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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'S SEPARATE STATEMENT
OF UNCONTROVERTED FACTS AND
CONCLUSIONS OF LAW IN SUPPORT
OF PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
PURSUANT TO FRBP 7056 AND 3007 ON
(1) OBJECTION TO PROOF OF CLAIM 6
OF DEUTSCHE BANK NATIONAL
TRUST COMPANY, AND (2) FIRST
CLAIM FOR RELIEF TO INVALIDATE
LIEN**

[Motion for Partial Summary Judgment, and
Proposed Order Granting Summary Judgment
filed concurrently herewith]

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

SEPARATE STATEMENT OF UNCONTROVERTED FACTS

AND CONCLUSIONS OF LAW

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| <u>PLAINTIFF'S UNDISPUTED FACTS</u> | <u>PLAINTIFF'S SUPPORTING LAW AND/OR EVIDENCE</u> |
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| <p>1. In January 2005, Debtor obtained a loan from Commercial Capital Bank, FSB ("Commercial"), evidenced by a Promissory Note dated January 20, 2005 ("Note") and Deed of Trust recorded on January 27, 2005 ("DOT").</p> | <p>RJN, <u>Exhibits "3" and "4"</u>, respectively</p> |
| <p>2. In June 2005, the Indymac INDX Mortgage Loan Trust 2005-Ar12, Mortgage Pass-Through Certificates, Series 2005-AR12 ("Trust"), Under The Pooling And Servicing Agreement Dated June 1, 2005 ("PSA") is formed, of which Deutsche Bank National Trust Bank ("Deutsche Bank") is the Trustee.</p> | <p>RJN, <u>Exhibit "5"</u>, Reyes Declaration; and RJN, <u>Exhibit "2"</u>, PSA</p> |
| <p>3. The Cut-Off Date of the Trust was June 1, 2005, and a Closing Date of June 6, 2005. Debtor's Note and DOT had to be transferred to the Trust by the Closing Date.</p> | <p>RJN, <u>Exhibit "2"</u>, PSA, pages 20-21, 52-53, 59-60, and Exhibit H-1-1</p> |
| <p>4. On July 7, 2011, the Debtor filed for protection under Chapter 11 of the Bankruptcy Code.</p> | <p>Docket Entry No. 1</p> |
| <p>5. On August 2, 2011, Deutsche Bank through its agent Michael B. Shaw (an attorney at the Brice Firm) filed Deutsche</p> | <p>RJN, <u>Exhibit "1"</u>, Claim</p> |

| | | |
|--|--|---|
| 1 2 3 4 | Bank's Claim 6 ("Claim"), allegedly secured by Debtor's real property commonly referred to as 16625 S. Pacific Ave., Sunset Beach, CA 90742 ("Property"). | |
| 5 6 7 | 6. The Claim attached the Note but did not have an allonge or endorsement affixed to the Note. | RJN, Exhibit "1" , Claim |
| 8 9 10 11 | 7. At his deposition, Reyes testified that Deutsche Bank did not hire Mr. Shaw to file the Claim, and that he did not know he was filing the Claim. | RJN, Exhibit "6" , Reyes Deposition, pages 28-29 |
| 12 13 14 15 16 17 18 | 8. The Original Collateral Loan File ("Loan File") contained correspondence that the Brice Firm had the Debtor's Loan File in its possession prior to the filing of the Reyes Declaration, which contained a cover sheet entitled Collateral File Imaging Checklist, that stated on April 23, 2012 there was no allonge present ("N/A"). | RJN, Exhibit "7" , Collateral Filing Image Checklist |
| 19 20 21 22 23 24 25 26 27 28 | 9. At his Deposition, Reyes admitted Deutsche Bank did not have Shaw file the Claim. Q. Let's take a look at what's marked as Exhibit 3. This is the proof of claim that was filed in Ms. Kalush's bankruptcy proceeding on or about August 2, 2011. Have you ever seen this document before? A. No. Q. Now, at the bottom it's got a signature | RJN, Exhibit "6" , Reyes Deposition, pages 28-29 |

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| 1 | from Michael Shaw, as creditor's | |
| 2 | authorized agent. Did Deutsche hire | |
| 3 | Mr. Shaw? | |
| 4 | MS. RHIM: Objection. Vague. | |
| 5 | THE WITNESS: No. | |
| 6 | Q. Now, this document was signed on | |
| 7 | August 2, 2011. And Mr. Shaw | |
| 8 | attached a promissory note and deed | |
| 9 | of trust. Do you see that? | |
| 10 | A. Yes, I see those documents. | |
| 11 | Q. Did Deutsche give those document to | |
| 12 | Mr. Shaw? | |
| 13 | MS. RHIM: Objection. Vague. | |
| 14 | THE WITNESS: No. | |
| 15 | 10. Deutsche Bank was required to strictly | RJN, Exhibit "2" , PSA, pages 20-21, 59-60, |
| 16 | comply with the PSA which had a Cut Off | 112, and Exhibit H-1-1 |
| 17 | Date of June 1, 2005 and a Closing Date | |
| 18 | of June 6, 2005. The PSA is governed by | |
| 19 | New York law. Pursuant to Section | |
| 20 | 2.01(a), (b), and (c), as of the June 6, 2005 | |
| 21 | PSA Closing Date, the original endorsed | |
| 22 | Note, Mortgage (deed of trust) and | |
| 23 | assignment of Mortgage had to be | |
| 24 | delivered. | |
| 25 | 11. The Reyes Declaration admits that | RJN, Exhibit 5 , Reyes Declaration |
| 26 | Deutsche Bank did not receive the | |
| 27 | Debtor's DOT until May 3, 2012 or nearly | |
| 28 | 7 years after the PSA closed. | |
| 29 | 12. In addition to the Reyes Declaration, at | RJN, Exhibit "6" , Reyes Deposition, pages 22- |
| 30 | his Deposition, Reyes confirmed the DOT | 23 |
| 31 | was not delivered by the Trust Closing | |
| 32 | Date: | |

