, using an extensive array of risky option-adjustable-rate-mortgages (option ARMs), subprime loans, 80/20 loans,
and other nontraditional products. Ultimately, loans were made to many borrowers who simply could not afford to make their payments.
The thrift remained profitable only as long as it was able to sell those loans in the secondary mortgage market.

When home prices declined in the latter half of 2007 and the secondary mortgage market collapsed, INDYMAC was forced to
hold \$10.7 billion of loans it could not sell in the secondary market. Its reduced liquidity was further exacerbated in late June 2008 when
account holders withdrew \$1.55 billion or about 7.5% of INDYMAC's deposits. During this time INDYMAC's financial situation was
unraveling at the seams, culminating on July 11, 2008 when INDYMAC was placed into conservatorship by the Federal Deposit Insurance
Company "FDIC" due to liquidity concerns. A bridge bank, INDYMAC FEDERAL BANK, F.S.B., Defendant in the instant action, was
established to assume control of INDYMAC's assets and secured liabilities, and the bridge bank was put into conservatorship under the
control of the FDIC.

On March 19, 2009 the Acting Director of Office of Thrift Supervision "OTS" replaced the FDIC as conservator for INDYMAC
pursuant to Section 5(d)(2)(C) of the Home Owners' Loan Act (HOLA), 12 U.S.C. 1464(d)(2)(C); and appointed the FDIC as the receiver
for INDYMAC pursuant to Section 5(d)(2) of HOLA, 12 U.S.C. 1464(d)(2) and Section 11(c)(5) of the FDIA, 12 U.S.C. 1821(c)(5).

As a result of the OTS Order, INDYMAC became an "inactive institution" on March 19, 2009, the very same day that the Order
was issued. In other words, INDYMAC, as a defunct corporation, was no longer in existence as of March 19, 2009.

LAW OFFICES OF TIMOTHY L. MCCANDLESS
820 Main Street, Suite #1
P.O. Box 149
Martinez, California 94553
Telephone (925) 957-9797 / Facsimile (925) 957-9799

LAW OFFICES OF TIMOTHY L. MCCANDLESS
820 Main Street, Suite #1
P.O. Box 149
Martinez, California 94553
Telephone (925) 957-9797/ Facsimile (925) 957-9799

1 mortgages, unlawful pooling of mortgages and the injection into the United States banking
2 industry of un-sourced (i.e. unknown) funds, including, without limitation, improper off-shore
3 funds. Defendant is informed and thereon believes and alleges that MERS has been listed as
4 beneficiary owner of more than half the mortgages in the United States. MERS is improperly
5 listed as beneficiary owner of Defendant's mortgage.

6 Nationwide, there are courts requiring banks that claim to have transferred mortgages to MERS
7 to forfeit their claim to repayment of such mortgages.

8 MERS' operations undermine and eviscerate long-standing principles of real property law,
9 such as the requirement that any person who seeks to foreclose upon a parcel of real property: (1)
10 be in possession of the original Note and mortgage; and (2) possess a written assignment giving it
11 rights to the payments due from borrower pursuant to the mortgage and Note.

12 The Plaintiff and its agents did not want to pay the fees associated with recording mortgages
13 and they did not wanted to bother with the trouble of keeping track of the originals. That is the
14 significance of the word 'Electronic' in Mortgage Electronic Registration Systems, Inc. The
15 undermined long-established rights and sabotaged the judicial process, eliminating,
16 "troublesome" documentation requirements. While conversion to electronic loan documentation
17 may eventually be implemented, it will ultimately be brought about only through duly enacted
18 legislation which includes appropriate safeguards and counterchecks.

19 Upon information and belief:

- 20 a) MERS is not the original lender for Defendant's loan;
- 21 b) MERS is not the creditor, beneficiary of the underlying debt or an assignee
22 under the terms of Defendant's Promissory Note;
- 23 c) MERS does not hold the original Defendant's Promissory Note, nor has it ever
24 held the originals of any such Promissory Note;
- 25 d) At all material times, MERS was unregistered and unlicensed to conduct
26 mortgage lending or any other type or real estate or loan business in the State of
27 California and has been and continues to knowingly and intentionally
28 improperly record mortgages and conduct business in California and elsewhere
on a systematic basis for the benefit of the Plaintiff and other lenders.

