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7
8 **UNITED STATES BANKRUPTCY COURT**
9 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
10 **SANTA ANA DIVISION**

11 In re
12 TRUDY KALUSH,
13 Reorganized Debtor.

Case No. 8:11-bk-19563-ES
Chapter 11
Adv. Case No. 8:12-ap-01206-ES

14
15 TRUDY KALUSH,
16 Plaintiff,
17 vs.
18 DEUTSCHE BANK NATIONAL TRUST
19 COMPANY AS TRUSTEE OF THE
20 INDYMAC INDX DEED OF TRUST LOAN
21 TRUST 2005-AR12, DEED OF TRUST
22 PASS-THROUGH CERTIFICATES, SERIES
2005-AR12, UNDER THE POOLING AND
SERVICING AGREEMENT DATED JUNE
1, 2005; ONEWEST BANK, FSB; and DOES
1-100, Inclusive,
23 Defendants.

**PLAINTIFF TRUDY KALUSH'S REPLY
IN SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT
PURSUANT TO FRBP 7056 AND FRBP
3007 ON (1) OBJECTION TO PROOF OF
CLAIM 6 OF DEUTSCHE BANK
NATIONAL TRUST COMPANY, AND (2)
FIRST CLAIM FOR RELIEF TO
INVALIDATE LIEN; MEMORANDUM
OF POINTS AND AUTHORITIES;
DECLARATION OF ROBERT P. GOE IN
SUPPORT THEREOF**

Hearing:
Date: November 5, 2013
Time: 2:00 p.m.
Courtroom: 5A

24
25 **TO THE HONORABLE ERITHE SMITH, UNITED STATES BANKRUPTCY**
26 **JUDGE, AND PARTIES IN INTEREST:**
27
28

I.

INTRODUCTION

1
2
3 Plaintiff Trudy Kalush (“Debtor” or “Plaintiff”) hereby files her Reply (“Reply”) to the
4 Defendants’ Opposition (“Opposition”) to Plaintiff’s Motion for Partial Summary Judgment
5 Pursuant to FRBP 7056 and FRBP 3007 on (1) Objection to Proof of Claim 6 of Deutsche Bank
6 National Trust Company, and (2) First Claim For Relief to Invalidate Lien (“Debtor’s MSJ”).
7 Unless attached hereto, Debtor will reference the exhibits attached to the Debtor’s MSJ.

8 Deutsche Bank National Trust Company (“Deutsche Bank”) and OneWest Bank (“OWB”)
9 have failed to establish pursuant to FRBP 7056 and Fed. R. Civ. P. 56 that a genuine issue of
10 material fact exists concerning Debtor’s Claim Objection and the First Claim for Relief in the
11 Adversary Proceeding (“AP”) against Deutsche Bank as Trustee Of The IndyMac INDX Mortgage
12 Loan Trust 2005-AR12, Mortgage Pass-Through Certificates, Series 2005-AR12 (“Trust”), Under
13 The Pooling And Servicing Agreement Dated June 1, 2005 (“PSA”) and Plaintiff is entitled to
14 summary judgment. Deutsche Bank was not Debtor’s original lender and any rights it possesses
15 comes through the PSA, which is governed by Article 9 of the Uniform Commercial Code, not
16 Article 3. True and correct copies of pertinent pages of the PSA are attached to the MSJ as Exhibit
17 “2”. The Cut-Off Date of the Trust was June 1, 2005 and the Trust’s Closing Date was June 6,
18 2005. Pursuant to the Trust, Debtor’s Note and DOT had to be transferred to the Trust by the
19 Closing Date, which admittedly did not occur. Contrary to Defendants’ argument, Debtor does not
20 admit that either the Note or DOT was properly transferred to the Trust.