1 Q. So is there a document that says that
2 the Kalush Deed of Trust was not
3 delivered as of the closing of the PSA?
4 A. That the Kalush mortgage was not
5 delivered or that the – that’s what
6 you’re asking?
7 Q. It says the original recorded mortgage,
8 which you say you received on May 3,
9 2012?
10 A. Right.
11 Q. You did not have it as of the closing –
12 Deutsche did not have it as of the
13 closing of this trust; correct?
14 A. That’s correct based on our business
15 records, that’s correct.

14 13. The PSA in Section 2.2 Acceptance by the
15 Trustee of the Mortgage Loans, provides:
16 “If a substitution or purchase of a
17 Mortgage Loan pursuant to this
18 provision is required because of a delay
19 in delivery of any documents by the
20 appropriate recording office, or there is
21 a dispute between either the Master
22 Servicer or the Seller and the Trustee
23 over the location or status of the
24 recorded document, then the substitution
25 or purchase shall occur within 720 days
26 from the Closing Date. In no other case
27 may a substitution or purchase occur
28 more than 540 days from the Closing
Date.”

RJN, **Exhibit “2”**, PSA, pages 52-53

| | | |
|---|--|---|
| <p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24</p> | <p>14. Pursuant to the PSA, Exhibit H-1-1, entitled <i>Form of Final Certification of Trustee</i>, it provides:</p> <p>In accordance with section 2.02 of the above Captioned Pooling and Servicing Agreement (the “Pooling and Servicing Agreement”), the undersigned, as Trustee, hereby certifies that as to each Mortgage Loan listed in the Mortgage Loan Schedule (other than any Mortgage Loan paid in full or listed on the attached Document Exception Report it has received:</p> <p>(i) The <u>original Mortgage Note</u>, endorsed in the form provided in Section 2.01(c) of the Pooling and Servicing Agreement, with all intervening endorsements showing a complete chain of endorsement from the originator to the Seller.</p> <p>(ii) The <u>original recorded Mortgage</u>.</p> <p>(iii)</p> <p>(iv) The original or duplicate original recorded assignment or assignments of the Mortgage showing a complete chain of assignment from the originator to the Seller.</p> | <p>RJN, <u>Exhibit “2”</u>, PSA Exhibit H1-1, 2</p> |
| <p>25 26</p> | <p>15. The Claim did not attach any assignments to the DOT.</p> | <p>RJN, <u>Exhibits “1</u>, Claim</p> |
| <p>27 28</p> | <p>16. The DOT has allegedly been assigned as follows:</p> | <p>RJN, <u>Exhibits “8”, “9”, “10”, “11” and “12”</u>, respectively</p> |

| | | |
|---|---|--|
| <p>1 2 3 4 5 6 7 8 9 10 11 12 13 14</p> | <p>(i) March 16, 2005, unrecorded assignment from Commercial to IndyMac Bank, FSB (“IndyMac”);</p> <p>(ii) March 30, 2005, unrecorded assignment from IndyMac Bank, FSB (“IndyMac Fed”) to unknown creditor;</p> <p>(iii) April 5, 2011, recorded assignment from IndyMac Fed to Deutsche Bank;</p> <p>(v) January 23, 2013, assignment from JPMorgan Chase Bank (“JPMorgan”) to Onewest;</p> <p>(vi) June 12, 2013, Assignment of Deed of Trust from Onewest to Deutsche Bank.</p> | |
| <p>15 16 17 18 19</p> | <p>17. Debtor propounded written discovery on JPMorgan which include a request for all assignments of Debtor’s DOT (RFP No. 3). JPMorgan provided its “Response to Subpoena by Debtor Trudy Kalush” stating it had no documents.</p> | <p>RJN, <u>Exhibit “13”</u></p> |
| <p>20 21</p> | <p>18. Deutsche Bank has never amended the Claim.</p> | <p>Claims Register</p> |
| <p>22 23 24 25 26 27</p> | <p>19. On May 1, 2013, the Court entered its Order Confirming Debtor’s Third Amended Chapter 11 Plan of Reorganization, dated March 21, 2013, which provided for the Court to retain jurisdiction over the Deutsche Bank Claim objection and Adversary Proceeding.</p> | <p>Docket Entry No. 375</p> |

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CONCLUSIONS OF LAW

1. Claim No. 6 is disallowed in its entirety.
2. Deutsche Bank has no lien on the Property

Dated: September 24, 2013

GOE & FORSYTHE, LLP

By: /s/Robert P. Goe
Robert P. Goe, Attorneys for
Reorganized Debtor/Plaintiff Trudy
Kalush

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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'S SEPARATE STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO FRBP 7056 AND 3007 ON (1) OBJECTION TO PROOF OF CLAIM 6 OF DEUTSCHE BANK NATIONAL TRUST COMPANY, AND (2) FIRST CLAIM FOR RELIEF TO INVALIDATE LIEN** 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*) September 24, 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)** ustpreion16.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*) September 24, 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*) September 24, 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

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.

September 24, 2013
Date

Susan C. Stein
Printed Name

/s/Susan C. Stein
Signature