Defendant initiated loan modification negotiation efforts with ONEWEST BANK, F.S.B.,
(hereinafter "ONEWEST") on or about November 2010, after experiencing unforeseen financial

1 hardship. Defendant believed that his loan servicer would be willing to avoid a foreclosure since
2 he and his wife Mrs. Paragas were willing to tender unconditionally but needed the monthly
3 payments restructured to reflect the downturn in their monthly gross income, and reflect the
4 current market conditions.

5 Despite Defendant's efforts, ONEWEST has refused to work in any reasonable way to modify
6 the loan or avoid foreclosure sale. Furthermore ONEWEST is presently bound by a Consent
7 Order, WN-11-011², with the United States of America Department of the Office of Thrift
8 Supervision related to its initiation and handling of foreclosure proceedings. The Consent Order is
9 based in part on foreclosure affidavits that have been found to be false. ONEWEST presently
10 manages approximately 141 billion dollars in residential mortgage loans in which it has litigated
11 numerous wrongful foreclosure proceedings and initiated non-judicial foreclosure proceedings
12 without proper standing.

13 The challenged foreclosure process is based upon several Assignments of DOT.

- 14 a) First Assignment executed and effective January 3, 2011, *See* RJN Exhibit "2";
- 15 b) Second Assignment executed and effective May 24, 2011, *See* RJN Exhibit "3";
- 16 and
- 17 c) Third Assignment executed and effective October 31, 2011, *See* RJN Exhibit
18 "4".

19 There are no documents of which the Court can take judicial notice that establish that MERS
20 either held the Promissory Note or was given the authority by INDYMAC, the original lender, to
21 assign the Note.

22 Defendant further alleges and according the San Mateo County Recorder's Office, that first
23 Assignment of DOT (*See* RJN Exhibit "2") was purportedly signed by Mr. BRIAN BURNETT as
24 the "Assistant Secretary" of MERS, Defendant believes and alleges that Mr. BRIAN BURNETT
25 was never, in any manner whatsoever, appointed as the "Assistant Secretary" by the Board of
26 Directors of MERS, as required by MERS' corporate by-laws and an adopted corporate resolution
27 by the Board of Directors of MERS. For that reason, Mr. BRIAN BURNETT never had, nor has,
28 any corporate or legal authority from MERS, or the lender's successors and assigns, to execute
the purported "Assignment." Furthermore Mr. BRIAN BURNETT purports to be ONEWEST's
"Assistant Vice President" according the Substitution of Trustee ("SOT") executed and effective

² *See*: <http://www.mortgagedaily.com/forms/OccConsentOrderOnewest041311.pdf>

LAW OFFICES OF TIMOTHY L. MCCANDLESS
820 Main Street, Suite #1
P.O. Box 149
Martinez, California 94553
Telephone (925) 957-9797 / Facsimile (925) 957-9799

1 January 13, 2011 a true and correct copy of the SOT is attached to the Declaration of Alexander
2 See RJN Exhibit "5".

3 This is a shell game where Mr. BRIAN BURNETT purports to be "Assistant Secretary" and
4 "Assistant Vice President" for two different entities at the same time, in reality Mr. BRIAN
5 BURNETT is an employee for ONEWEST, so that he can manufacture the paperwork necessary
6 for ONEWEST to hijack the mortgage and then foreclose on the property. Furthermore this is
7 example of how MERS is being used by its members to perpetrate a fraud.

8 On or about October 31, 2011 another MERS' employee Mrs. WENDY TRAXLER as
9 "Assistant Secretary" once again assigned same DOT to ONEWEST (See RJN Exhibit "4").