21 Deutsche Bank’s Claim is allegedly secured by the Debtor’s real property commonly
22 referred to as 16625 S. Pacific Ave., Sunset Beach, California 90742 (the “Property”). Deutsche
23 Bank has the burden to prove its legal standing concerning the Promissory Note dated January 20,
24 2005 (“Note”) and Deed of Trust recorded on January 27, 2005 (“DOT”) in favor of Commercial
25 Capital Bank, FSB (“Commercial”). A true and correct copy of the Note is attached to the MSJ as
26 Exhibit “3” and the DOT as Exhibit “4”. Deutsche Bank is improperly attempting to foreclose on
27 the Property, having recorded a Notice of Default on July 26, 2013.
28

1 The Motion is based nearly entirely on the Affidavit of Ronaldo Reyes (“Reyes
2 Declaration”)¹ who wholly fails to provide any competent evidence of Deutsche Bank’s ownership
3 of the Debtor’s Note and attaches the “Endorsement to Promissory Note” (“Endorsement”) but
4 conspicuously does not state that it was attached to the Note. Further, Reyes makes no mention of
5 why the Endorsement was not attached to Deutsche Bank’s Proof of Claim 6 (“Claim”) filed in
6 2011, some 6 years after Deutsche Bank allegedly received Debtor’s Note and the Endorsement.

7 The Claim Objection must be sustained as there is not a single document attached to the
8 Claim that evidences Deutsche Bank’s ownership of Debtor’s loan.

9 Debtor’s only other declaration is from Charles Boyle (“Boyle Declaration”). OWB
10 allegedly did not become the servicer of Debtor’s Note for Deutsche Bank until March 19, 2009.
11 Notwithstanding, Boyle remarkably claims the Endorsement was “physically stapled to the Note”
12 (Boyle Declaration, page 2, lines 19-20) but makes no mention of the fact that the Note filed with
13 the Claim did not have the Endorsement. The Boyle Declaration does not attach the Note or
14 Endorsement. OWB on numerous occasions states that it has exclusive authority to file the claim
15 without review or further authorization by Deutsche Bank.

16 Boyle was not produced by Defendants as the person most knowledgeable for OWB in
17 response to Debtor’s Notice of Deposition. Rather, OWB produced Charles Ray Bean (“Bean”) on
18 December 20, 2012, who testified at his deposition as follows:

19 Page 29, lines 20-25, and page 30, lines 1 through 8:

20 “Q. Have you ever actually physically seen the original Kalush promissory note?

21 Ms. Rhim: I’m going to object. I think the question’s been asked and answered.

22 The witness can answer.

23 The Witness: No, I have not seen the original. No I have not.

24 By Mr. Goe:

25 Q. Okay. So you wouldn’t know then, obviously, whether or not this endorsement
26 was actually attached to the note, the physical original note?

27 A. Correct.

28 ¹ Attached as Exhibit A to the Reyes Declaration is the BCAP Trust which has nothing to do with Debtor’s Loan.

1 Q. You would not?

2 A. I would not know.”

3 Page 36, lines 20 through 23:

4 “Q. How did Deutsche Bank become the owner of this deed of trust?

5 A. I don’t know specifically how they became the owner to this loan. I don’t know
6 that.”

7 Defendant’s opposition on page 4, footnote 4 states “OneWest caused the claim to be
8 filed pursuant to its exclusive authority to do so as servicer without review or approval by
9 DBNTC.”

10 Again, Bean was produced as the PMK of OWB, the purported servicer of Debtor’s loan.
11 Further, the Claim was signed by a Michael Shaw as “agent”. When asked about Shaw, Bean
12 responded on pages 8 and 9 as follows:

13 “By Mr. Goe:

14 Q. This is a proof of claim that was filed in Ms. Kalush’s bankruptcy case.

15 Have you ever seen this document before?

16 A. I have.

17 Q. Now, down at the bottom it states – it’s signed by Michael B. Shaw, as creditor’s
18 authorized agent.

19 Do you see that?

20 A. I do.

21 Q. Who is Mr. Shaw?

22 A. I do not know.

23 Q. Now, are you the person at One West Bank who was the most knowledgeable of
24 the Kalush file?

25 Ms. Rhim: I’m going to interpose an objection. It calls for a legal conclusion.
26 I also think the question is vague and ambiguous.

27 The witness can answer if he can.

28 The Witness: I would say that I am.

By Mr. Goe:

1 Q. And did you authorize Mr. Shaw to file this proof of claim?

2 A. No, I did not.

3 Q. Have you ever spoken to Mr. Shaw?

4 A. No, I have not.”

5 True and correct copies of pages 1, 8, 9, 29, 30 and 36 of the Bean Deposition are attached
6 to the Goe Declaration as **Exhibit “1”**.

7 In sum, neither Boyle nor Reyes even mention the Claim and failure of the Endorsement to
8 be attached nor any of the bogus assignments of the DOT (defined below). Further, Defendant’s
9 argument above that OWB had and gave authority to file the Claim is simply false, again
10 evidencing Defendant’s conduct of saying (whether or not true) what it believes is necessary to
11 establish ownership of Debtor’s loan.