10 Defendant alleges that employees of same entity, in this case MERS', Mr. BRIAN BURNETT
11 and Mrs. WENDY TRAXLER, both "Assistant Secretaries", did not communicated as to the
12 Defendant's Note and DOT before the execution of the Assignments, or it appears that MERS'
13 employees preparing and signing off on foreclosures without reviewing them, as the law requires.

14 It has been widely reported in the media that mortgage servicers, lenders, and major banks
15 have suspended over a hundred thousand foreclosures because relevant documents may not have
16 been properly prepared by ROBO-SIGNERS. Typically, the ROBO-SIGNERS were given phony
17 titles such as "Vice President" and "Assistant Secretary" to make it appear that they were bank
18 officers. In reality, ROBO-SIGNERS were typically, teens, hair stylists, Wal-Mart workers,
19 students, and unemployed persons of varying backgrounds.

20 The ROBO-SIGNING of affidavits and Assignments of Mortgage and all other mortgage
21 foreclosure documents served to cover up the fact that loan servicers cannot demonstrate the facts
22 required to conduct a lawful foreclosure.

23 Here in this instant case Mr. BRIAN BURNETT assigned DOT from MERS to ONEWEST on
24 or about January 3, 2011 (See RJN Exhibit "2"), on or about May 24, 2011 Mrs. MOLLIE
25 SCHIFFMAN an "Assistant Vice President" of ONEWEST assigned interest of Defendant's Note
26 and DOT to the Plaintiff (See RJN Exhibit "3"), yet on or about October 31, 2011 Mrs. WENDY
27 TRAXLER once again assigns same Note and DOT from MERS to ONEWEST (See RJN Exhibit
28 "4"), this fabricated Assignments of DOT is nothing more than an attempt of Plaintiff and its
agents to hijack the mortgage and then foreclose on the property, in violation of California Civil
Law.

Defendant further alleges that purported Assignments of his Note and DOT, is attempt to pave

1 the way for Plaintiff to be able to claim an estate or interest in the Property adverse to that of
2 Defendant.

3 Defendant alleges that, on information and belief, ONEWEST, QUALITY LOAN SERVICE
4 CORPORATION, (hereinafter "QUALITY"), Plaintiff and/or its agents have been fraudulently
5 enforcing a debt obligation, fraudulently foreclosed on Plaintiff's Subject Property in which they
6 did not have pecuniary, equitable or legal interest. Thus, ONEWEST's, QUALITY's and/or
7 Plaintiff's conduct was part of a fraudulent debt collection scheme.

8 Defendant further alleges that on or about January 26, 2011 QUALITY recorded Notice of
9 Default ("NOD"), See JNR Exhibit "6".

10 Defendant further alleges, on or about May 4, 2011, had received Notice of Trustee's Sale
11 ("NTS") See RJN Exhibit "7". The sale was scheduled for May 23, 2011 at 1:00 p.m., but
12 postponed to several times, until April 23, 2012 at 1:00 p.m., when sale of the Subject Property
13 was executed.

14 On or about April 23, 2012 at 12:31 p.m., Defendant filed voluntary Chapter 13 bankruptcy
15 protection in the United States Bankruptcy Court for the Northern District of California, Case No.
16 12-31228 See RJN Exhibit "8", along with Motion to Extend Automatic Stay pursuant *U.S.C.*
17 *Section 362(c)(3)(B)*, Notice of Opportunity for Hearing on Motion to Extend Automatic Stay
18 pursuant *U.S.C. Section 362(c)(3)(B)*, and Declaration in Support of Hearing on Motion to Extend
19 Automatic Stay pursuant *U.S.C. Section 362(c)(3)(B)* See RJN Exhibit "9".

20 Plaintiff and its agents have been notified of the filings, but failed to object and proceeded with
21 the sale of the Subject Property in violation of the *11 U.S.C. Section 362*, and conveyed all its
22 right, title and interest in and to the Plaintiffs' property.

23 On or about May 4, 2012 QUALITY recorded Trustee's Deed Upon Sale ("TDUS") See RJN
24 Exhibit "10", that operated to perfect the lenders/beneficiary interest in the property of the
25 Defendant during the pendency of the Chapter 13 proceeding.