12 Defendants also completely ignore the bogus assignments of the DOT. Defendants’ assert
13 all necessary actions were taken in March 2005 to make Deutsche Bank the owner of the loan. If
14 that is so, why would JPMorgan Chase Bank assign the DOT to OWB on January 23, 2013?
15 (MSJ, Exhibit 11).

16 The Opposition fails to explain why Defendants’ own attorneys at the Brice Firm (who had
17 the Original Collateral File) stated in writing no allonge was present (MSJ Exhibit 7), while
18 Defendants Opposition admits on page 18, lines 26-28, that the original Note and DOT were at
19 times with counsel.

20 Debtor’s MSJ should be granted and the Deutsche Bank Claim disallowed and its alleged
21 lien invalidated as it is admittedly not a perfected secured creditor. The undisputed evidence is
22 that Debtor’s Note (which did not have the Endorsement attached to the Claim) and DOT have
23 never been assigned to the Trust, and further any alleged attempts to deliver the Note and DOT to
24 the Trust or assign Debtor’s DOT to Deutsche Bank were illegal and more than 7 years after the
25 Trust admittedly closed.

26 Finally, the Note is not negotiable and thus references in the Defendants’ Opposition to
27 Article 3 are not relevant.

28

1
2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. THERE IS NO ALLONGE ATTACHED TO THE CLAIM WHICH MUST**
4 **BE DISALLOWED.**

5 Defendants ignore this fact. Deutsche Bank's Claim was signed by its alleged agent
6 Michael B. Shaw an attorney at the law firm of Brice Vander Linden and Wenick, PC ("Brice
7 Firm") (*see* MSJ, Exhibit "1"). The Claim attached the Note but did not have an allonge attached,
8 which is fatal to Deutsche Bank's standing pursuant to Cal. Commercial Code, Section 3204,
9 which as discussed herein requires that an endorsement/allonge be "affixed" to the Note. *See In re*
10 *Veal*, 450 B. R. 897, 911 (9th Cir. BAP 2011). The Debtor reviewed the Original Collateral Loan
11 File ("Loan File") at Deutsche Bank's counsel's office which included evidence that the Brice
12 Firm had the file in its possession prior to the filing of the Original Reyes Declaration. The Loan
13 File contained a cover sheet entitled Collateral File Imaging Checklist, which stated on April 23,
14 2012 there was no allonge present ("N/A"). (MSJ, Exhibit "7".) **Neither Boyle or Reyes ever**
15 **mention that the Loan File was with the Brice Firm as late as April 23, 2012 and the**
16 **Opposition admits (page 18, lines 26-28) the Loan File has been with counsel at times.**

17 Defendants think they have solved all their problems by having Reyes and Boyle state the
18 Endorsement has always been attached to the Note since 2005, although the claim filed in 2011
19 did not attach the Endorsement and their own attorneys at the Brice Firm who had the Loan File
20 stated in writing that no Endorsement was in the file.

21 As discussed in the Debtor's MSJ, Judge Hollowell's decision *In re Weisband*, 427 B.R.
22 13, 18-20 (Bankr.D.Ariz.2010), is on all fours with the present situation where *GMAC* filed a
23 proof of claim that did not include an allonge but later in connection with *GMAC's* stay motion
24 produced a special endorsement. Defendants' Opposition makes absolutely no mention of this
25 case.

26 Judge Hollowell ruled:

27 "Under Arizona law, a holder is defined as 'the person in possession of a
28 negotiable instrument that is payable either to bearer or to an identified

1 person that is the person in possession.’ *A.R.S. §47-1201(B)(21)(a)*. *GMAC*
2 has failed to demonstrate that it is the holder of the Note because, while it
3 was in possession of the Note at the evidentiary hearing, it failed to
4 demonstrate that the Note is properly payable to *GMAC*. A special
5 endorsement to *GMAC* was admitted into evidence with the Note. However,
6 for the Endorsement to constitute part of the Note, it must be on ‘a paper
7 affixed to the instrument.’ *A.R.S. §47-3204; see also In re Nash, 49 B.R.*
8 *254, 261 (Bankr. D. Ariz. 1985)*. Here, the evidence did not demonstrate
9 that the Endorsement was affixed to the Note. The Endorsement is on a
10 separate sheet of paper; there was no evidence that it was stapled or
11 otherwise attached to the rest of the Note. Furthermore, when *GMAC* filed
12 its proof of claim, the Endorsement was not included, which is a further
13 indication that the allonge containing the Endorsement was not affixed to
14 the Note.” (emphasis added)

15 *Id.* at 18.