26 On or about June 11, 2012 U.S. Bankruptcy Judge, Mr. THOMAS E. CARLSON granted
27 Motion to Extend Automatic Stay See RJN Exhibit "11", stating that Automatic Stay, under *11*
28 *U.S.C. Section 362(a)*, shall remain in force for the duration of Defendant's Chapter 13
proceeding, until is terminated under *11 U.S.C. Section 362(c)(1)*, or a Motion for Relief from
Stay is granted under *11 U.S.C. Section 362(d)*, no Motion for Relief has been filed by any
Creditor, including Plaintiff herein.

1 On or about May 16, 2012, Plaintiff filed this instant case. The Unlawful Detainer Complaint
2 states that the Plaintiff obtained the right to possession by a Trustee's sale and that title was
3 perfected and recorded [UD Complaint, ¶11]. Title is "duly perfected" when all steps have been
4 taken to make it perfect, that is, to convey to purchaser that which he has purchased, valid and
5 good beyond all reasonable doubt, *Kessler v. Bridge* (1958, Cal App Dep't Super Ct) 161 Cal
6 App 2d Supp 837, 327 P2d 241, 1958 Cal App LEXIS 1814.

7 In this instant case, the title has not been perfected in Plaintiff's since the title to the Property
8 was not conveyed to Plaintiff under the power of sale contained in the DOT and/or was not
9 conveyed in compliance with *California Civil Code Section 2924 et seq.*, and in violation of *11*
U.S.C. Section 362.

10 **FHLMC DOES NOT HAVE STANDING TO BRING THE INSTANT ACTION**

11 FHLMC lacks standing to bring the instant action for possession of the subject property. (1)
12 FHLMC is not a proper party to this action, and as such the court is without jurisdiction to grant
13 possession of the subject property to Plaintiff. Further, (2) Plaintiff or Plaintiff's predecessor
14 failed to perform (2) conditions precedent (i) mandated by the original DOT, Section (20) which
15 requires a separate Notice and opportunity to cure in addition to the procedure established by
16 *California Civil Code Section 2924* thereby cancelling the performance of Defendant, and (ii)
17 they failed to record the assignment of the deed of Trust a condition precedent to conducting a
18 foreclosure sale, (3) Plaintiff cannot prove that the non-judicial foreclosure which occurred,
19 strictly complied with the tenets of *California Civil Code Section 2924* in order to maintain an
20 action for possession pursuant to *California Code of Civil Procedure Section 1161*.

- 21 1. Plaintiff failed to perform a condition precedent contained in the DOT prior to
22 bringing this action pursuant to *California Code of Civil Procedure Section*
23 *1161*, which mandates that the trustee attempting in writing prior to the
24 institution of a non-judicial foreclosure to allow defendant to cure the default;
- 25 2. Plaintiff failed to record the assignment of the Note and DOT prior to initiating
26 the foreclosure therefore the foreclosure was invalid under *Section 2924*;
- 27 3. The original promissory note executed by Defendant and his wife Mrs. Paragas
28 is invalid due to the ineffective method of assignment utilized by the parties,
assignment of the promissory note was not contained on the body of the page of

1 the Note, but rather was effectuated on a different paper, notwithstanding the
2 fact that there was sufficient room to draft the assignment on the face of the
3 note;

- 4 4. At the time of making the Note and DOT, Plaintiff's predecessor ONEWEST
5 was operating its business from Inside California; however, ONEWEST was not
6 lawfully registered with the Secretary of State to conduct business pursuant to
7 *California Corporations Code Section 1502 et seq.* invalidating the Note and
8 DOT; and
- 9 5. The Trustee that conducted the non-judicial foreclosure sale was not a holder in
10 due course of the Original Note, because the Note was rendered non-negotiable
11 by (i) the manner in which the assignment was attempted, and (ii) the failure of
12 FHLMC to record the assignment, invalidating the Note, and resulting TDUS,
13 which denies Plaintiff standing to seek possession under *California Code of*
14 *Civil Procedure Section 1161a.*
- 15 6. The Substitution of Trustee was not in compliance with Civil code 2934a and as
16 such there was no effective Substitution of Trustee the trustee is still Chicago
17 Title as provided in the Deed of Trust.