16 Judge Hollowell further ruled:

17 “Thus, ownership of the note never transferred to the defendant. Applying
18 that principle to the facts here, *GMAC* did not become a holder of the Note
19 due to the improperly affixed special endorsement. (emphasis added)

20 *Id.* at 18.

21 Defendants cite *In re Zulueta*, 2011 WL 4485621, *4(BAP 9th Cir. Aug. 23, 2011), which
22 is a case where OWB was a servicer holding a note with a stamp from Indymac Bank and the
23 original deed of trust was delivered, and there was no issues relating to validity of the lien. A
24 comparison of the claim filed in *Zulueta* and the Claim filed in Debtor’s case is critical.

25 Specifically, in *Zulueta*, Deutsche Bank filed with its claim both the endorsement of the note and
26 assignment of the deed of trust, neither of which were present on the Claim filed in Debtor’s case.

27 The federal government has sanctioned OWB and other major lenders and servicers for
28 various wrongful practices, including proffering false evidence in court cases. *See Morgan v.*
HSBC Bank USA, NA, (Ky. App. 2011) 2011 WL 320776 (“finding it ‘troubling’ that plaintiff
[bank] first asserted that the note was unavailable, then filed a note payable to a prior lender, and
then with its motion for summary judgment produced a new allonge to the note endorsing the note
to the plaintiff”).

The certified Note attached under penalty of perjury to the Claim did not have the
Endorsement. The Brice Firm who filed the Claim and had possession of the Original Loan File

1 (as admitted in the Opposition) also confirmed there was no allonge. Mysteriously, after its claim
2 is objected to by Debtor, Deutsche Bank produces an uncertified copy of the Note with an allonge.
3 The allonge was clearly not affixed to the Note as required by law or it would have been part of
4 the certified Note and copied and attached to the Claim as part of the Note and, therefore, the
5 Claim must be disallowed.

6 **II. DEBTOR’S NOTE AND DOT WERE NOT TIMELY TRANSFERRED TO**
7 **THE TRUST AND THERE IS NO CHAIN LINKING DEUTSCHE BANK.**

8 Deutsche Bank filed the Original Reyes Declaration to support ownership of Debtor’s loan
9 through the Trust and PSA. Remarkably, Reyes admits that Deutsche Bank did not receive the
10 Debtor’s DOT until May 3, 2012 or nearly 7 years after the PSA closed. Further, he provides
11 absolutely no evidence that Debtor’s loan was timely assigned to the Trust. Deutsche Bank was
12 required to strictly comply with the PSA which had a Cut Off Date of June 1, 2005 and a Closing
13 Date of June 6, 2005. (*See* MSJ, Exhibit “2”, PSA, pages 20-21.) The PSA is governed by New
14 York law (*see* PSA, page 112). Pursuant to Section 2.01(a), (b), and (c), as of the June 6, 2005
15 PSA Closing Date, the original endorsed Note, Mortgage (deed of trust) and assignment of
16 Mortgage had to be delivered. (*See* PSA, pages 59-50.) This admittedly did not occur and any
17 purported assignment of the DOT to Deutsche Bank is void. Now, Defendants assert the multiple
18 assignments of the DOT discussed below was mere “housekeeping”.

19 Pursuant to an extremely important and recent case, the Debtor has standing to challenge a
20 securitized trust’s ownership pursuant to the decision of the California Court of Appeal of Glaski
21 v. Bank of America, N.A., 218 Cal. App. 4th 1079 (2013) which held:

22 “We conclude that a borrower may challenge the securitized trust’s chain
23 of ownership by alleging the attempts to transfer the deed of trust to the
24 securitized trust (which was formed under N.Y. law) occurred after the trust’s
25 closing date. Transfers that violate the terms of the trust instrument are void
26 under New York law, and borrowers have standing to challenge void assignments
of their loans even though they are not a party to, or a third party beneficiary of,
the assignment agreement.”

27 *See* Glaski at 1083 (emphasis added)

1 As discussed below, Debtor's DOT has allegedly been assigned at least five (5) times
2 through either recorded or unrecorded assignments. As stated, there has never been a timely
3 assignment to the Trust. In fact, unbelievably, after the Original Reyes Declaration was filed and
4 after Deutsche Bank filed numerous pleadings opposing confirmation, on January 23, 2013 JP
5 Morgan Chase Bank ("JPMorgan") executed a "Corporate Assignment of Deed of Trust"
6 ("1/23/13 Assignment") assigning Debtor's DOT to OneWest Bank (MSJ, Exhibit "11".) How
7 did JP Morgan acquire Debtor's DOT, which purportedly was owned by Deutsche Bank through
8 the Trust that closed in June 2005? For over 2 years in the bankruptcy proceeding Deutsche Bank
9 claimed it held the DOT and filed the Claim. The break in chain of title and failure to comply
10 with the Trust is admitted.

11 **III. PURSUANT TO *GLASKI*, ANY ALLEGED ASSIGNMENT OF DEBTOR'S**
12 **LOAN TO DEUTSCHE BANK IS VOID AS IN VIOLATION OF THE**
13 **TRUST AND PSA.**

14 To the best of counsel's knowledge, there is no binding authority on this Court concerning
15 Deutsche Bank's failure to comply with the PSA. Pursuant to the landmark decision in *Glaski*,
16 Debtor has standing to challenge whether her loan was timely transferred to the Trust and if it was
17 not, Deutsche Bank's Claim is void. Here, the undisputed evidence in the original Reyes
18 Declaration and Reyes Declaration and Reyes Deposition testimony, and the assignments of the
19 DOT, evidence that Debtor's loan was not transferred to the Trust by the PSA's June 6, 2005
20 Closing Date.

21 To make matters even worse for Deutsche Bank, eight (8) years after the Trust closed,
22 JPMorgan somehow took ownership of Debtor's loan and executed the January 23, 2013
23 Assignment of DOT to OWB. As in *Glaski* where the "chain of title was broken", the Appellate
24 Court found the assignments void.

25 In sum, *Glaski* is the precise same situation as here (i.e., a trust with a closing date and
26 efforts by the lender to assign the deed of trust years after the trust closed). Based on *Glaski*, the
27 Deutsche Bank Claim is void and must be disallowed.

1 Debtor disagrees with Defendants' argument that the non-binding decision of *Dick v.*
2 *American Home Mtg., et al.*, 2013 WL5299180 at *2 (E.D. Cal. 2013) should control the Court's
3 decision. First and foremost, *Dick* did not address a claim objection, but rather, a post-foreclosure
4 adversary proceeding where leave to amend was granted. This is entirely different than a claim
5 objection proceeding where Deutsche Bank's claim has not a shred of evidence to support alleged
6 ownership. The *Dick* decision also did not address New York law, which governs the Trust.
7 Under 28 U.S.C §1652, this Court has the duty to apply New York law in accordance with the
8 controlling decision of the highest state court. A recent New York Supreme Court decision is
9 factually similar to the case before the Court. *See Wells Fargo Bank, N. A. v. Erobobo, et al.*,
10 2013 WL 1831799 (N.Y. Sup. Ct. April 29, 2013). In *Erobobo*, defendants argued that plaintiff (a
11 REMIC trust) was not the owner of the note because plaintiff obtained the note and mortgage after
12 the trust had closed in violation of the terms of the PSA governing the trust, rendering plaintiff's
13 acquisition of the note void. *Id.* At *2. The *Erobobo* court held that under N.Y. Est. Powers &
14 Trusts Law §7-2.4, any conveyance in contravention of the PSA is void; this meant that
15 acceptance of the note and mortgage by the trustee after the date the trust closed rendered the
16 transfer void. *Id.* At 8.

17 Based on the *Erobobo* decision and the plan language of N. Y. Est. Powers & Trusts Law
18 §7-2.4, the Court should find that under New York law, assignment of the Debtor's Note after the
19 Trust closing date is void *ab initio*.

20 In addition to Deutsche Bank's *Glaski* problems, it also lacks standing based on JPMorgan
21 Chase taking ownership of Debtor's loan between 2011 and 2013, when it executed the January
22 23, 2013 Assignment of Debtor's DOT.