18 LEGAL ANALYSIS

19 In this matter before the Bench, it becomes pellucidly clear that several fatal errors occurred
20 throughout the assignment of the Defendant's Note and DOT, and ineffective non-judicial
21 foreclosure sale, which when weighed together have the effect of denying Plaintiff the necessary
22 standing to seek possession.

- 23 1. **Plaintiff failed to perform a condition precedent contained in the DOT**
24 **prior to bringing this action pursuant to *California Code of Civil***
25 ***Procedure Section 1161.***

26 This party is charged with the duty to perform and condition precedent prior to bringing the
27 instant action and failed to do so. Paragraph (20) of the DOT provides in pertinent part:

28 **Neither borrow or lender may commence, join, or be joined to any judicial action**
(as either an individual litigant, or the member of a class, that arises from the other
party's actions pursuant to this security instrument or alleges that the other party has

1 **2. Plaintiff failed to record the assignment of the Note and DOT prior to**
2 **initiating the foreclosure therefore the foreclosure was invalid under**
3 **Section 2924.**

4 There is also a condition precedent to enforcing the note by an assignee, see *California Civil*
5 *Code Section 2932.5* which states:

6 2932.5. Where a power to sell real property is given to a mortgagee, or
7 other encumbrancer, in an instrument intended to secure the payment of
8 money, the power is part of the security and vests in any person who by
9 assignment becomes entitled to payment of the money secured by the
 instrument. The power of sale may be exercised by the assignee if the
 assignment is duly acknowledged and recorded. (emphasis added).

10 **The assignment was not Recorded**

11 The assignment was not recorded. Since FHLMC failed to record the assignment they were not
12 entitled to enforce the Note or to foreclose on this Property therefore the Title was not perfected
13 under *Section 2924* by a foreclosure sale and was not duly carried out under *Section 2924* and was
14 wholly defective and this Plaintiff has no standing in this Unlawful Detainer action.

15 In addition to recording the assignment, the Beneficiary must also deliver the Original Note to
16 the Trustee in order for the Trustee to conduct the foreclosure sale. *Haskell V. Matranga* (1979)
17 CA 3d. 471, 479-480, 160 CR 177;

18 In the Case of a Mortgage with a power of Sale an assignee can only enforce the power of sale
19 if the assignment is recorded, since the assignee's authority to conduct the sale must appear in the
20 public records, *New York Life Insurance Co. V. Doane*, (1936) 13 CA 2d. 233, 235-237, 56 P2d.
 984, 56 ALR 224;

21 **3. The Substitution of Trustee was not in compliance with *Civil Code 2934a* and as**
22 **such there was no effective Substitution of Trustee the trustee is still Chicago**
23 **Title as provided in the Deed of Trust.**

24 *Civil Code Section 2934a(b)* provides that the "If the substitution is executed, but not
25 recorded, prior to or concurrently with the recording of the notice of default, the beneficiary or
26 beneficiaries or their authorized agents shall cause notice of the substitution to be mailed prior
27 to or concurrently with the recording thereof An affidavit shall be attached to the
28 substitution that notice has been given to those persons and in the manner required by this

1 subdivision.” *Civil Code Section 2934a(b)* (emphasis added); See also *Atienza v. Wells Fargo*
2 *Bank, N.A.*, No. C 10-03457 RS, 2011 U.S. Dist. LEXIS 1738, 2011 WL 11507, at *3 (N.D.
3 Cal. Jan. 4, 2011) (“[S]ection 2934a(b) provides that if the substitution is executed prior to or
4 concurrently with the recording of a [notice of default], then notice of the substitution must be
5 mailed on or before that recordation date.” (emphasis added). Here supporting documents
6 clearly show a violation of *Section 2934a* that resulted in improper notice.