23 **IV. IN ADDITION TO NOT COMPLYING WITH THE TRUST, THERE IS NO**
24 **VALID ASSIGNMENT OF THE DOT TO DEUTSCHE BANK.**

25 California Code of Civil Procedure ("CCP"), Section 1624 sets forth certain types of
26 agreements that must be in writing in order to be enforceable. Among those agreements listed in
27 the statute are: contracts to sell an interest in real property. Every state has some type of Statute of
28 Frauds; the law's purpose is to prevent the possibility of a nonexistent agreement between two

1 parties being "proved" by perjury or fraud. CCP §1626. A contract in writing takes effect upon its
2 delivery to the party in whose favor it is made, or to his agent.

3 Notable, Defendants' Opposition ignored all assignments of the DOT after 2011 and they
4 have good reason to do so.

5 As noted above, in 2013, JPMorgan was allegedly the owner of the loan as it executed the
6 January 23, 2013 Assignment to OWB.

7 Because Defendants did not originate Debtor's loan, their claimed right to enforce is based
8 on being assignees of the Note and DOT. Parties claiming rights under an assignment bear the
9 burden of proving they received valid assignments. See *Mata v. Citimortgage, etc., et al.* 2011
10 WL 4542723 (C.D. Cal. 2011), *2 (because, under *Cockerell*, a party claiming rights under an
11 assignment has the burden of proving a valid assignment, borrowers stated a claim for declaratory
12 relief as to the perfection and validity of the secured interest, where defendants refused borrowers'
13 demands to provide such proof); see also *In re Veal*, 450 B.R. 897, 908, 913 (9th Cir. B.A.P.
14 2011) (financial institutions that were not initial note payees were required to demonstrate facts to
15 establish prudential standing to sue to enforce it, in turn requiring them to demonstrate a factual
16 basis for claiming the substantive legal right to enforce it).

17 One who fails to prove a valid assignment has "no standing to complain" about not
18 receiving proceeds of the note or a sale of property securing it. *Cockerell v. Title Ins. & Trust Co.*,
19 42 Cal.2d 284, 293 (Cal. 1953).

20 Every assignment in the chain must be valid or the party claiming the note cannot enforce it. *In*
21 *re Gavin*, 319 B.R. 27, 32 (B.A.P. 1st Cir. 2004); *In re Wells*, 407 B.R. 873 (Bankr. N.D. Ohio 2009).

22 As discussed in Debtor's MSJ, there is an unrecorded assignment of the DOT from
23 Commercial to Indymac Fed dated March 16, 2005. (MSJ, Exhibit "8").

24 Then on March 30, 2005, IndyMac Fed executed an assignment to an unknown creditor
25 (MSJ, Exhibit "9").

26 Six years later IndyMac Fed recorded an assignment of the DOT to Deutsche Bank on
27 April 5, 2011, while there is no explanation as to what has occurred with the Note and DOT in the
28 intervening 6 years. (MSJ, Exhibit 10.) Defendants say this was "housekeeping".

Two years later, on July 23, 2013, out of the blue, JPMorgan assigns the DOT to OWB and
then five months later, OWB assigns the DOT to Deutsche Bank (MSJ, Exhibits 11 and 12). How
did JPMorgan have anything to assign 8 years after the closing of the Trust?

1 The Defendants have failed to establish ownership of the Note and DOT, and the Claim
2 must be disallowed.

3 **V. PLAINTIFF'S NOTE IS NOT A NEGOTIABLE INSTRUMENT UNDER**
4 **UCC 3, AND THE PSA PROVIDES THAT IT IS A UCC 9 NOTE SO**
5 **OWNERSHIP MUST BE PROVED.**

6 Defendants argue that Plaintiffs' note is a negotiable instrument within the meaning of
7 Article 3 of the California Commercial Code, and that Deutsche Bank or Onewest can enforce it as
8 a "holder" within the meaning of Article 3.

9 The argument suffers from several fundamental flaws as set forth in greater detail in
10 Debtor's Opposition to Defendants Motion for Summary Judgment.

11 As a matter of law under Civil Code § 1642, a California mortgage note cannot be a
12 "negotiable instrument" under Article 3 of the California Commercial Code, because, in particular,
13 the Note refers to other documents (in particular, the DOT). Thus, Article 3's provisions
14 regarding enforceability by a "holder" are irrelevant.