7 Failure to record the Substitution of Trustee before recording the Notice of Default, Plaintiff
8 was required to send a Notice of Substitution of Trustee prior to or concurrently with the
9 recordation of the Notice of Default on January 26, 2011. There is no affidavit attached to the
10 Notice of Substitution of Trustee. This is in clear violation of *Section 2934a(b)*.

11 **4. Plaintiff is not a holder in due course of the original promissory Note**
12 **executed by the borrower, because the method of assignment utilized by the**
13 **parties to indorse the assignment rendered the note non-negotiable as a**
14 **matter of law.**

15 The assignment of the original promissory Note was invalidated by the manner in which the
16 assignment was attempted. It has long been settled that the assignment of a Note must be reflected
17 on the body of the note, as long as there is room available. If room to draft the assignment is
18 available, but the party making the assignment drafts the assignment on a separate piece of paper,
19 the Note is no longer negotiable. The public policy is to avoid one party from making multiple
20 assignments of the same property, at the same time, and defrauding each assignee of their
21 consideration for the assignment. In *Privus vs. Bush*, (1981) 118 Cal.App.3d 1003, the court held
22 that a promissory Note executed as security for a DOT was rendered non-negotiable because the
23 endorsement by the assignor was not contained on the face of the Note, notwithstanding the fact
24 that there was sufficient space on the Note to effectuate the assignment.

25 The *Privus, supra.*, Court held at pages 106-107, in pertinent part: *California Uniform*
26 *Commercial Code Section 3302, Subdivision (1)* provides, “A holder in due course is a holder
27 who takes the instrument (a) For value; and (b) In good faith; and (c) without notice that it is
28 overdue or has been dishonored or of any defense against or claim to it on the part of any person.”
In the present case, the trial Court did not question Defendant’s status as a holder in due course
because of any failure to satisfy the value, good faith, or no notice requirements. Rather, the Court

1 concluded that Defendant is not a holder in due course because he is not a holder at all, an
2 essential prerequisite to qualifying as a holder in due course. A holder is “a person who is in
3 possession of ... an instrument ..., issued or indorsed to him” (*Section 1201(20)*.) The trial
4 Court ruled that the Williams’ signature on the paper attached to the promissory Note did not
5 qualify as an endorsement because there was adequate space for the endorsement on the note
6 itself.” (emphasis added).

7 *Section 3202(2)* states, “An endorsement must be written by or on behalf of the holder and on
8 the instrument or on a paper so firmly affixed thereto as to become a part thereof.” Thus, the code
9 does not say whether or not such a paper, called an “allonge,” may be used when there is still
10 room for an endorsement on the instrument itself. Nor has any reported California case dealt with
11 this issue under the code. The code does, however, instruct us as to where to look for the law with
12 which to resolve the issue. *Section 1103* states that, “(u)nless displaced by the particular
13 provisions of this code, the principles of law and equity, including the law merchant ... shall
14 supplement its provisions,” and that section’s *Uniform Commercial Code* comment Notes “the
15 continued applicability to commercial contracts of all supplemental bodies of law except insofar
16 as they are explicitly displaced by this Act.” Therefore, since the *Commercial Code* has not
17 addressed the issue, we decide the present case according to the rules on allonges of the law
18 merchant.” *Privus vs. Bush*, (1981) 118 Cal.App.3d 1003,1007.