15 Further, as discussed in *Veal*, when the Note is sold, Article 9 governs whether the
16 purchaser obtains a property interest in the Note. *Veal* at 913 (citing UCC 9-109 (a)(3)).

17 **IV. CONCLUSION**

18 The Claim must be disallowed as there is nothing attached to evidence Deutsche Bank's
19 ownership of the loan.

20 Defendants' defects in ownership of Debtor's Note and DOT are numerous, including no
21 Endorsement attached to the Claim, no compliance with the PSA/Trust, and no valid assignment of
22 the DOT. Based upon the above, the Debtor's MSJ should be granted.

23 Dated: October 22, 2013

Respectfully submitted by:

GOE & FORSYTHE, LLP

24
25 By: /s/Robert P. Goe
26 Robert P. Goe, Attorneys for
27 Reorganized Debtor/Plaintiff Trudy
28 Kalush

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DECLARATION OF ROBERT P. GOE

I, Robert P. Goe, declare and state:

I am a partner in the law firm of Goe & Forsythe, LLP, attorneys for Reorganized Debtor, Trudy Kalush (“Debtor” or “Plaintiff”). I have personal knowledge of the facts alleged herein and if called upon as a witness, I could and would competently testify thereto.

1. True and correct copies of pages 1, 8, 9, 29, 30 and 36 of the Bean Deposition I conducted on December 20, 2012 are attached hereto as **Exhibit “1”**. Bean was produced by OWB as its PMK concerning Debtor’s loan.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: October 22, 2013

By: /s/Robert P. Goe
Robert P. Goe

EXHIBIT 1

EXHIBIT 1

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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA, SANTA ANA DIVISION

- - -

In re)
)
 TRUDY KALUSH,)
)
) No: 8:11-bk-19563-ES
 Debtor and Debtor in)
 Possession.)
)
 _____)

DEPOSITION OF ONE WEST BANK
BY AND THROUGH CHARLES RAY BEAN
IRVINE, CALIFORNIA
DECEMBER 20, 2012

ATKINSON-BAKER, INC.
COURT REPORTERS
(800) 288-3376
www.depo.com

REPORTED BY: THERESA M. SILVA, CSR NO. 12895

FILE NO: A60BC8F

1 Is that like an "Inc." or an "LLP" or "LLC," if
2 you know?

3 A. I don't know. All I know is it's IndyMac
4 Mortgage Services, a division of One West Bank FSB.

5 Q. One West Bank FSB?

6 A. Right.

7 Q. So you don't know if IndyMac Mortgage Services
8 is like a separate legal entity from One West Bank?

9 A. I don't know that.

10 MS. RHIM: And I'm going to object. Calls for a
11 legal conclusion.

12 MR. GOE: That's fine.

13 BY MR. GOE:

14 Q. Let me show you the next what we're going to
15 mark as Exhibit 2.

16 (Debtor's Exhibit 2 was marked
17 for identification.)

18 BY MR. GOE:

19 Q. This is a proof of claim that was filed in
20 Ms. Kalush's bankruptcy case.

21 Have you ever seen this document before?

22 A. I have.

23 Q. Now, down at the bottom it states -- it's signed
24 by Michael B. Shaw, as creditor's authorized agent.

25 Do you see that?

1 A. I do.

2 Q. Who is Mr. Shaw?

3 A. I do not know.

4 Q. Now, are you the person at One West Bank who was
5 the most knowledgeable of the Kalush file?

6 MS. RHIM: I'm going to interpose an objection.
7 It calls for a legal conclusion. I also think the
8 question is vague and ambiguous.

9 The witness can answer if he can.

10 THE WITNESS: I would say that I am.

11 BY MR. GOE:

12 Q. And did you authorize Mr. Shaw to file this
13 proof of claim?

14 A. No, I did not.

15 Q. Have you ever spoken to Mr. Shaw?

16 A. No, I have not.

17 Q. The address there for One West Bank is
18 Kalamazoo, Michigan.

19 That is not where you work, is it?

20 A. No sir, it is not.

21 Q. What is your business address?

22 A. My business address is 2900 Esperanza Crossing,
23 in Austin, Texas, 78758.

24 Q. Now, why were you named as the person in
25 response to the deposition notice in Kalush?

1 with our situation here.

2 The witness can answer if he can.

3 THE WITNESS: Well, I mean, I review most of my
4 documents electronically, so that means they've been
5 scanned into our system.

6 So affixed, is that what you're asking me?

7 BY MR. GOE:

8 Q. Let me ask you another question.

9 Okay. Do you ever look at original loan files?
10 Original loan files, like paper copies of the documents,
11 like the original promissory note in paper?

12 Do you have files like that that you look at?

13 A. No, not in the current role that I'm in.

14 Q. Never?

15 A. Not in the current role that I'm in.

16 Back in '05, when I was in the mortgage division
17 of it, in the wholesale division, I would see those
18 things. But it was not specifically my job to process
19 them, if you will.

20 Q. Have you ever actually physically seen the
21 original Kalush promissory note?

22 MS. RHIM: I'm going to object. I think the
23 question's been asked and answered.

24 The witness can answer.

25 THE WITNESS: No, I have not seen the original.

1 No, I have not.

2 BY MR. GOE:

3 Q. Okay. So you wouldn't know then, obviously,
4 whether or not this endorsement was actually attached to
5 the note, the physical original note?

6 A. Correct.

7 Q. You would not?

8 A. I would not know.

9 Q. I'm going to show what you I'm going to mark as
10 Exhibit 5.

11 (Debtor's Exhibit 5 was marked
12 for identification.)

13 BY MR. GOE:

14 Q. You'll see at the bottom there, it states,
15 OWB Kalush 0115, which is a document your attorneys
16 produced.

17 Have you ever seen this document before?

18 A. Yes, I have.

19 Q. What is it?

20 A. It's an assignment of deed of trust.

21 Q. Now, if you look down right above where it says,
22 dated March 16th, 2013, [sic] it references a mortgage
23 loan purchase agreement.

24 Do you see that?

25 A. Right. Mortgage loan purchase agreement between

1 A. As the servicer for the trust, for Deutsche --
2 let's see. What is it? Deutsche Bank National Trust
3 Company, as trustee of the IndyMac Index Mortgage Loan
4 Trust 2005 AR12.

5 IndyMac Bank, IndyMac Federal and, down the
6 road, One West, was the servicer of the trust that this
7 loan is in. So they became the servicer, from my
8 understanding, in May of 2005 and have pretty much just
9 carried over all the way through today.

10 Q. Well, then how did Deutsche Bank National Trust
11 Company become the holder of this note and deed of trust?

12 MS. RHIM: I'm going to interpose the same
13 objections. And I'm also going to state that I believe
14 the witness has already testified with respect to the
15 PSA, which may be enlightening with respect to the
16 question.

17 But the witness can answer if he can.

18 THE WITNESS: Restate your question.

19 BY MR. GOE:

20 Q. How did Deutsche Bank become the owner of this
21 deed of trust?

22 A. I don't know specifically how they became the
23 owner to this loan. I don't know that.

24 Q. Okay. Do you know who Charles Boyle is?

25 A. I do.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 18101 Von Karman Avenue, Suite 510, Irvine, CA 92612

A true and correct copy of the foregoing document entitled (*specify*): **PLAINTIFF TRUDY KALUSH'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO FRBP 7056 AND FRBP 3007 ON (1) OBJECTION TO PROOF OF CLAIM 6 OF DEUTSCHE BANK NATIONAL TRUST COMPANY, AND (2) FIRST CLAIM FOR RELIEF TO INVALIDATE LIEN; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF ROBERT P. GOE IN SUPPORT THEREOF** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) October 22, 2013, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

- Allan P Bareng barenga@bryancave.com, theresa.macaulay@bryancave.com
- Robert P Goe kmurphy@goeforlaw.com, rgoe@goeforlaw.com;mforsythe@goeforlaw.com
- Robert Reganyan reganyanlawfirm@gmail.com
- J Alexandra Rhim arhim@dykema.com, cperez@dykema.com
- United States Trustee (SA) ustpregion16.sa.ecf@usdoj.gov
- Sharon Z. Weiss sharon.weiss@bryancave.com, raul.morales@bryancave.com

Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On (*date*) October 22, 2013, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows: Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL:

(*state the method for each person or entity served*): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) October 22, 2013, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows: Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

- The Honorable Erithe A. Smith, USBC, 411 West Fourth Street, Santa Ana, CA 92701 (Hand delivered)

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

October 22, 2013
Date

Kerry A. Murphy
Printed Name

/s/Kerry A. Murphy
Signature