19 “Although the cases are not unanimous, the majority view is that the law merchant permits the
20 use of an allonge only when there is no longer room on the negotiable instrument itself to write an
21 indorsement. (See generally *Annot.*, Indorsement of Negotiable Instrument By Writing Not On
22 Instrument Itself (1968) 19 A.L.R.3d 1297, 1301-1304; *Annot.*, Indorsement of Bill or Note by
23 Writing Not On Instrument Itself (1928) 56 A.L.R. 921, 924-926.) Typical of the majority
24 position is *Bishop v. Chase*, (1900) 156 Mo. 158, 56 S.W. 1080. There it was held that the general
25 rule is that an instrument could be indorsed only by writing on the instrument itself, but that an
26 exception to the rule allows the use of an attached paper “when the back of the instrument is so
27 covered as to make it necessary.” (*Id.*, 156 Mo. 158, 56 S.W. at p. 1083.) Thus, the Court
28 invalidated an attempted endorsement by allonge when “there was plenty of room upon the back
of the Note to have made the endorsement, and the only excuse for not doing so was that it was
more convenient to assign it on a separate paper.” (*Id.*, 156 Mo. 158, 56 S.W. at p. 1084.)” *Privus
vs. Bush*, (1981) 118 Cal.App.3d 1003, 1007.

1 Here, the original Note executed had sufficient space for an endorsement, however, the note
2 does not contain an endorsement, and Defendant has never seen a document which purports to
3 assign the note to a third party. As such, Plaintiff is not a holder in due course, nor was the trustee
4 who conducted the non-judicial foreclosure a holder in due course. Such failures on the part of the
5 trustee who conducted the non-judicial foreclosure clearly demonstrate that the sale was not
6 conducted pursuant to the strict mandates of *California Civil Code Section 2924*.

7 A non-judicial foreclosure sale under the power-of-sale in a DOT or Mortgage, on the other
8 hand, must be conducted in strict compliance with its provisions and applicable statutory law. A
9 trustee's powers and rights are limited to those set forth in the DOT and laws applicable thereto.
10 (See, e.g., *Fleisher v. Continental Auxiliary Co.*, (1963) 215 Cal.App.2d 136, 139, 30 Cal.Rptr.
11 137; *Woodworth v. Redwood Empire Sav. & Loan Assn.*, (1971) 22 Cal.App.3d 347, 366, 99
12 Cal.Rptr. 373). No Court order authorizing or approving the sale is involved. A sale under the
13 power of sale in a DOT or Mortgage is a "private sale." *Walker v. Community Bank*, (1974) 10
14 Cal.3d at p. 736, 111 Cal.Rptr. 897. (emphasis added).

15 The statutory procedures governing the conduct of such sales are found in *Civil Code Sections*
16 *2924, 2924a-2924h*, which set forth the time periods in which to comply with certain
17 requirements, the persons authorized to conduct the sale, the requirements of Notice of Nefault
18 and Election to Sell and for cure of default and reinstatement, inter alia. The sale is concluded
19 when the trustee accepts the last and highest bid. (*Civil Code Section 2924h, Subd. (c)*). *Coppola*
20 *vs. Superior Court*, (1989) 211 Cal.App.3d 848, 868.

21 Here, Plaintiff's predecessor rendered the note non-negotiable by failing to list the assignment
22 on the fact of the Note, notwithstanding the fact that sufficient space existed. Thus, the Note could
23 not be the security interest utilized for execution of the non-judicial foreclosure pursuant to
24 *California Civil Code Section 2924*. Plaintiff cannot prove that the foreclosure strictly complied
25 with *Section 2924* as mandated. Thus, the TDUS is invalid, and does not confer upon Plaintiff a
26 right to seek possession of the subject premises pursuant to *California Code of Civil Procedure*
27 *Section 1161a*. Therefore, Plaintiff does not have standing to prosecute the instant action, and the
28 matter must be dismissed or in the alternative Defendant is entitled to Summary Judgment.

As a General Rule a Defendant in an Unlawful Detainer cannot test the strength or validity of
Plaintiff's Title *Vella v. Hudgins*, (1977) 20 C3d 251, 255, 142 CR 414, 572 P2d 28; *Old*
National Financial Services, Inc. v. Seibert, (1987) 194 CA 3d 460, 465, 289 CR 728; However,

LAW OFFICES OF TIMOTHY L. MCCANDLESS
820 Main Street, Suite #1
P.O. Box 149
Martinez, California 94553
Telephone (925) 957-9797 / Facsimile (925) 957-9799

1 a different rule applies in an Unlawful Detainer which is brought by a purchaser after a
2 foreclosure sale. His right to obtain possession is based on the fact that the property has been
3 "Duly Sold" by foreclosure proceedings *California Code of Civil Procedure Section 1161a*, and
4 therefore it is necessary that the Plaintiff "Prove" that each of the statutory procedures have been
5 complied with as a condition for obtaining possession of the property *Vella V. Hudgins Supra*;
6 *Stephens, Pertain and Cunningham V. Hollis* (1987) 196 CA3d 948, 953, 242 CR 251.

7 In the first instance, it appears that Plaintiff is not even the real party in interest. Plaintiff has
8 the burden of proving that it is the proper Plaintiff and that the TDUS resulted from a properly
9 conducted non-judicial foreclosure sale.

10 Again as stated in *Privus vs. Bush*, (1981) 118 Cal.App.3d 1003, the court held that a
11 promissory note executed as security for a DOT was rendered non-negotiable because the
12 endorsement by the assignor was not contained on the face of the Note, notwithstanding the fact
13 that there was sufficient space on the Note to effectuate the assignment and thus the Plaintiff was
14 not a holder in due course, notwithstanding their title as a "Holders".

15 *California Code of Civil Procedure Section 1161(3)* mandates that in order to seek possession
16 after a sale pursuant to *Civil Code Section 2924*, the Plaintiff's interest must be "duly perfected".
17 *California Code of Civil Procedure Section 1161* provides in pertinent part:

(b) In any of the following cases, a person who holds over and continues in possession
of a manufactured home, mobile home, floating home, or real property after a three-day
written notice to quit the property has been served upon the person, or if there is a
subtenant in actual occupation of the premises, also upon such subtenant, as prescribed
in *Section 1162*, may be removed there from as prescribed in this chapter:

(3) Where the property has been sold in accordance with *Section 2924 of the Civil
Code*, under a power of sale contained in a deed of trust executed by such person, or a
person under whom such person claims, and the title under the sale has been duly
perfected.

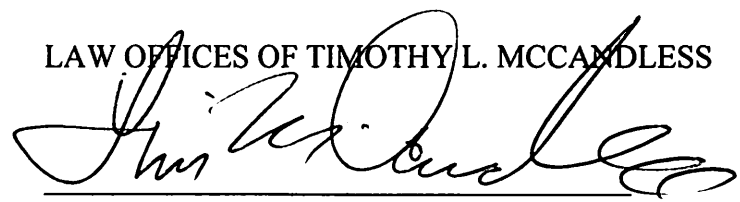
22 Here, it has been shown that Plaintiff, FHLMC did not perfect its interest because the original
23 assignment rendered the note non-negotiable, and secondarily they failed to record the assignment
24 prior to commencing the foreclosure, thus, the non-judicial foreclosure could not lawfully
25 proceed, and the trustee did not strictly comply with the mandates of *Section 2924*.

26 A non-judicial foreclosure sale under the power-of-sale in a DOT or Mortgage, on the other
27 hand, *must be conducted in strict compliance* with its provisions and applicable statutory law. A
28 trustee's powers and rights are limited to those set forth in the deed of trust and laws applicable

1 thereto. (See, e.g., *Fleisher v. Continental Auxiliary Co.*, (1963) 215 Cal.App.2d 136, 139, 30
2 Cal.Rptr. 137. Therefore, the Court would properly exercise its discretion pursuant to *California*
3 *Code of Civil Procedure Section 631.8*, by granting the Motion to Dismiss for lack of standing on
4 the part of Plaintiff in Favor of Defendant.

5
6 DATED: Sept 24, 2012

LAW OFFICES OF TIMOTHY L. MCCANDLESS



Timothy L. McCandless, Esq.
Attorney for Defendant(s): Alexander B. Paragas

LAW OFFICES OF TIMOTHY L. MCCANDLESS
820 Main Street, Suite #1
P.O. Box 149
Martinez, California 94553
Telephone (925) 957-9797 / Facsimile (925) 957-9799

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28